

**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-SEVENTH CONGRESS
FIRST SESSION

PURSUANT TO
S. Res. 52

ON
S. 167

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

JUNE 7, 1961

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1961

70911 O

COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

ESTES KEFAUVER, Tennessee	ALEXANDER WILEY, Wisconsin
OLIN D. JOHNSTON, South Carolina	EVERETT MCKINLEY DIRKSEN, Illinois
JOHN L. McCLELLAN, Arkansas	ROMAN L. HRUSKA, Nebraska
SAM J. ERVIN, Jr., North Carolina	KENNETH B. KEATING, New York
JOHN A. CARROLL, Colorado	NORRIS COTTON, New Hampshire
THOMAS J. DODD, Connecticut	
PHILIP A. HART, Michigan	
EDWARD V. LONG, Missouri	
WM. A. BLAKLEY, Texas	

SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

ESTES KEFAUVER, Tennessee, *Chairman*

JOHN A. CARROLL, Colorado	EVERETT MCKINLEY DIRKSEN, Illinois
PHILIP A. HART, Michigan	ALEXANDER WILEY, Wisconsin
THOMAS J. DODD, Connecticut	ROMAN L. HRUSKA, Nebraska
BERNARD FENSTERWALD, Jr., <i>Staff Director</i>	

CONTENTS

WITNESSES

Boyd, George, Jr., of Dunnington, Bartholow & Miller, New York, N.Y., on behalf of the American Paper & Pulp Association.....	Page 87
Dixon, Paul Rand, Chairman, Federal Trade Commission, accompanied by John Wheelock, executive director, and John V. Buffington, assistant to the Chairman.....	76
Loevinger, Lee, Assistant Attorney General, Antitrust Division, Depart- ment of Justice, accompanied by John Duffner and John Poole.....	17
Simon, William, of Howrey, Simon, Baker & Murchison, Washington, D.C., on behalf of the American Bar Association.....	98

STATEMENTS

American Mining Congress.....	148
Association of the Bar of the City of New York.....	141
Manufacturing Chemists' Association.....	150
National Association of Manufacturers.....	144
National Coal Association.....	149

EXHIBITS AND APPENDIX

Text of S. 167.....	2
Text of H.R. 6689.....	23
Opening statement by Senator Kefauver.....	15
Antitrust law of the State of Hawaii.....	133
"Case Studies of Celler-Kefauver and Sherman Act Investigation Prob- lems," presented by Judge Loevinger.....	55

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

WEDNESDAY, JUNE 7, 1961

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

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 457, Old Senate Office Building, Senator Estes Kefauver, presiding.

Present: Senator Kefauver (chairman).

Also present: Bernard Fensterwald, Jr., staff director; Horace L. Flurry, counsel; Peter N. Chumbris, counsel for the minority; Nicholas N. Kittrie, counsel for the minority; Dean W. Wallace, counsel for the minority; Paul S. Green, editorial director; and Gladys E. Montier, clerk.

Senator KEFAUVER. The committee will come to order.

The hearings by the subcommittee today are on S. 167, introduced by me on January 5, 1961. It is identical to a bill, S. 716, as favorably reported by the Committee on the Judiciary on June 29, 1959, and—with one important exception—it is the same as that bill as passed by the Senate on July 29, 1959.

(The text of S. 167 follows:)

1 ful restraints and monopolies, and for other pur-
2 poses”, approved October 15, 1914 (38 Stat. 730,
3 as amended; 15 U.S.C. 12), commonly known as
4 the Clayton Act;

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

7 (3) Section 3 of the Act entitled “An Act to
8 amend section 2 of the Act entitled ‘An Act to sup-
9 plement existing laws against unlawful restraints
10 and monopolies, and for other purposes’, approved
11 October 15, 1914, as amended (U.S.C., title 15,
12 sec. 13), and for other purposes”, approved June
13 19, 1936 (49 Stat. 1528; 15 U.S.C. 13a), com-
14 monly known as the Robinson-Patman Act; and

15 (4) Any statute hereafter enacted by the Con-
16 gress which prohibits, or makes available to the
17 United States in any court or antitrust agency of
18 the United States any civil remedy with respect
19 to (A) any restraint upon or monopolization of
20 interstate or foreign trade or commerce, or (B)
21 any unfair trade practice in or affecting such
22 commerce;

23 (b) The term “antitrust agency” means any board,
24 commission, or agency of the United States (other than
25 the Department of Justice) charged by law with the

1 administration or enforcement of any antitrust law or the
2 adjudication of proceedings arising under any such law;

3 (c) The term "antitrust order" means any final
4 order of any antitrust agency, or any final order, decree,
5 or judgment of any court of the United States, duly
6 entered in any case or proceeding arising under any anti-
7 trust law;

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

12 (e) The term "antitrust violation" means any act
13 or omission in violation of any antitrust law or any anti-
14 trust order;

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

19 (g) The term "person" means any corporation,
20 association, partnership, or other legal entity not a
21 natural person;

22 (h) The term "documentary material" includes the
23 original or any copy of any book, record, report, memo-
24 randum, paper, communication, tabulation, chart, or
25 other document; and

1 (i) The term "custodian" means the antitrust docu-
2 ment custodian or any deputy custodian designated under
3 section 4 (a) of this Act.

4 CIVIL INVESTIGATIVE DEMAND

5 SEC. 3. (a) Whenever the Attorney General, or the
6 Assistant Attorney General in charge of the Antitrust Divi-
7 sion of the Department of Justice, has reason to believe that
8 any person may be in possession, custody, or control of
9 any documentary material pertinent to any antitrust investi-
10 gation, he may issue in writing, and cause to be served upon
11 such person, a civil investigative demand requiring such
12 person to produce such material for examination.

13 (b) Each such demand shall—

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

17 (2) describe the class or classes of documentary
18 material to be produced thereunder with such definite-
19 ness and certainty as to permit such material to be
20 fairly identified;

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

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

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

3 (c) No such demand shall—

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

9 (2) require the production of any documentary evi-
10 dence which would be privileged from disclosure if de-
11 manded by a subpoena duces tecum issued by a court of
12 the United States in aid of a grand jury investigation of
13 such alleged antitrust violation.

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

18 (e) Service of any such demand or of any petition filed
19 under section 5 of this Act may be made upon a partnership,
20 corporation, association, or other legal entity by—

21 (1) delivering a duly executed copy thereof to any
22 partner, executive officer, managing agent, or general
23 agent thereof, or to any agent thereof authorized by ap-
24 pointment or by law to receive service of process on

6

1 behalf of such partnership, corporation, association, or
2 entity;

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

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

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

15 ANTITRUST DOCUMENT CUSTODIAN

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

22 (b) Any person upon whom any demand issued under
23 section 3 has been duly served shall deliver such material
24 to the custodian designated therein at the place specified
25 therein (or at such other place as such custodian thereafter

1 may prescribe in writing) on the return date specified in
2 such demand (or on such later date as such custodian may
3 prescribe in writing). No such demand or custodian may
4 require delivery of any documentary material to be made—

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

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

15 (c) The custodian to whom any documentary material
16 is so delivered shall take physical possession thereof, and
17 shall be responsible for the use made thereof and for the return
18 thereof pursuant to this Act. The custodian may cause the
19 preparation of such copies of such documentary material as
20 may be required for official use by any individual who is
21 entitled, under regulations which shall be promulgated by
22 the Attorney General, to have access to such material for
23 examination. While in the possession of the custodian, no
24 material so produced shall be available for examination,
25 without the consent of the person who produced such ma-

1 terial, by any individual other than a duly authorized officer,
2 member, or employee of the Department of Justice or any
3 antitrust agency, provided nothing herein shall prevent the
4 Attorney General from making available the material so
5 produced for examination by the Committee on the Judiciary
6 of each House of the Congress. Under such reasonable terms
7 and conditions as the Attorney General shall prescribe,
8 documentary material while in the possession of the cus-
9 todian shall be available for examination by the person who
10 produced such material or any duly authorized representa-
11 tive of such person.

12 (d) Whenever any attorney has been designated to
13 appear on behalf of the United States before any court,
14 grand jury, or antitrust agency in any case or proceeding
15 involving any alleged antitrust violation, the custodian may
16 deliver to such attorney such documentary material in the
17 possession of the custodian as such attorney determines to
18 be required for use in the presentation of such case or pro-
19 ceeding on behalf of the United States. Upon the conclu-
20 sion of any such case or proceeding, such attorney shall
21 return to the custodian any documentary material so with-
22 drawn which has not passed into the control of such court,
23 grand jury, or antitrust agency through the introduction
24 thereof into the record of such case or proceeding.

25 (e) Upon the completion of (1) the antitrust investi-

1 gation for which any documentary material was produced
2 under this Act, and (2) any case or proceeding arising from
3 such investigation, the custodian shall return to the person
4 who produced such material all such material (other than
5 copies thereof made by the Department of Justice, any
6 antitrust agency or any committee of the Congress, pursuant
7 to subsection (c)) which has not passed into the control of
8 any court, grand jury, or antitrust agency through the in-
9 troduction thereof into the record of such case or proceeding.

10 (f) When any documentary material has been produced
11 by any person under this Act for use in any antitrust investi-
12 gation, and no such case or proceeding arising therefrom has
13 been instituted within a reasonable time after completion of
14 the examination and analysis of all evidence assembled in the
15 course of such investigation, such person shall be entitled,
16 upon written demand made upon the Attorney General or
17 upon the Assistant Attorney General in charge of the Anti-
18 trust Division, to the return of all documentary material
19 (other than copies thereof made by the Department of
20 Justice or any antitrust agency pursuant to subsection (c))
21 so produced by such person.

22 (g) In the event of the death, disability, or separation
23 from service in the Department of Justice of the custodian
24 of any documentary material produced under any demand
25 issued under this Act, or the official relief of such custodian

1 from responsibility for the custody and control of such mate-
2 rial, the Assistant Attorney General in charge of the Anti-
3 trust Division shall promptly (1) designate another antitrust
4 investigator to serve as custodian thereof, and (2) transmit
5 notice in writing to the person who produced such material
6 as to the identity and address of the successor so designated.
7 Any successor so designated shall have with regard to such
8 materials all duties and responsibilities imposed by this Act
9 upon his predecessor in office with regard thereto, except
10 that he shall not be held responsible for any default or
11 dereliction which occurred before his designation as
12 custodian.

13

JUDICIAL PROCEEDINGS

14 SEC. 5. (a) Whenever any person fails to comply with
15 any civil investigative demand duly served upon him under
16 section 3, the Attorney General, through such officers or
17 attorneys as he may designate, may file, in the district court
18 of the United States for any judicial district in which such
19 person resides, is found, or transacts business, and serve upon
20 such person a petition for an order of such court for the en-
21 forcement of such demand, except that if such person trans-
22 acts business in more than one such district such petition
23 shall be filed in the district in which such person maintains
24 his principal place of business, or in such other district in

1 which such person transacts business as may be agreed upon
2 by the parties to such petition.

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

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

23 (d) Whenever any petition is filed in any district court
24 of the United States under this section, such court shall have

1 jurisdiction to hear and determine the matter so presented,
2 and to enter such order or orders as may be required to
3 carry into effect the provisions of this Act. Any final order
4 so entered shall be subject to appeal pursuant to section
5 1291 of title 28 of the United States Code. Any dis-
6 obedience of any final order entered under this section by
7 any court shall be punished as a contempt thereof.

8 **CRIMINAL PENALTY**

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

12 **“§ 1509. Obstruction of antitrust civil process**

13 “Whoever, with intent to avoid, evade, prevent, or ob-
14 struct compliance in whole or in part, by any person with any
15 civil investigative demand made under the Antitrust Civil
16 Process Act, willfully removes from any place, conceals,
17 withholds, destroys, mutilates, alters, or by any other means
18 falsifies any documentary material in the possession, custody
19 or control of any person which is the subject of any such
20 demand duly served upon any person shall be fined not more
21 than \$5,000 or imprisoned not more than five years, or
22 both.”

23 (b) The analysis to such chapter is amended by insert-
24 ing at the end thereof the following new item:

“1509. Obstruction of antitrust civil process.”

Senator KEFAUVER. The proposal of such legislation is far from new. Authority to give the Department of Justice power to obtain documentary evidence needed in civil investigations has been under active consideration for many years.

The Attorney General's National Committee to Study the Antitrust Laws, in its report of March 31, 1955, strongly favored such legislation.

The Judicial Conference of the United States concluded that the present civil investigative machinery is inadequate for effective anti-trust enforcement.

The Eisenhower administration publicly and consistently endorsed remedial legislation on a number of occasions.

More recently, the Kennedy administration has asked for such legislation.

The reason for this impressive and bipartisan support of civil demand legislation is clear. 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 the Department does not have sufficient facts with respect to the nature of the violation, it can proceed only in one of four ways, none of which appears to be satisfactory.

First, it may seek voluntary cooperation from those who are believed to be in violation of the law, but this is not a satisfactory method upon which to depend for the enforcement of the law. Experience has shown that in many instances such voluntary cooperation is not received.

Second, the Department may hold a grand jury investigation and use subpoenas duces tecum in order to obtain the needed documentary material. It appears to be a harsh method of obtaining evidence for use in civil cases to subject people to grand jury investigations when a civil case only is anticipated. Furthermore, such procedure is expensive to the Government, tends to delay the prosecution of civil cases, and the courts generally look with disfavor on the use of grand jury investigations for the sole purpose of developing civil cases.

Third, the Attorney General may require the Federal Trade Commission to conduct an investigation to obtain evidence upon which the Department of Justice would proceed where a decree has been entered. This has been done on only a few occasions. As a general principle, action should not be subject to the ability of the Federal Trade Commission to make investigations. It could disrupt the work of the FTC and divert its personnel and funds from the work of the Commission.

Fourth, the Department may file a civil complaint based upon whatever information it has at the time and then undertake to obtain, under the Federal Rules of Civil Procedure, the information or documents to which the Department should have had access before the complaint was filed. This procedure is at best haphazard, since the complaint originally filed may have been based upon facts which are not supported by the evidence uncovered after full investigation, requiring amendments to the complaint and perhaps a dismissal of the complaint. If the complaint is dismissed, litigants would be

put to expense and trouble which would not have been caused but for the filing of a complaint without sufficient facts being available.

S. 167 will give the Department the authority to proceed in a proper way in the civil enforcement of the antitrust laws. S. 167 also will provide effective machinery for effective antitrust enforcement in cases where civil proceedings, rather than criminal indictments, should be brought by the Department of Justice.

It has been argued that civil demand legislation would empower "fishing expeditions" by the Department of Justice. Past experience and past testimony have shown that it would have just the opposite effect; it would make unnecessary such expeditions, whether via the unwarranted civil complaint route or the criminal indictment route.

At the conclusion of my remarks, I shall place in the record a brief memorandum which I have had prepared and which explains the provisions of the bill.

I shall ask the several witnesses to comment on the primary difference between S. 167, 87th Congress, and S. 716, 86th Congress, as it passed the Senate. This difference relates to the availability of documents to the FTC and the Judiciary Committees of the House of Congress. Under S. 167, documents would automatically be available to the FTC, and access by the committee of Congress would remain in the same status as now exists. Under S. 716, as passed by the Senate, both the FTC and the Congress could have access only at the discretion of the Attorney General, and such access would be subject to appeal by the person who had submitted documents under a civil demand.

Our first witness today is the very distinguished new Assistant Attorney General for the Antitrust Division, Judge Lee Loevinger. He will be followed by the equally distinguished new Chairman of the Federal Trade Commission, Mr. Paul Rand Dixon, erstwhile counsel of this subcommittee.

(The memorandum referred to is as follows:)

MEMORANDUM ON PROVISIONS OF S. 167 (87TH CONG.) CIVIL INVESTIGATIVE DEMAND

The bill gives authority to the Attorney General or the Assistant Attorney General in charge of the Antitrust Division to issue a civil investigative demand requiring any person, other than a natural person, to produce documentary material for examination whenever there is reason to believe that such person has in custody material pertinent to any civil antitrust investigation. The demand so issued is required to be in writing and to set forth the nature of the conduct constituting the alleged antitrust violation which is under investigation, and to cite the provision of the antitrust laws believed to be violated. The civil demand is required to describe the documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified and to name the date by which compliance must be made, provided that such time limit shall give a reasonable period of time for the assembling and production of the material demanded. The civil demand must also identify the custodian designated in the Department of Justice to whom such material is to be delivered and the place for such delivery.

Under the provisions of the bill, the sufficiency of the civil demand issued may be tested by a petition filed in the district court in which the office of the custodian designated is located, seeking an order of the court to modify or to set aside the demand. The sufficiency of a civil demand is to be determined by the court upon the same test as is applied by the courts to a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of an antitrust violation. The bill expressly provides that a civil demand may not require the production of any material which would be privileged from

disclosure if the same material were demanded in such a subpoena duces tecum in aid of a grand jury investigation.

Service of a civil demand on a person who is believed to have such documentary material is provided for in the same general manner as the service of complaints in civil cases in Federal district courts.

In order to make certain the material received by the Department of Justice under a civil demand is properly preserved and the rights of the owner of such material are protected, the legislation would require the Assistant Attorney General in the Antitrust Division to designate a custodian of such records. Such a custodian would be responsible for the preservation of the documents and the bill provides a penalty which can be enforced by the owner of the documents in the district court if such custodian should not conform to the requirements of the bill with respect to the custody and handling of such documents.

Such material obtained under a civil demand may be used before any court, grand jury or antitrust agency in any case or proceeding involving any alleged antitrust violation. The bill also provides that nothing in the bill shall prevent the Attorney General from making available the material so produced for examination by the Committee on the Judiciary of each House of the Congress. This provision in the bill does not require the Attorney General to make the documentary material available to the Judiciary Committees of the Congress but prevents the bill from barring the Attorney General's making such material subject to examination by the Judiciary Committees of the Congress. The Attorney General and the custodian are barred from subjecting the material to examination by any person other than an employee of the Department of Justice or any other antitrust agency and the person from whom the documents were obtained.

Upon the conclusion of any such antitrust case or proceeding, the documents produced, not including copies made by the Department of Justice, which have not passed into the hands of a court, grand jury or other antitrust agency, shall be returned by the custodian to the person producing the documents under the civil demand.

The bill provides for the enforcement of civil investigative demands by a petition filed by the Attorney General in the district court for an order of the court requiring compliance with a demand. Disobedience to any final order issued by the court may be punished as a contempt of the order. Also, any willful obstruction of the antitrust civil process as provided in the bill would be punishable by a fine of not more than \$5,000, or by imprisonment for not more than 5 years, or both. To be punishable, such an obstruction must be done with "intent to avoid, evade, prevent, or obstruct compliance" with any civil investigative demand made pursuant to the bill.

Senator KEFAUVER. We are delighted to have the very able and distinguished new Assistant Attorney General for the Antitrust Division who has been very helpful to the subcommittee.

**STATEMENT OF LEE LOEVINGER, ASSISTANT ATTORNEY GENERAL,
ANTITRUST DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED
BY JOHN DUFFNER AND JOHN POOLE**

Mr. LOEVINGER. I appear today in response to Senator Kefauver's request to present the views of the Department of Justice on S. 167. This bill would provide the Department with a civil investigative demand, which is equivalent to a subpoena, for use in investigating suspected violations of the antitrust laws. A substantially identical bill was introduced by Senator Kefauver in the 86th Congress, approved by this subcommittee and passed by the Senate. Unfortunately, the bill was not enacted. The Department of Justice favors the proposed bill (S. 167) and urges that it be approved.

The problems of antitrust enforcement today are more serious than ever. Recent hearings before this subcommittee have pointed this

up. There has been a widespread conspiracy to maintain high prices in the sale of heavy electrical equipment. This conspiracy was finally uncovered when one of the conspirators became frightened and informed. Because there was reason to suspect criminal violations of the antitrust laws, the Department was then able to institute grand jury proceedings. Subpenas duces tecum were issued to obtain books and records of the companies involved and these contained evidence of the unlawful pattern of collusion in bidding. Without these grand jury subpenas, an effective investigation would have been impossible.

I might say that the Department received approximately 650,000 documents in the course of that investigation and these formed the basis for the indictments and for subsequent proceedings.

As this committee knows, in many cases, the grand jury cannot be used to investigate antitrust violations. The Supreme Court held, in *United States v. Proctor & 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. This decision is now being used to harras the Department in situations where grand jury investigations have led to civil, rather than criminal cases. There are many reasons why the Department may not seek an indictment in these instances. The evidence uncovered may not be strong enough to meet the strict standard of proof in criminal cases. The antitrust violations uncovered may not involve such willful disregard for the law as to warrant the imposition of criminal penalties—and the stigma which attaches to those penalties. Another reason for bringing only a civil suit is that the public interest may require the prompt invocation of civil remedies such as divestiture or injunction. The bringing of a criminal case will often delay this civil relief.

Whatever the reason for proceeding only by civil case, the decision to do so now subjects the Department to great potential harassment. In *United States v. Carter Products, Inc.*, a civil case was brought in the Southern District of New York after a grand jury proceeding in which no indictment was returned. The court ordered answers to interrogatories requesting the names of all persons involved in the decision not to proceed criminally and all persons who assisted in drafting the complaint. After those names were supplied, 13 attorneys and officials of the Department of Justice, including the former Attorney General, William P. Rogers, were subpoenaed to give depositions. Similar tactics are now being tried in a number of other cases.

Senator KEFAUVER. Did this Carter case grow out of an alleged conspiracy on bidding to the U.S. Government on tranquilizers? That is the one that I seem to recall.

Mr. LOEVINGER. It involves alleged price fixing in tranquilizing drugs, yes.

Senator KEFAUVER. I believe that American Home was a codefendant.

Mr. LOEVINGER. Yes, sir, American Home Products.

These inquiries as to when the Department decided to proceed civilly can now be used as the basis for a long series of motions, depositions, and interrogatories delaying the course of the lawsuit.

Thus, one of the very reasons why we may have decided to proceed civilly can be frustrated. In addition, the harassment to be faced in a civil suit may tend to coerce the discretion to bring a criminal suit. When the evidence might permit either criminal or civil proceedings, the Department may be tempted to seek an indictment in order to avoid this delay in a civil suit brought alone.

One of the most important uses of a civil investigative demand would be to enable the Department to make some preliminary investigations before making the decision whether or not to utilize the grand jury. We could thus reduce the number of instances in which we use a grand jury, decide to bring only a civil suit and then face the threat of serious delay in such a suit.

When the Government investigates civil violations of the antitrust laws, it cannot use the grand jury at all. This applies to Sherman Act cases where civil remedies alone are appropriate. It also applies to every investigation under the Celler-Kefauver Act. These cases are ones in which the Government obtains its basic antitrust remedies of injunction and divestiture. They are just as important as the criminal cases. In these civil antitrust investigations, however, the Government has no powers comparable to those of the grand jury. Until a case is actually filed, there is no way to compel the production of pertinent documents and materials.

We are submitting to the committee at this time summaries of a few civil antitrust investigations conducted in recent years in which a civil investigative demand was needed and could appropriately have been used.

(The document referred to may be found on page 55.)

They indicate the seriousness of the problem. Very often, the only reliable information we have about an industry is in the hands of corporations in that industry. To carry out an effective investigation, the Government must have access to this information. That access is often refused.

In case No. 29 in the summary, the Department was investigating alleged violations of the Sherman Act. The FBI was requested to examine certain of the files of a company in the industry involved. A letter requesting that the FBI be given access to the files was sent to the company. The general counsel of this company replied by a letter which refused the request and said:

It is contrary to the established policy of this company to grant permission for the examination of its records and files, and in view of this fact, I am unable to comply with the request in your letter of August 18.

In case No. 9 in the summary, the Department was investigating an acquisition of one retail chain by a competitor. It was important to determine whether the acquired corporation was a failing concern. One of the attorneys in the Antitrust Division wrote counsel for the acquiring corporation which had already supplied us with some information. In response to this request, the corporation's counsel replied by letter:

I am thoroughly familiar with this transaction and do not feel that we have in any way violated the law. Since I feel this way about it, I am disinclined to give you the information.

Because of this corporation's refusal to supply pertinent information, we were forced, months later, to refer this matter to the Federal Trade Commission.

In another investigation, case No. 18 in the summary, the Department was investigating an acquisition in an already highly concentrated industry. We sent a detailed letter of inquiry to the executive vice president and counsel of the acquiring corporation. He responded with a letter which said in part "we shall do the best we can and you will have our cooperation as always." Later, an Antitrust Division attorney called a member of the law firm which had been retained as counsel for this corporation and asked when we would receive the information requested in the letter of inquiry sent 3 months before. Counsel said that the compiling of this information was underway but that he believed that the Justice Department already considered the acquisition as violative of the law. Because of this, he said, he was going to recommend to his client that it refrain from furnishing the Government with information which would help it in a suit against the company. Two weeks later, this lawyer met with attorneys in the Antitrust Division and announced that his client had changed its policy of full cooperation with the Government and would submit only certain types of information. Thus, after 5 months of delay, we found that this corporation had reneged on its original promise to give full cooperation. The investigation had to continue without much of the information deemed pertinent.

In another Sherman Act investigation, No. 25, seven companies refused to allow the FBI to review their files. The attorney for three of these companies gave as his reason that his clients "would not benefit by cooperating" with the Department. The attorney for another refused to allow a file search on grounds of "bad relations" with the Antitrust Division.

In still another case, No. 1 in the summary, a manufacturing corporation had purchased the facilities of a competitor. The Antitrust Division wrote its customary merger inquiry letter to the acquiring corporation. It was advised by the corporation that it had turned this matter over to a well-known law firm. More than 2 weeks after the inquiry letter was sent, a member of that firm wrote to advise that he would be out of town for a few days and would look into the matter and write us on his return. A month after this letter he finally sent another, stating:

We prefer not to supply the data requested by [your] letter except under subpoena. However, we are willing to give you the following information.

His enclosure was far less than had been requested.

In case No. 20, the staff of an Antitrust Division field office was investigating an alleged cartel in a commodity. Six companies were asked to allow a search of their files. The first of these companies referred the investigators to the company's attorney. He refused to cooperate except under grand jury subpoena. The second company flatly refused to allow a file search or to give any information. The third admitted that the desired correspondence was in its files but also refused to give any cooperation. The fourth company sent investigators to its attorney who said to get a subpoena. The fifth com-

pany declined to allow a file search, saying it was "pointless" because the correspondence asked for did not exist. The sixth company refused to give any information and refused a file search saying, "there is nothing in the files." From other sources, the investigators got enough evidence to go before a grand jury. The two companies which denied that there was anything in their files both produced pertinent correspondence under subpoena.

In situations like this, and there are many, the Department is powerless to investigate unless it has evidence of violations of a criminal nature. Very often it does not.

Because of delays and outright refusals of this kind, the Department has been denied access to materials which were crucial to its investigations. It has been forced into the dilemma where it could not be sure whether to sue until certain information was available but that information would not be available until suit was brought. The result has been that some antitrust investigations have dragged on for years. Others have had to be referred to agencies better equipped to investigate.

In all candor, I suppose it has to be admitted some were dropped.

Lack of an effective tool of investigation causes even more than a waste of time and money. It impairs the program of antitrust enforcement. This is particularly true in Celler-Kefauver Act investigations. Unless the Department can gather the necessary information quickly, it cannot enjoin the consummation of mergers which may lessen competition. Even after a merger has been consummated, time is of great importance. While investigations are delayed or stalled, the assets of acquired corporations can be intermingled with others; their goodwill sapped and the possibilities of restoring competition diminished. Respect for the law itself diminishes when the law cannot be enforced speedily and effectively.

Senator KEFAUVER. Judge Loevinger, I know that Congressman Celler, and I too, appreciate your referring to the Celler-Kefauver Act. In case anybody reading this record doesn't understand what that is, that is the 1950 amendment to section 7 of the Clayton Act.

Mr. LOVINGER. Yes, sir.

S. 167, the bill now pending before this committee, would create a civil investigative demand. This demand would be used by the Department to compel the production of pertinent materials in civil antitrust investigations. This bill contains ample protection for the rights of corporations under investigation and since individuals are not subject to demands under the bill, no fifth amendment problems are created.

I would like to stress the fact that the powers and procedures which this bill would create are not unprecedented. We are including in the material which we are submitting a description of similar powers which are now vested in officials of the Federal Government and many States. Among others, the Secretaries of Agriculture, Labor, and the Treasury are authorized to administer laws within their jurisdiction by compelling the production of documents and the testimony of witnesses. Similar powers to enforce antitrust laws are conferred upon the attorneys general of at least 12 States. The State of Wash-

ington has recently enacted legislation similar to S. 167. Other States go considerably beyond S. 167, authorizing service of subpoenas on natural persons and requiring such persons to give oral testimony. On May 27, 1961, the Legislature of Hawaii passed a bill embodying virtually all of the provisions of S. 167, plus a power to secure testimony in civil antitrust investigations. S. 167, then, is a relatively limited grant of a type of investigative power which is well established.

Finally, I would like to emphasize the importance of the penal provisions which are in section 6 of this bill. These provisions would make willful obstruction of antitrust civil process subject to criminal penalties. The destruction or secreting of documents under subpoena by grand juries has become a serious problem. The Department has had reasons to suspect many instances of this. At present, it is considering bringing a case against a large corporation suspected of these practices. In such a case, there are clear legal sanctions. Willful obstruction of compliance with a grand jury subpoena duces tecum is both a criminal contempt and a violation of section 1503 of United States Code, title 18.

A civil investigative demand does not carry these sanctions. These demands would not be orders of the court. The Department would have to wait until a failure to comply with them before it could obtain a court order enforcing them. Thus, we could not bring contempt proceedings for willful acts of obstruction of justice which took place at the time of service of the demands, which is when most such acts would occur. Nor could we proceed under section 1503 of title 18 which covers only obstruction of justice in connection with judicial proceedings.

Without the penal sanctions of section 6, these demands would be unenforceable until a court order was obtained. Such a situation would invite disrespect for the law.

Section 6 of this bill provides the same penalties as section 1503 of title 18. It reaches only "willful" obstruction of compliance. In effect, it simply extends the coverage of section 1503 to the civil investigative demand. On the matter of notice, it is entirely fair to the corporations which will be affected. While most obstruction of jus-

tice statutes are general, this one gives specific warning that a civil investigative demand carries a certain sanction. If the demand is to be a really useful tool of investigation, it must carry such a sanction.

I might add here, sir, the American Bar Association, as I understand it, opposes section 6 of the penal provisions. It does so on two grounds; first, it is unfair to be so tough and secondly, these matters are already covered by section 1001 of title 18.

Now I believe the grounds for objection are inconsistent. If the matter is already covered by section 1001, the penalty is more severe than proposed in section 6 of the pending bill because section 1001 of title 18 carries a \$10,000 fine.

Furthermore, if they are already covered it does not harm to enact a specific penal provision. If they are not already covered, it is perfectly obviously necessary that they should be.

In any event, since penal statutes are strictly construed, we conceive it to be highly desirable that there should be a specific penal provision that says very clearly and unmistakably to those subject to its terms, that it is a criminal act for the executive officers to beat it up to the second floor and start burning documents when an antitrust lawyer comes in the front door of the company.

The enactment of these penalty provisions may well decrease litigation in these matters. If corporations know that demands can be enforced, voluntary cooperation with investigators will increase. Thus, the civil investigative demand would serve much of its purpose simply by being available.

In conclusion, I respectfully but earnestly urge the committee to renew its efforts to secure the enactment of this legislation. The passage of this bill will provide an important and much needed improvement in the enforcement of the antitrust laws.

Senator KEFAUVER. Thank you, Judge Loevinger, for a very persuasive statement in favor of the enactment of this bill.

I think the record should show that an identical bill has been filed in the House of Representatives by Congressman Celler. It is H.R. 6689. Let it be printed in the record at this point.

(The text of H.R. 6689 follows:)

2

1 ful restraints and monopolies, and for other pur-
2 poses”, approved October 15, 1914 (38 Stat. 730,
3 as amended; 15 U.S.C. 12), commonly known as
4 the Clayton Act;

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

7 (3) Section 3 of the Act entitled “An Act to
8 amend section 2 of the Act entitled ‘An Act to sup-
9 plement existing laws against unlawful restraints
10 and monopolies, and for other purposes’, approved
11 October 15, 1914, as amended (U.S.C., title 15,
12 sec. 13), and for other purposes”, approved June
13 19, 1936 (49 Stat. 1528; 15 U.S.C. 13a), com-
14 monly known as the Robinson-Patman Act; and

15 (4) any statute hereafter enacted by the Con-
16 gress which prohibits, or makes available to the
17 United States in any court or antitrust agency of
18 the United States any civil remedy with respect
19 to (A) any restraint upon or monopolization of
20 interstate or foreign trade or commerce, or (B)
21 any unfair trade practice in or affecting such
22 commerce;

23 (b) The term “antitrust agency” means any board,
24 commission, or agency of the United States (other than
25 the Department of Justice) charged by law with the

3

1 administration or enforcement of any antitrust law or the
2 adjudication of proceedings arising under any such law;

3 (c) The term "antitrust order" means any final
4 order of any antitrust agency, or any final order, decree,
5 or judgment of any court of the United States, duly
6 entered in any case or proceeding arising under any anti-
7 trust law;

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

12 (e) The term "antitrust violation" means any act
13 or omission in violation of any antitrust law or any anti-
14 trust order;

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

19 (g) The term "person" means any corporation,
20 association, partnership, or other legal entity not a
21 natural person;

22 (h) The term "documentary material" includes the
23 original or any copy of any book, record, report, memo-
24 randum, paper, communication, tabulation, chart, or
25 other document; and

4

1 (i) The term "custodian" means the antitrust docu-
2 ment custodian or any deputy custodian designated under
3 section 4 (a) of this Act.

4 CIVIL INVESTIGATIVE DEMAND

5 SEC. 3. (a) Whenever the Attorney General, or the
6 Assistant Attorney General in charge of the Antitrust Divi-
7 sion of the Department of Justice, has reason to believe that
8 any person may be in possession, custody, or control of
9 any documentary material pertinent to any antitrust investi-
10 gation, he may issue in writing, and cause to be served upon
11 such person, a civil investigative demand requiring such
12 person to produce such material for examination.

13 (b) Each such demand shall—

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

17 (2) describe the class or classes of documentary
18 material to be produced thereunder with such definite-
19 ness and certainty as to permit such material to be
20 fairly identified;

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

5

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

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

5 (c) No such demand shall—

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

11 (2) require the production of any documentary evi-
12 dence which would be privileged from disclosure if de-
13 manded by a subpoena duces tecum issued by a court of
14 the United States in aid of a grand jury investigation of
15 such alleged antitrust violation.

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

20 (e) Service of any such demand or of any petition filed
21 under section 5 of this Act may be made upon a partnership,
22 corporation, association, or other legal entity by—

23 (1) delivering a duly executed copy thereof to any

6

1 partner, executive officer, managing agent, or general
2 agent thereof, or to any agent thereof authorized by ap-
3 pointment or by law to receive service of process on
4 behalf of such partnership, corporation, association, or
5 entity;

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

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

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

18 ANTITRUST DOCUMENT CUSTODIAN

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

25 (b) Any person upon whom any demand issued under

1 section 3 has been duly served shall deliver such material
2 to the custodian designated therein at the place specified
3 therein (or at such other place as such custodian thereafter
4 may prescribe in writing) on the return date specified in
5 such demand (or on such later date as such custodian may
6 prescribe in writing). No such demand or custodian may
7 require delivery of any documentary material to be made—

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

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

18 (c) The custodian to whom any documentary material
19 is so delivered shall take physical possession thereof, and
20 shall be responsible for the use made thereof and for the re-
21 turn thereof pursuant to this Act. The custodian may cause
22 the preparation of such copies of such documentary material
23 as may be required for official use by any individual who is
24 entitled, under regulations which shall be promulgated by
25 the Attorney General, to have access to such material for

1 examination. While in the possession of the custodian, no
2 material so produced shall be available for examination,
3 without the consent of the person who produced such ma-
4 terial, by any individual other than a duly authorized officer,
5 member, or employee of the Department of Justice or any
6 antitrust agency, provided nothing herein shall prevent the
7 Attorney General from making available the material so
8 produced for examination by the Committee on the Judiciary
9 of each House of the Congress. Under such reasonable terms
10 and conditions as the Attorney General shall prescribe,
11 documentary material while in the possession of the cus-
12 todian shall be available for examination by the person who
13 produced such material or any duly authorized representa-
14 tive of such person.

15 (d) Whenever any attorney has been designated to
16 appear on behalf of the United States before any court,
17 grand jury, or antitrust agency in any case or proceeding
18 involving any alleged antitrust violation, the custodian may
19 deliver to such attorney such documentary material in the
20 possession of the custodian as such attorney determines to
21 be required for use in the presentation of such case or pro-
22 ceeding on behalf of the United States. Upon the conclu-
23 sion of any such case or proceeding, such attorney shall
24 return to the custodian any documentary material so with-
25 drawn which has not passed into the control of such court,

1 grand jury, or antitrust agency through the introduction
2 thereof into the record of such case or proceeding.

3 (e) Upon the completion of (1) the antitrust investi-
4 gation for which any documentary material was produced
5 under this Act, and (2) any case or proceeding arising from
6 such investigation, the custodian shall return to the person
7 who produced such material all such material (other than
8 copies thereof made by the Department of Justice, any
9 antitrust agency or any committee of the Congress, pursuant
10 to subsection (c)) which has not passed into the control of
11 any court, grand jury, or antitrust agency through the in-
12 troduction thereof into the record of such case or proceeding.

13 (f) When any documentary material has been produced
14 by any person under this Act for use in any antitrust investi-
15 gation, and no such case or proceeding arising therefrom has
16 been instituted within a reasonable time after completion of
17 the examination and analysis of all evidence assembled in the
18 course of such investigation, such person shall be entitled,
19 upon written demand made upon the Attorney General or
20 upon the Assistant Attorney General in charge of the Anti-
21 trust Division, to the return of all documentary material
22 (other than copies thereof made by the Department of
23 Justice or any antitrust agency pursuant to subsection (c))
24 so produced by such person.

25 (g) In the event of the death, disability, or separation

10

1 from service in the Department of Justice of the custodian
2 of any documentary material produced under any demand
3 issued under this Act, or the official relief of such custodian
4 from responsibility for the custody and control of such mate-
5 rial, the Assistant Attorney General in charge of the Anti-
6 trust Division shall promptly (1) designate another antitrust
7 investigator to serve as custodian thereof, and (2) transmit
8 notice in writing to the person who produced such material
9 as to the identity and address of the successor so designated.
10 Any successor so designated shall have with regard to such
11 materials all duties and responsibilities imposed by this Act
12 upon his predecessor in office with regard thereto, except
13 that he shall not be held responsible for any default or
14 dereliction which occurred before his designation as
15 custodian.

16

JUDICIAL PROCEEDINGS

17 SEC. 5. (a) Wherever any person fails to comply with
18 any civil investigative demand duly served upon him under
19 section 3, the Attorney General, through such officers or
20 attorneys as he may designate, may file, in the district court
21 of the United States for any judicial district in which such
22 person resides, is found, or transacts business, and serve upon
23 such person a petition for an order of such court for the en-
24 forcement of such demand, except that if such person trans-
25 acts business in more than one such district such petition

1 shall be filed in the district in which such person maintains
2 his principal place of business, or in such other district in
3 which such person transacts business as may be agreed upon
4 by the parties to such petition.

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

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

25 (d) Whenever any petition is filed in any district court

12

1 of the United States under this section, such court shall have
2 jurisdiction to hear and determine the matter so presented,
3 and to enter such order or orders as may be required to
4 carry into effect the provisions of this Act. Any final order
5 so entered shall be subject to appeal pursuant to section
6 1291 of title 28 of the United States Code. Any dis-
7 obedience of any final order entered under this section by
8 any court shall be punished as a contempt thereof.

9

CRIMINAL PENALTY

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

13 **“§ 1509. Obstruction of antitrust civil process**

14 “Whoever, with intent to avoid, evade, prevent, or ob-
15 struct compliance in whole or in part, by any person with any
16 civil investigative demand made under the Antitrust Civil
17 Process Act, willfully removes from any place, conceals,
18 withholds, destroys, mutilates, alters, or by any other means
19 falsifies any documentary material in the possession, custody
20 or control of any person which is the subject of any such
21 demand duly served upon any person shall be fined not more
22 than \$5,000 or imprisoned not more than five years, or
23 both.”

13

1 (b) The analysis to such chapter is amended by insert-
2 ing at the end thereof the following new item:

“1509. Obstruction of antitrust civil process.”

3

SAVING PROVISION

4 SEC. 7. Nothing contained in this Act shall impair the
5 authority of the Attorney General, the Assistant Attorney
6 General in charge of the Antitrust Division of the Depart-
7 ment of Justice, or any antitrust investigator to (a) lay
8 before any grand jury impaneled before any district court of
9 the United States any evidence concerning any alleged
10 antitrust violation, (b) invoke the power of any such court
11 to compel the production of any evidence before any such
12 grand jury, or (c) institute any proceeding for the enforce-
13 ment of any order or process issued in execution of such
14 power, or to punish disobedience of any such order or process
15 by any person.

Mr. LOEVINGER. That is my understanding, sir.

Senator KEFAUVER. It is my understanding from Congressman Celler that the Judiciary Committee of the House is planning hearings and they expect to take some action on the matter in the House of Representatives.

Mr. Flurry is our senior counsel. You have had a great deal of experience with the Department of Justice, Mr. Flurry, and we will give you the opportunity to pose some questions to Judge Loevinger.

Mr. FLURRY. Mr. Loevinger, on page 3, at the end of the first paragraph of your statement you state:

When the evidence might permit in either criminal or civil proceedings, the Department may be tempted to seek an indictment in order to avoid this delay in a civil suit brought alone.

In other words, that is due to the efficiency of the present law with respect to obtaining evidence in civil cases.

The Department is forced to burden companies and individuals with criminal proceeding whereas if they had the remedy provided under this bill, that would not be necessary.

Is that true?

Mr. LOEVINGER. I think the word "force" is too strong, Mr. Flurry. Obviously, this comment applies only to those cases that lie on the borderline and where the evidence is susceptible of interpretation that would support either civil or criminal proceedings.

In such cases, however, we feel that the present state of the law does account for a coercive element to the Department's determination and it might very well be that if we had the choice initially to proceed by a civil process with subpoena power, we could conduct certain of these investigations without ever proceeding to a criminal case and that might well be advantageous to companies subject to investigation.

Mr. FLURRY. Under the Sherman Act, all violations of the Sherman Act are criminal as well as civil. Is that true?

Mr. LOEVINGER. That is true in a certain sense, yes.

Mr. FLURRY. So it becomes a question of discretion within the administration of the law as to whether or not a civil or criminal case or both should be brought.

Mr. LOEVINGER. Yes.

Mr. FLURRY. So that in a case where the administrators deemed it of sufficient importance to get, shall we say, a civil case, and they are unable to obtain the evidence through voluntary cooperation, in such a case they almost are forced to resort to the criminal side and to return a criminal indictment as well as filing a civil case, would they not?

Mr. LOEVINGER. Yes, that is the element to which I refer.

Mr. FLURRY. So that you could proceed by grand jury in any violation of the Sherman Act, but you would thereby work an undue hardship in some cases upon the prospective defendant.

Mr. LOEVINGER. Well, there is one gloss on the Sherman Act that has been put on it by the Supreme Court in the *P. & G.* case which is that if initially the determination of the Department of Justice is that the violation does not warrant criminal proceedings, you are not warranted in proceedings with a grand jury.

As I say in this situation where you cannot get voluntary cooperation, it may very well be that the investigation is simply completely bogged down and this does happen.

Senator KEFAUVER. Either bogged down or it may not be brought at all.

Mr. LOEVINGER. Yes.

Mr. FLURRY. In your statement on page 9 with respect to the powers which have been provided to other agencies of Government such as the Departments of Agriculture, Labor and Treasury, have you had an opportunity to compare the breadth of the power provided in those laws with the breadth of the power provided in S. 167?

Mr. LOEVINGER. In general, the powers granted are granted in broad and general terms without the detailed provisions for procedure and protection of respondents provided by S. 167.

Now S. 167 is a much more carefully drafted bill with much more elaborate procedure of protection of respondents.

Mr. FLURRY. Those laws, as I understand it, have been in existence for quite a long time, have they not?

Mr. LOEVINGER. Many of them, yes. I do not have the dates of enactment in mind.

Mr. FLURRY. And the Federal Trade Commission has powers similar to that provided in this bill?

Mr. LOEVINGER. Yes.

Mr. FLURRY. Do you recall the section?

Mr. WALLACE. It is section 49.

Mr. LOEVINGER. I am advised it is section 49 of title 15 of the Code. I do not have the number in mind.

Mr. CHUMBRIS. That can be supplied later for the record.

Senator KEFAUVER. Mr. Dixon will testify to that.

Mr. WALLACE. It is section 49 of title 15 of the code.

Senator KEFAUVER. That is the Federal Trade Commission Act.

Mr. FLURRY. Are the provisions of S. 167 comparable with the provisions of the Federal Trade Commission Act with respect to obtaining similar information under the subpoena powers of the Federal Trade Commission commensurate with respect to the protection of the rights of those from whom such information is sought?

Mr. LOEVINGER. S. 167 is, I believe, more restrictive and somewhat more elaborate in the protections and safeguards it erects for the respondents.

Mr. FLURRY. So that generally speaking, at least without going into each of the separate acts with respect to each of the separate agencies or departments, S. 167, in your opinion is as broad in the protective provisions with respect to the rights of those investigated as the acts conferring such power on the different agencies and departments.

Mr. LOEVINGER. According to my best present recollection, it is more protective than any other comparable provisions of law.

Mr. FLURRY. There has been some question raised in the last Congress and at hearings on the bill with respect to the manner in which S. 167, and its predecessor S 716, provided for the production and custody of the documents attained under civil demand.

Do you see any objection to the provisions of S. 167 with respect to that aspect of the bill?

Mr. LOEVINGER. On the contrary, it very well drafted in respect to that aspect of the bill.

I should like to add here a note with respect to the relative merits of getting copies or getting originals of documents. To say that we will supply you with photostatic copies instead of originals may sound very well. Those who have not had expensive trial experience may regard this as the equivalent. In fact, it is not—based on my own experience and I have tried a good many lawsuits, including antitrust cases. There is no substitute for originals. It is frequently the fact that the most important evidence may well be a lightly penciled note or a handwritten notation appearing on the back of the document. That altogether escapes the photostater who handles the document.

Now I have even tried a case in which the watermark of the paper on which a document was typed was of some significance. I do not think it is equivalent to an adequate disclosure to give merely photostatic copies. I think that S. 167 is precisely and admirably drafted with respect to the kind of disclosure that the Government is entitled to in these cases.

Mr. FLURRY. Mr. Loevinger, in my personal experience in the Antitrust Division, I have had instances in which stipulations by opposing counsel and defense counsel as to the authenticity of the copies were extremely hard to obtain, and in some instances, we were not able to obtain such a stipulation until we had taken the matter before the court and the court had very clearly expressed its view with respect to the utter nonsense of attorneys representing the defendant as not entering into such a stipulation. But without such a stipulation, it would be necessary to resubpena the originals which you expected to use in the trial of that case.

Mr. LOEVINGER. Precisely.

Mr. FLURRY. Which would bring about delay, confusion and many difficulties.

Do you believe that you would have any such difficulty if you were willing to accept the copies in obtaining and accompanying stipulations with this bill facing the defendants?

Mr. LOEVINGER. Obviously, this bill is of such a character that it would obviate the difficulty you mentioned.

It is my anticipation that the practical operation of the Antitrust Division under this bill would not involve frequent production of originals where it was thought that the material sought was not of such a character that the originals need be examined.

We would be happy to receive copies, together with a stipulation of the kind that you mentioned.

I might say, Senator Kefauver, that when I first went to work for the Antitrust Division which was before World War II, that there was a practice that was fairly common then of the Assistant Attorney General writing a letter to companies under investigation requesting certain information. Lawyers from the Antitrust Division, on presenting this letter to the corporation under investigation, would ordinarily be given files of the classes involved in the investigation and permitted to inspect these in the company's offices. Document that they thought of significance would then be photostated and sent to the Department of Justice. This is what we used to refer to as a

file search. This was perhaps the most common method of investigation and was frequently done. I spent many hours engaged in just this practice.

Sometime after 1950, the companies apparently got too sophisticated for this and the practice altogether ceased. They simply won't permit us this kind of voluntary access.

It would be my anticipation that if this bill were passed probably that practice would again come to be a method of investigation because if we had the muscle to secure the documents by a legal process, if necessary, companies in many cases would be willing to comply voluntarily and actually invocation of the processes provided by the bill would probably become unnecessary in many cases.

Mr. FLURRY. Now, I notice in the proposed bill by the American Bar Association—

Senator KEFAUVER. The bill you refer to is the one that is attached to the statement of Mr. Richard A. Decker who will testify shortly. Is that right, Mr. Flurry?

Mr. FLURRY. Yes.

Now on page 7 of the bill attached to the statement of Mr. Decker—

Senator KEFAUVER. By the way, have you had an opportunity of examining this bill, Judge?

Mr. LOEVINGER. Yes.

Senator KEFAUVER. I mean this proposed bill.

Mr. FLURRY. Subparagraph G at the bottom says:

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.

Do you feel there is any necessity for such a provision?

Mr. LOEVINGER. I don't feel that it is necessary but we have no objection to this. This is equivalent to the second proviso of the amendment introduced by Senator Dirksen to a bill similar to S. 167 and we have no objection if the committee desires to include such a provision that is all right with us.

Mr. CHUMBRIS. Senator Ervin is also a cosponsor.

Senator KEFAUVER. While we are on that subject, we ought to talk about the provision of the bill, S. 167, on page 8. The language reads: Provided nothing herein shall prevent the Attorney General from making available the material so produced for examination by the Committee on the Judiciary of each House of Congress.

As matters now stand, there is nothing, I believe, that prevents the Attorney General from making available to or showing the Committee on the Judiciary or its chairman records that in his discretion he wants to show. Is that correct?

Mr. LOEVINGER. Well, that doesn't apply to everything, sir. There is a great variety of material in the Department of Justice. Certainly, the grand jury material for example, is protected by the Federal Rules of Criminal Procedure. There are certain limitations on the use of FBI material. That would be true with respect to material gathered generally in the course of a civil investigation.

Senator KEFAUVER. That is what I mean, material gathered generally doesn't come under these particular laws.

Mr. LOEVINGER. That is right.

Senator KEFAUVER. What is your feeling about this provision? This was the subject of a Dirksen-Ervin amendment in the last session of Congress. As the language stands here now, is it acceptable to you or what would be your recommendation about it?

Mr. LOEVINGER. The language is acceptable because in effect, what this does is leave the matter to the discretion of the Attorney General and I have great confidence in the discretion of the Attorney General.

However, were an amendment of the character provided by Senator Dirksen last time as section 5-E in the act passed by the Senate, we would not oppose that.

Senator KEFAUVER. Except on the amendment last year to 5-E, there was some prohibition about making material available to other antitrust agencies, which would include the Federal Trade Commission. Would you think there should be discretion to show other antitrust agencies general material that is collected just like they have some discretion on occasions to show material that they have collected by subpoena or gotten otherwise?

Mr. LOEVINGER. My personal opinion, sir, is yes, that it is highly advantageous for the Antitrust Division and the Federal Trade Commission to be able to transfer cases from one to the other where it appears appropriate and to do so at any stage of the investigation. Were the section 5-E of S. 716, without the reference to antitrust agencies included in the present bill, we would have no objection to that.

Senator KEFAUVER. In other words, if the so-called Dirksen-Ervin amendment is going to be adopted, you would favor striking out the words "or other antitrust agencies?"

Mr. LOEVINGER. Yes, sir.

Senator KEFAUVER. More explicitly, the Federal Trade Commission may get into an investigation and have records and documents and after securing them they would clearly indicate that this was a Department of Justice case and not a Federal Trade Commission case.

Conversely, you might come to the conclusion, after going into a case and getting certain records, that this was a Federal Trade Commission case and not a Department of Justice case.

Mr. LOEVINGER. Yes.

Senator KEFAUVER. So to avoid going through the whole thing all over again, there should be the right of transferring information and cases from one department to the other.

Mr. LOEVINGER. This is particularly appropriate in the case of the FTC since it does have its own subpoena power and therefore could get the documents in any event. It would merely have to subpoena them again.

Senator KEFAUVER. It would have to go through the same process all over again.

Mr. LOEVINGER. Yes.

Senator KEFAUVER. As a matter of fact, the Federal Trade Commission has broader powers than you would have under S. 167, does it not?

Mr. LOEVINGER. Yes.

Senator KEFAUVER. And then in limited matters, perhaps limited to the Federal Trade Commission, do they, on occasion, comply with your request for the right to see documents that they have subpoenaed?

Mr. LOEVINGER. Yes, we have a case now pending in California, a large merger case involving Phillips Oil Co. and Union Oil Co. which was transferred from the FTC.

Senator KEFAUVER. So that it shouldn't be a one-way street.

Mr. LOEVINGER. No, sir.

Senator KEFAUVER. Anything else, Mr. Flurry?

Mr. FLURRY. With respect to that, if the Dirksen amendment were to be placed in the bill on passage, you would be saying to the Department of Justice, in effect, that you can't furnish to the Federal Trade Commission material, although both agencies are of one government and the Commission is interested in the same antitrust enforcement problems as the Department of Justice.

This would be like an individual taking money out of one pocket and putting it into the other pocket. After all, it is one government and both of the agencies are seeking to enforce the antitrust laws. It seems like a useless delay and expense to the Government and the taxpayers to require one department to exercise its subpoena power to obtain information which the other agency already has in its possession. Isn't that true?

Mr. LOEVINGER. It is a plausible argument.

Mr. FLURRY. I believe that is all.

Senator KEFAUVER. Judge Loevinger, while you are here, do you want to give us your opinion of the bill proposed by the American Bar Association as presented by Mr. Decker?

Mr. LOEVINGER. Yes, sir.

Senator KEFAUVER. Mr. William Simon is going to discuss it. If you wish to file a memorandum in connection with it, we will be glad to have that.

Mr. LOEVINGER. As a former member of Mr. Decker's committee, I am not at all shy about expressing my opinions.

I believe that the bill drawn up by the ABA is considerably inferior to the bill proposed as S. 167. It is inferior for this reason. In the long run, it would probably reach the same objectives; in the long run we would probably get the same thing, but the run would be much longer under the ABA bill than it would be under S. 167 because the ABA bill is drafted with so many litigation producing qualifications that every time a subpoena was issued, there would be an opportunity for defense lawyers to have several protracted hearings in court in the course of which the court would be required to pass upon numerous points as to the demand before you would actually get the documents.

Like so many bills drafted by lawyers, this is essentially a litigation breeding bill, in my judgment. For example, in section 3-B(1) of the ABA bill, it requires that the subject matter of the investigation, including the particular offense, be described in your civil investigated demand.

Well now, if this is strictly interpreted it is far stricter than the Federal Rules of Civil Procedure in describing pleadings. In other words, you would have to allege the offense involved with greater

particularity in your preliminary investigative subpoena than you are required to do in your complaint and this in my judgment is nonsense. This in my judgment simply gives the opportunity to go into court and create an extended hearing that in the long run, is going to produce nothing for anybody except the lawyers.

In subsection 2 the same provision says "describe the documentary material."

Now again, S. 167 refers to classes of documentary material. To make this concrete, under S. 167 presumably, the Department would demand all correspondence between the president of company "A" and the president of company "B" relating to the establishment of prices on "X" commodities during a specified period.

If section 3B-2 of the ABA bill means no more than this and we won't know that until after many court decisions, if it means no more than this, we might as well have S. 167 which clearly means what I have suggested.

If it means you must describe each document; that is to say the letter from company "A" dated so and so to company "B", then obviously, what it requires is that you know what the material is before you can subpoena it. This is impossible and self-frustrating. This is precisely the kind of objection that, in fact, you run into from defense counsel in antitrust cases when you make this kind of demand. I know because I have tried many cases in which we have had similar problems arise in discovery procedure under the Federal Rules of Civil Procedure and the ABA bill is simply drafted in order to give a foundation for almost every quibbling objection that defense lawyers have raised in response to plaintiff's demands for material in discovery proceedings of this sort.

I think those are very objectionable provisions. I think that the lack of any muscle in the bill in the sense of the fact that it does not contain any penal provisions to prevent attempts to evade or avoid the process, is a very serious defect. I have already commented on that.

All in all, I think that S. 167 is a considerably preferable bill. There may very well be provisos in the ABA bill to which we have no objection such as the one Mr. Flurry asked me about. I do not say everything in the ABA bill is objectionable. It certainly is not. There are differences in language that are essentially immaterial. Insofar as the differences are significant, I think the bill now before the committee is a considerably better bill.

Senator KEFAUVER. So we will have the record complete, I think section 1001 of title 18 should be placed in the record at this point. That is the overall section applicable to all departments of Government or agencies of Government with reference to falsifying or covering up certain documents.

(Sec. 1001 of title 18 follows:)

Sec. 1001. Statements or entries generally.

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 any 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 five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

Senator KEFAUVER. Your point is, and I agree with you, that it is better to have a penal section in this particular act rather than having to try to rely upon the overall section, section 1001, is that correct?

Mr. LOEVINGER. Yes, section 1001 is essentially part of the False Claims and Statements Act and it would require a good deal of litigation to establish whether or not it does, in fact, apply to this bill if enacted.

As I say, I notice in Mr. Decker's statement he says that he believes section 1001 would apply to any willful obstruction with a civil demand.

If that is true, section 6 of the act has the effect of applying a lesser penalty because section 1001 involves a \$10,000 fine and section 6 provides for a \$5,000 fine.

Furthermore, section 6 has the virtue of giving clear, explicit, unequivocal, unmistakable notice to respondents that there is a criminal penalty. There is a criminal penalty attached to any attempt to frustrate a civil demand.

Now we think this justifies the enactment.

Senator KEFAUVER. Mr. Flurry asked you about the power of other agencies of Government, such as Agriculture, Federal Trade, Treasury Department, and Department of Labor, to secure documents. There is such a right in some of the agencies of the Department of Health, Education, and Welfare also, I believe.

Mr. LOEVINGER. I was not attempting to be inclusive, sir.

The Secretary of the Army has similar powers. There are many Federal administrative officials with similar powers.

Senator KEFAUVER. Some of these statutes, as you point out, are more comprehensive and less restrained and restricted than the one posed here.

Mr. LOEVINGER. Yes, sir.

Senator KEFAUVER. Anything else, Mr. Flurry?

Mr. FLURRY. I would like to ask this, Mr. Loevinger:

I have always considered that the protection of individual and corporate rights in criminal proceedings is certainly as important, if not more important, than in civil proceedings.

It is not true that the information required to be carried in the civil demand under section 3 of S. 167 is more specific than that necessary to be set forth in a grand jury subpoena. For example, in a grand jury subpoena, you do not have to state the subject matter of the investigation.

Mr. LOEVINGER. That is right.

Mr. FLURRY. Or the particular offense and you do not have to describe each particular document. But as you stated a moment ago, they are usually described by class or classes.

Mr. LOEVINGER. Yes.

Mr. FLURRY. So that S. 167 requires as great or greater specificity with respect to civil demands than the law now requires, and the court decisions require, with respect to grand jury subpoenas.

Mr. LOEVINGER. Yes, sir.

Mr. FLURRY. So actually, the civil demand bill has gone further in protecting the individual and corporate rights in civil demands than the law now requires with respect to grand jury subpoenas.

Mr. LOEVINGER. Yes, sir.

Mr. FLURRY. I believe that is all.

Senator KEFAUVER. Judge Loevinger, in your statement you referred to a number of examples where the efforts of the Department of Justice have been delayed or thwarted in trying to secure documents that you had to have and that you needed.

Mr. LOEVINGER. Yes.

Senator KEFAUVER. And you referred to certain cases. We have here the case studies that you have supplied and there are quite a number of others.

Mr. LOEVINGER. Yes, sir.

Senator KEFAUVER. Without objection this will be placed in the record following your testimony.

(The document referred to may be found on p. 55.)

Mr. LOEVINGER. Those were done in a way that I apologize for a little bit, but it was necessary we thought, because of the identity of the companies which is concealed by the mode of reference, and it is therefore prepared in such a manner that it may be published without disclosing the identities or specific details which would be improper.

Senator KEFAUVER. Then following those case studies are the extracts from State laws giving the State's attorney general the power to secure documents and papers similar to what is provided for in S. 167.

Mr. LOEVINGER. Yes, sir.

Senator KEFAUVER. Without objection, that will also be made a part of the record following the case studies.

(The document referred to may be found on p. 67.)

Senator KEFAUVER. I was very interested in talking with you about the antitrust law that has been recently adopted by the new State of Hawaii. I think we should include in this record the new antitrust law of the State of Hawaii.

(The law referred to may be found on p. 133.)

Senator KEFAUVER. What is your opinion of this law?

Mr. LOEVINGER. It is a well-drafted law, sir. In drafting this, the Legislature of Hawaii sought considerable assistance. They had Dr. Vernon Mundt who has previously worked for one Senate committee.

Senator KEFAUVER. He is at the University of Washington, and a very fine economist. He is well known by you and by the chairman of this committee and others.

Mr. LOEVINGER. Also Mr. Hugh Cox, a Washington lawyer went out there and worked with the committees; they were in communication with myself and my staff and we sent Mr. Lyle Jones of our San Francisco office out there to work with them. So they did have considerable assistance.

Senator KEFAUVER. I know, Judge Loevinger, that you are too modest about yourself, but you took a great deal of interest in helping them set up this model law. It is a very fine State law.

Mr. Chumbris, do you have some questions?

Mr. CHUMBRIS. Judge, on page 6, you stated in still another case, in your summary, that a manufacturing corporation had purchased

the facilities of a competitor and the Antitrust Division wrote the letter of inquiry to the acquiring corporation.

If this bill becomes law, will that help alleviate some of the problems that you have in the present merger bill that you are trying to get through the Congress?

Mr. LOEVINGER. Oh, I am sure it will.

Mr. CHUMBRIS. The reason why I asked the question, during the informal discussions on both of these bills when they were pending, it was brought out that if the investigative demand bill became law, there would not be as much necessity for the present merger bill since Congress had to consider which bill they are going to give priority.

Mr. LOEVINGER. The civil investigative demand bill is a broader bill. It applies across the spectrum of antitrust and, therefore, I think it was to have a broader scope and this might be thought to have more significance. The two really get at somewhat different things.

Mr. CHUMBRIS. I wasn't trying to compare the two bills, but if the civil investigative demand bill became law, it would help the Department of Justice with many of its present merger problems—

Mr. LOEVINGER. Yes, sir.

Mr. CHUMBRIS (continuing). That are intended in the other bill, S. 166.

Senator KEFAUVER. While you are on that subject, S. 166 is the present premerger bill which has been recommended by the Attorney General and by you, is that correct?

Mr. LOEVINGER. That is correct. I testified before the Celler committee in connection with that, sir.

Senator KEFAUVER. You are strongly for that bill?

Mr. LOEVINGER. Yes sir.

Senator KEFAUVER. Even though, as you say, the passage of this bill would help in that field considerably?

Mr. LOEVINGER. Yes, sir.

Senator KEFAUVER. Very well.

Mr. CHUMBRIS. Judge, on page 1, and let me say I don't want to make a play on words, but you state—

a substantially identical bill was introduced by Senator Kefauver in the 86th Congress, approved by this subcommittee and passed by the Senate.

Would you accept Senator Kefauver's words when he said "with one important exception"?

Mr. LOEVINGER. Yes, sir; that was an oversight on my part; I apologize.

Mr. CHUMBRIS. When someone reads the record, that exception will be noted.

Mr. LOEVINGER. I was in error.

Mr. CHUMBRIS. One other question; on page 9 you state:

Other States go considerably beyond S. 167, authorizing service of subpoenas on natural persons and requiring such persons to give oral testimony.

I don't know what the constitution of the State of Washington is, but in your statement you have pointed out that if this included natural persons, it might be violative of the fifth amendment to require the natural person to produce documents which might be, in a sense, self-incriminating.

Mr. LOEVINGER. What it does is involve immunity problems, sir. As you probably know, we have an immunity statute in connection with the grand jury investigations and natural persons can be and are called for grand juries and required to give testimony, but this then involves certain immunities.

Mr. CHUMBRIS. That I understand. So that the record will be clear, if we were to put natural persons in this bill then, forcing them to produce under that subpoena would automatically grant immunity. Would that automatically grant immunity?

Mr. LOEVINGER. There is some legal issue involved here. Whether or not merely requiring the production of documents would grant immunity or whether it is necessary to require some testimony before immunity is granted—there are some delicate legal issues there and these are, of course, avoided by S. 167 in the form in which it now stands.

Mr. CHUMBRIS. The only reason I am asking that question is in case someone should read this statement and say, the State of Washington did this; maybe we ought to amend S. 167 and put a similar provision and no legal question would result from that.

Mr. LOEVINGER. We are not now asking you to go beyond S. 167.

Mr. CHUMBRIS. That is all. Thank you very much.

SENATOR KEFAUVER. Mr. Kittrie?

Mr. KITTRIE. Judge Loevinger, I would like to ask you two questions based on some of the objections that have been heard to this bill and I would like to have your comments.

In a way, this bill is pretty similar to a search warrant, isn't it?

Mr. LOEVINGER. No, sir; I don't think so.

Mr. KITTRIE. You demand that somebody produce materials. It is very similar to the power you give in a search warrant where you say you go into so and so's place to search it.

Mr. LOEVINGER. I may be under some handicap by virtue of the fact that I have never practiced much criminal law or had a great deal to do with search warrants.

Mr. KITTRIE. Let me complete my question.

SENATOR KEFAUVER. Mr. Kittrie, he understands the question and should have an opportunity to enlarge on his answer.

Mr. KITTRIE. I wish he would.

Mr. LOEVINGER. If I am correct, I think a search warrant is based merely on the suspicion that someone may have secreted about his house or place of business or other premise something that you would like to find. It gives you or the law enforcement agency, the right to go in and simply search the premises. Obviously, there are much greater limitations and restrictions in section 3 of this bill. This requires that you describe the specific categories of documents that you want; that you state the nature of the conduct which is under investigation; that you provide a date by which they can be assembled and turned over to a custodian.

This seems to me to be substantially different from a search warrant as I understand a search warrant.

Mr. KITTRIE. Let me proceed from this point, Judge, because the point that is being made is that this bill, by not being too specific as to what you want and so on, would encourage the Department of Justice to undertake fishing expeditions. This has been one of the

objections and by comparison, it has been stated for example, when you issue a search warrant, you cannot just issue a search warrant to search a place of any evidence of a crime. In issuing a search warrant you have to specify that you are either looking for the fruits of a crime, the tools of a crime, or for contraband goods. But you cannot just say "I want to search so and so's place because I think a crime has been committed." The objection has been made that this bill, in stating here what you have to submit before you get this demand, is not specific enough and may encourage the Department of Justice any time they believe that some violation may possibly be undertaken, it will justify them to go ahead and start fishing.

How do you feel about that? Is this justified or not?

Mr. LOEVINGER. I have heard this many times. I have argued many times in court. The same cry was raised in 1938 when the Federal Rules of Civil Procedure with the discovery processes were proposed.

The same cry was heard in 1952 in my own State of Minnesota when we proposed to adopt new rules for the district court following the Federal Rules of Civil Procedure.

The cry has long since been answered by the U.S. Supreme Court when it has said the time-honored claim of fishing expedition is no longer an appropriate response for demand for discovery.

This is a cry that is based upon the sporting theory of justice that there should be rules of the game by which everybody starts from the same point, races to the finish line under a specified condition to see which is the better runner.

We aren't trying to see who is the better runner. We aren't trying to see who is the better lawyer. We are not trying to see who can out litigate the other.

We are trying to enforce the laws of the United States that relate to a most important public policy. The question is: Has there or has there not in fact been something done which is contrary to our important national policy.

I don't think that the cry of "fishing expedition" is even really relevant to the discussion, sir. I think it is an archaic, outmoded cry that has long since been disavowed by the better courts, including the U.S. Supreme Court.

I think that the same cry has been raised with respect to every progressive litigative investigatory technique that has been proposed and it has never been held to be a proper objection.

Mr. KITTRIE. Would you feel that the language of the bill proposed by the American Bar Association, which is more specific as to what should be required in a demand of this type, would provide a better assurance that no possibility of a fishing expedition could take place?

Mr. LOEVINGER. No, sir, I believe it is far inferior. I believe for the reasons I stated before it will have no effect except to provide considerable delay and additional revenue to lawyers.

Mr. KITTRIE. You think it would restrict the Department of Justice too much?

Mr. LOEVINGER. Yes, sir.

Mr. KITTRIE. I have two more questions, Judge. One pertains to the judicial remedy that is provided here in case the people who

are asked to produce these documents have some objection. Will they proceed to file a petition with the court? This bill does not provide what will happen to the demand while this is being litigated in the courts.

Do you feel that the demand should stand until the judge modifies the demand or do you feel that the bill should state that until the judge makes a decision as to the demand, the document should not be required to be produced?

Mr. LOEVINGER. I think that the matter can well be handled under prevailing civil rules. I don't know of any court that has had any difficulty with this to date. This is the kind of situation that arises every day in the Federal District Courts when there are subpoenas served, demands under the various discovery proceedings, objections filed. I have been involved in dozens of them myself. While competing counsel sometimes have different notions as to what should be done, I have never seen a judge having any difficulty in disposing of that kind of question.

Mr. KITTRIE. You feel there is no need for a specific provision here?

Mr. LOEVINGER. I don't think so. I have no strong feeling on it, but I don't think so.

Mr. KITTRIE. One final question that relates to the time element in filing any objections in case of a demand of this type. In the bill, it says that the demand would prescribe a return day which would provide a reasonable period of time.

At a later point here, I believe that section 5, subsection B, provides any person on whom the demand has been served to file his objection within 20 days after the service of such demand or at any time before the return date specified in the demand, which means if he demand gives a return date which is rather short, he would not really have the 20 days in which he can appeal.

Do you feel a person or a corporation should be given a minimal period of time, which may be 20 days, rather than forcing him to file his objection sometime, maybe within 48 hours which may be rather difficult for him to do?

Mr. LOEVINGER. Ordinarily, there is no question that there will be his period of time. But what about the situation where you have got a proposed merger and a proposed mixing of the assets of a corporation which may be within 48 hours of the time an announcement is made.

If we are going to be required to give at least 20 days' notice, the entire act may have been accomplished before that is done. We have quite recently had an example of just this kind of thing in the Louisville, Ky., bank case in which they hurriedly called a meeting and got the banks merged and the assets mixed while we had somebody on the train going down to Louisville to file a complaint.

Mr. KITTRIE. Is there any way of getting quick action for the Department of Justice and yet at the same time providing the other side with a minimum opportunity of time to object to any point they may want to object to in a demand, or is that the best we can do?

Mr. LOEVINGER. I think this is an appropriate proceeding and it is very similar to the present civil processes and the Federal Civil rules. The 20-day period makes quite obvious that 20 days is ordinarily the time period to be specified for a return as a minimum and

I had no doubt that in the overwhelming majority of cases no request will be made for the production of documents in less than 20 days.

In the unusual case in which production is required, if the action is to be effective, I think that there should be the opportunity to demand on less than 20 days' notice.

Mr. KITTRIE. Thank you very much, Judge.

Senator KEFAUVER. Mr. Wallace?

Mr. WALLACE. Judge, I notice in your written statement you made no mention about the material going to the Committees of the Judiciary of the House and Senate.

In the last hearings before this committee on this point, Judge Hanson appeared and, referring to the report of the Attorney General's Committee to Study the Antitrust Laws in 1955, he pointed out that they were in favor of it. I should I think, point out that there was a minority view on that but more important than that—

Senator KEFAUVER. They were in favor of what?

Mr. WALLACE. In favor of the civil investigative demand bill, but there were some minority views on that matter.

Mr. LOEVINGER. I might say I suspected the minority views of Professor Schwartz would now be in favor of this bill. Those minority views were prior to the court's opinion, the Supreme Court opinion in the *P & G* case and the developments subsequent to that and I have no doubt he would support the bill now.

Mr. WALLACE. There are other members but they don't name them.

Senator KEFAUVER. Give us the citation of the *P & G* case.

Mr. LOEVINGER. It is in my statement. It is 356 U.S. 677.

Mr. WALLACE. On page 346 of the report of the Attorney General's Committee to Study the Antitrust Laws, dated March 31, 1959, and I quote:

The custodian will 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.

I emphasize the word "only" and I gather from this report that the majority felt that these documents should be made available only to the Department of Justice and to the Federal Trade Commission, and so forth.

Mr. LOEVINGER. Yes.

Mr. WALLACE. And they did not mention the Judiciary Committees of the House and Senate.

I ask you, are you aware of this comment and if you have any comment on it?

Mr. LOEVINGER. Yes, I am aware of it and we are not following the details of the Attorney General's 1955 Committee in that respect. I am quite aware of that. I have been asked and I have indicated that if there is serious concern about this that we have no objection to the so-called Dirksen amendment which is directed to this point.

Senator KEFAUVER. Provided it doesn't include other antitrust agencies.

Mr. LOEVINGER. Yes.

Mr. WALLACE. The bill contains requirements that no demand shall contain any requirement which would be held to be unreasonable in

a subpoena duces tecum from a grand jury or privileged matter held by a court under a subpoena duces tecum from a grand jury.

Now my point is this. What body of law determines whether or not the subpoena duces tecum would be unreasonable and whether the matter would be pertinent? I am talking about civil actions now. Would it be the law of the State in which that district court is sitting in determining whether or not this would be privileged or whether or not it would be unreasonable?

Mr. LOEVINGER. It would be a law of the Federal Courts, I assume. However, to a substantial degree, the Federal Courts do incorporate in their rulings the laws of the States, and thus there are certain privileges. For example, about half of the States have the doctor-patient privilege and about half of them do not. This would not ordinarily relate to documents, but it might very well since doctor's comments are sometimes contained in hospital reports for example.

If you are sitting in a State in which there is such a recognized privilege, this is privileged material. If you are sitting in a State where there is not such a recognized privilege, it is not privileged.

Mr. WALLACE. I understand that in civil actions the body of law in evidence is determined by the law of the State in which the Federal court is sitting. In criminal actions it is in light of reason and experience.

Of course, they take into consideration the common laws decided by the Federal courts.

Mr. LOEVINGER. No; the common law is decided by the State Courts, sir, and I believe that the common law is taken from the decisions of the courts of the States in which the court is sitting or where the action arises in both civil and criminal proceedings.

But there is also a certain body of Federal law which is not technically known as the common law, but which is applicable in these proceedings.

Now for example, *Hickman v. Taylor* which deals with privilege relevant to this precise topic, is a Federal decision which is not based on any State law but based upon the Supreme Court's interpretation of Federal proceedings and there isn't the slightest doubt in my mind that *Hickman v. Taylor* is a decision applicable to the decision you suggested.

Mr. WALLACE. This applies to privileged material?

Mr. LOEVINGER. Yes.

Senator KEFAUVER. For the record, furnish the citation for *Hickman v. Taylor*.

Mr. LOEVINGER. I don't have it in my head right now, sir.

Senator KEFAUVER. I don't mean right now, sir. Put it in the record.

(The citation referred to was subsequently supplied by Judge Loevinger as follows: 329 U.S. 495, decided 1947.)

Mr. WALLACE. Is it possible that the interpretation of these two sections may vary depending upon which State you are in and which court is involved, which State the Federal district court is sitting in? Isn't that a possibility?

Mr. LOEVINGER. That the privileges that are accorded may vary depending upon the law of the State in which the case arises?

Mr. WALLACE. Yes.

Mr. LOEVINGER. That is an inescapable incident of our Federal system, sir, ever since the *Erie Railroad* case.

Mr. WALLACE. Here is a situation. This law, in order to be uniform, I would think might be amended to provide just exactly what is purveyed. I mean by that what is unreasonable. Maybe it is not possible, but if you could set out cost data, material, secret processes, and some of those things that I think were mentioned the Dirksen amendment. Would that be possible? In other words, to have a uniformity of application over all of the States of the United States?

Mr. LOEVINGER. I hate to use the word "impossible" but this would come as close to being impossible or unreasonable as anything in the field of law that I can think of right now.

You are probably aware that the American Law Institute which has been involved in restating the law, field after field, simply gave up and did not attempt to restate the law of evidence. They did attempt a model code and this was not accepted.

The Federal courts have been talking for years about a uniform code of evidence for the Federal courts.

It seems to me that to attempt to saddle this legislation with the problems of uniform codes of evidence for the Federal courts would simply be like pulling the entire United States Code about your ears. It would be a wholly unreasonable burden.

I think what you are referring to is simply part of our Federal system, that privileges do vary from State to State depending upon State laws, and I do not think that we should attempt to tamper with this aspect of our Federal evidentiary law in such a bill as this. This would require extensive hearings and most serious consideration.

Mr. WALLACE. I understand that and I agree with you. But then we come to this problem. In the bill, where the custodian is to be situated can be determined by the Justice Department, as I understand it.

Mr. LOEVINGER. Yes. His acts are merely ministerial and have nothing to do with documents or contents.

Mr. WALLACE. They do in this sense because if an objection is made either to the demand or modifications are requested, as I understand the bill, the corporation must come to the point where the custodian is situated. Now, suppose the Department of Justice determines the custodian should be situated in Washington, D.C., as it might very well be, or Chicago, Ill., or in Philadelphia or San Francisco, but just assume they decided it would be in Washington. That would mean if a man wanted, or if a corporation wanted, to file an objection, they would have to come to Washington, D.C., and file it in the district court of the District of Columbia or request a modification.

Mr. LOEVINGER. You are referring to section 5B?

Mr. WALLACE. 5B on page 11, line 8, and also section C, line 19 and 20.

Mr. LOEVINGER. Well, I still do not think that is relevant.

The district court of the District of Columbia in that case will decide the matter, according to the law of the place where the documents are situated or the privilege allegedly arose.

Whether or not, for example, there is a doctor-patient privilege depends on where the disclosure is made, not where the lawsuit is brought.

Mr. WALLACE. AS I understand the provision of the bill, the disclosure is made here in Washington. The custodian is here in Washington.

Mr. LOEVINGER. The disclosure of the patient to the doctor, whether or not it is privileged, the disclosure by the doctor to the court is made depending upon whether or not the original disclosure of the patient was privileged.

Mr. WALLACE. In this situation suppose that there is X corporation in Omaha, Nebr., and a demand is made upon them to furnish certain documents to a custodian named in Washington, D.C., and that he is to furnish the documents in Washington, D.C.

Would your interpretation of this bill be that if he filed an objection claiming a privilege, the laws of Nebraska would apply or the laws of the District of Columbia?

Mr. LOEVINGER. It depends upon the character of the privilege, as I say.

Now as I say, *Hickman v. Taylor* is a Federal privilege and does not depend upon the law of Nebraska, and I assume anyone would have the right to invoke that privilege.

Mr. WALLACE. Leaving out that case and assuming it will be determined by the law of the State, what would you say?

Mr. LOEVINGER. Assuming it is a privilege, it depends on State law. It clearly would depend upon the law of Nebraska.

Mr. WALLACE. It would?

Mr. LOEVINGER. Yes.

Mr. WALLACE. Would you have any objection to allowing an amendment whereby the custodian would have to secure the documents at the residence of the corporation or can you see any hardship requiring a man to come from Omaha to the District of Columbia to file an objection?

Mr. LOEVINGER. I do not think that this is an amendment that we would have strong feelings about one way or the other. I have not thought about it extensively, but my offhand reaction is that there would be no objection.

Mr. WALLACE. Can you give some examples, Judge Loevinger, on matters that might be excluded under the provisions of section 3C-1 and section 3C-2?

I understand a grand jury investigation on subpoena is pretty broad and there is, of course, no defense presented in a grand jury and I imagine in an antitrust case it may be different. But I am wondering if there are any situations where the court might deny this material.

Do you have any suggestions as to situations that might arise when it might be denied?

Mr. LOEVINGER. I think for example, take unreasonableness. To take a perfectly absurd example, suppose that Sears, Roebuck prints, and I suppose hundreds of thousands of copies of their catalog and if we subpoenaed all the copies of the Sears, Roebuck catalog, it would be ridiculous. You are entitled to one copy if it is relevant, but there is absolutely no reason for demanding more than one copy and I have

not the slightest doubt that this would immediately be quashed if such a demand were made. This is the kind of thing in a less excessive example that you, in fact, get on occasion, whether or not you are getting excessive copies or making too wide a demand.

As I say, the best example of privilege is the Hickman-Taylor example because this is the one that has been litigated and one that cannot be wrong because the U.S. Supreme Court passed on it.

Mr. WALLACE. Did that involve a lawyer-client relationship?

Mr. LOEVINGER. That was the work product of the lawyer.

As I recollect the case, it related to the lawyer's notes of interviews with witnesses. I believe that the lawyer in that case had interviewed certain witnesses and had made notes in his own handwriting of the statements and the adversary sought to secure the lawyer's notes, recording his interviews with the witnesses.

Mr. WALLACE. Would you think that this privilege might include the secret processes that have been developed on patents? Would this be included in this definition of privilege?

Mr. LOEVINGER. Yes; it might. This is a difficult question to answer because the claim of secrecy is made by companies frequently on relatively unsubstantial grounds and I would not want to say that every time a claim of secrecy is made there is automatically a privilege. However, where it is a well-founded claim based upon what are recognized as trade secrets, ordinarily there would be no point to their disclosure. I have no doubt the court would protect them.

Mr. WALLACE. Do you see any difficulty in not having any restriction on the passage of this material to the Committees of the Judiciary and no restriction on how they handle it?

In other words, I assume that once the committees get it, they could use it in any way they felt desirable.

Mr. LOEVINGER. Let me point out that section 5-B provides for a petition on behalf of the respondent for an order modifying or setting aside such demand. I have little doubt that the court, under this, could enter protective orders of the rule 30-B type which would restrict disclosure of certain types of information if, in fact, there were any that were required to be so restricted.

Mr. WALLACE. The problem here, Judge, is, suppose that these people, the corporations, have no objection to the Department of Justice getting this material but they did not want to go beyond that. He would have to make the decision right away as to whether or not to object because he would have to object within 20 days and think ahead and say, "Well, now, it is possible that this material may go to the House Committee on the Judiciary or Senate Committee on the Judiciary and therefore, I am going to have to make an objection even though I do not care if the Department of Justice has it or not."

Do you see any problems involved in that situation or possible amendments that could be made here?

Mr. LOEVINGER. Well, as I say, the procedure provided in the so-called Dirksen amendment relating to disclosure to Congress, I think that provides an adequate safeguard and I have said twice that we had no objection to it.

Mr. WALLACE. I take it you do not feel the same rule as we have in the discovery proceedings, rule 26-B of the Federal Rules of Civil Procedure, should be applied in the demanding of documents.

Mr. LOEVINGER. I do not at the moment recollect 26-B. I think 26-B relates to oral depositions.

Mr. WALLACE. That is right, and I was wondering whether or not those same requirements that the matter be relevant should apply here. You have already touched on that in some way, but in this bill it says that if the Department of Justice has reason to believe that any person has in their possession any material pertinent to an investigation, that requirement is for the Department of Justice to just believe it, but in stating in your demand, it is not necessary that you state that this is relevant. All you have to do is describe what you want and the nature of it, but you do not have to say it is relevant to what you are investigating, do you?

Mr. LOEVINGER. Well, I think I take that as Mr. Decker's objection.

Mr. WALLACE. I think that is mentioned in his bill.

Mr. LOEVINGER. He apparently draws a distinction between pertinent and relevant. Frankly, I am not sure whether there is any distinction at all.

Mr. WALLACE. I think there is a distinction that in the sense in this bill you do not have to allege that, whereas there is no requirement that it be relevant or pertinent.

Mr. LOEVINGER. Well, I think that the requirement that it be reasonable means that it must have some relationship to the object of inquiry which must be disclosed. If it is related to the object of your inquiry, the nature of the conduct constituting the alleged antitrust violation, it seems to me it is clearly unreasonable and I again have no doubt whatever that the courts would so hold.

Now a lot of these objections can be raised. It can be argued and you can put hypothetical cases of all kinds, in fact, these are just exactly the kind of problems the courts have been dealing with for many years and on the whole, relatively well, although I object to some decisions. I have no doubt you object to some decisions and courts, like others, make errors.

On the whole, I think our courts have dealt very well with problems of this sort.

I am sure it would be unreasonable to seek material that is unrelated to the subject matter of your inquiry.

Mr. WALLACE. I didn't mean to prolong this. Thank you, Judge.

Senator KEFAUVER. Anything else?

Thank you very much, Judge Loevinger.

(The document presented by Judge Loevinger follows:)

CASE STUDIES OF CELLER-KEFAUVER AND SHERMAN ACT INVESTIGATION PROBLEMS

This folder contains a list of case studies where denial of voluntary access to data thwarted investigations under the Celler-Kefauver or Sherman Acts.

In presenting these specific illustrations, care has been exercised to avoid disclosure of the identity of individuals, corporations, and industries. They are, however, based on actual fact situations which are on file in the Department of Justice.

CASE STUDY NO. 1

In May 195— an announcement was made that a prominent manufacturer of certain household items, with sales the previous year of over \$200 million, purchased the competitive manufacturing division of another corporation.

On June 26 we wrote the acquiring corporation our customary merger letter seeking information to assist us in evaluating the merger. On July 3 we were advised by house counsel that our letter had been turned over to a well-known

law firm. On July 13 we received a letter from a member of that firm, saying in part:

"It is necessary for me to be out of town for about 10 days or 2 weeks on business. As soon as I return I will look into the matter and write you again."

On August 13 we received another letter from this individual stating:

"We prefer not to supply the data requested by [your] letter except under subpoena. However, we are willing to give you the following information:

"Copies of the 1953, 1954, and 1955 reports of [the corporation] are enclosed as requested."

This letter then states the amount of money paid for the property, equipment, and inventory and gives some additional information designed to convince us that the transaction was a liquidation of assets in an attempt to stop losses rather than a sale of a going business.

CASE STUDY NO. 2

In October 195- the Antitrust Division sent the general counsel of a very large corporation an inquiry letter relating to the corporation's recent acquisition of two significant retail chains. The letter was acknowledged by counsel November 6, stating he would supply us with the information requested as soon as it could be compiled. Much of the information requested was supplied by a letter dated December 7.

By letter dated the following January 23, the Antitrust Division requested additional material and information, among which was a request that it be furnished with a copy of a study by one of the corporation's divisions concerning the feasibility of establishing a processing plant in the vicinity of the retail outlets.

On February 27 the Antitrust Division sent counsel a followup letter because it had had no response to its January 23 letter. A response to both letters was received on March 20. The letter stated:

"* * * our production of documents of the sort now called for should be limited to those submitted to the executive committee of the board of directors after these acquisitions had been proposed and were before them for consideration * * *. Accordingly, we hope you will agree that we should not be asked to supply other material and data of a hypothetical and speculative nature or which in whole or in part found its way into the studies referred to."

Thus, the Antitrust Division was denied access to a document, the importance of which to its investigation is revealed in this extract from an internal memorandum.

"In approving the acquisition of [one of the retail outlets] the executive committee referred to the study of the * * * division and made the following statement:

"It was also mentioned that in the event plans materialized for the construction, by 1961, of a [processing plant] at [vicinity of the retail outlets] to supply the product requirements of company interests in the [vicinity of the retail outlets], it is anticipated that when allocating a proportionate share of the [processing plant] investment against the [retail outlets'] business a combined marketing and refining net annual profit of 11.6 percent would be realized on the average net book value of the company in that year."

On August 24 the executive committee approved the acquisition of the other retail outlets. Minutes of this meeting discussed the expansion program set forth in the study of the * * * division and go on to state as follows:

"Assuming such a program is carried out and that company interests construct a [processing plant] in the [vicinity of the retail outlets] by 1961, and when allocating \$6 million of the [processing plant] investment against the [retail outlets'] business, it is anticipated that a combined marketing and [processing] net profit at 10.2 percent would be realized in 1961 on the total 'investment' base of \$11.7 million.

"All minutes of the executive committee also contain a provision that expansion and [processing plant] proposals will be submitted and considered on their own merits from time to time in the future.

"It is apparent from the foregoing that the eventual establishment of a [processing plant] in the [vicinity of the retail outlets] to supply the volume of business which [the corporation] has acquired in the [retail outlets'] purchases is an integral part of [the corporation's] present plans. There is clearly a good possibility that such plans will culminate with the establishment of

such a [processing plant] in [the vicinity of the retail outlets]. If this occurs, the present supplier of the acquired corporations will be irrevocably foreclosed from the share of the market represented by [the retail outlets]."

CASE STUDY NO. 3

In May 195- contracts transferring certain assets from one corporation to another were executed. (The acquiring corporation was among the 100 largest and the industry of which it is a member is highly concentrated.) The following day May 23, counsel for the acquiring corporation verbally advised a member of the Antitrust Division of the acquisition.

On July 31 we sent a merger inquiry letter to counsel requesting 24 items of information. An August 2 counsel called to advise the Department's letter had been received in the middle of the vacation plans and he doubted if information would be furnished prior to the week of September 9. On September 18 a conference was held between corporation counsel and representatives of the Division, at which certain requested documents were presented and answers furnished orally to a number of our questions. Corporation's counsel stated the purpose of the conference, which was held at their request, was to insure that the answers were satisfactory and written answers would follow the conference. During the conference certain statistical data were presented in the form of scraps of paper torn from a document in the possession of corporation's counsel.

On October 29 we received a memorandum from corporation's counsel embodying answers to eight questions. On November 18 we sent corporation counsel a document containing our understanding of the oral answers presented to the eight questions at the September 18 conference, as well as a listing of the material presented by scraps of paper at the conference in answer to five other questions. The purpose of this letter was to hasten what appeared to be a dragging process. On November 27 corporation's counsel confirmed with certain amendments the answers contained in our November 18 letter.

Thus, 5 months after our initial letter, we finally obtained a semblance of a response to it.

CASE STUDY NO. 4

On April 2, 195- we wrote to a large corporation requesting information relating to a certain acquisition it had made. Partial responses were made on May 6 and 15, and June 9. On August 8 we responded to a number of questions raised by the corporation with respect to our request, and also asked for additional information.

At the request of counsel a conference was held on September 17 to discuss the corporation's compliance with our request. At that conference counsel requested to be relieved of complying with our request for certain data. On October 8 the corporation summarized its ability and inability to furnish certain of the information previously requested. On October 23 we inquired whether the corporation intended to comply with certain of the requests for information made on April 3 and August 8. At various times prior to and on December 31, the corporation supplied certain of the data previously requested.

However, by the same letter it declined to furnish certain types of information deemed by us to be of most importance in determining whether suit against the corporation was warranted. In addition, some of the few documents supplied were incomplete and others had important parts blanked out in the reproduction thereof.

Thus, after 8 months we concluded we would have to obtain the information, if available, from other sources.

CASE STUDY NO. 5

On July 28, 195-, the Antitrust Division wrote to a certain corporation seeking information concerning certain acquisitions it had made. On September 4 the corporation supplied part of the information. On November 10 we requested the balance of the information sought. The following January 14 the general counsel of the corporation sent additional information and promised to send the balance within a few weeks. On April 3 we again wrote the corporation requesting the balance of the material sought on July 28 and last promised on January 14, together with material relative to acquisitions made by the corporation after July 28. On September 21 the corporation furnished part of the data requested on April 3 and prior thereto.

On October 8 we wrote the corporation seeking information on new acquisitions. On October 17, October 27, October 30, and November 11, the corporation supplied parts of the data previously requested. On November 25 we again requested data on a number of recent acquisitions by the corporation. On December 2 the corporation supplied a small amount of data and advised it needed time to comply with our last request.

For 1½ years we corresponded with the corporation but did not receive sufficient information to determine whether the corporation has violated section 7. The corporation had even made further acquisitions before it supplied some information on past acquisitions.

CASE STUDY NO. 6

On December 6, 195-, we sent our usual merger inquiry letter to a large corporation concerning its acquisition of the assets of a competitor. On December 10 we received a letter from a member of the law firm to which our inquiry had been referred, stating that as he would be out of town for the next few weeks, it would be a short while before a reply could be made to our request. On December 16, 195-, we advised him of our concern over press reports that the acquisition might be consummated before the end of the month and urged that the information requested be supplied as quickly as possible. A second letter expressing our concern was sent to him on December 20. In response the attorney in a letter dated December 26, stated he would respond to our queries when he "* * * receive(s) specific information concerning the purchase and its effect, if any, on competition." Subsequent information indicated the merger was consummated December 31.

On the following February 4, the attorney responded to our letters of December 6, 16, and 20, but the information and material contained in his letter was not an adequate response to our inquiries. On March 4 we advised him of that fact; on March 24 he responded by stating that the reason he had not answered all questions was that we were under the misapprehension that the two corporations were contemplating a merger when in fact one acquired the assets of the other. The letter did contain some additional information.

On April 17 we addressed a letter to the attorney requesting more detailed information. On April 29 he responded that he was giving consideration to our request. On May 9, when he was in Washington on other matters, he stopped in and asked for a conference. He stated the purpose of his visit was to determine what was troubling the Government attorneys. He then took the April 17 letter and said, if he could be convinced of its relevance to a section 7 inquiry, he would consider furnishing the additional information. Most of the conference time was consumed by the attorney giving representatives of the Division a lecture on section 7, and insisting that most of the information requested had no relevancy.

On June 5 he responded to our April 17 letter; on July 2 we asked for clarification of one of his answers; on July 14 he responded by asking the Division to state how a clarification would be relevant to our inquiry; on July 23 we sent a letter to him showing the relevancy of our request; on August 5 he responded to our July 2 letter.

At this point, after more than 9 months of effort and still not having an adequate response to our inquiries, we turned to other sources. On the basis of production data voluntarily supplied, which we requested of the acquiring corporation's competitors and industry information obtained from the trade association, we finally were able to evaluate this acquisition.

CASE STUDY NO. 7

Because the particular acquisition involved in this case study has become the subject matter of a section 7 complaint and a discussion of details in this study as in other case studies would disclose the identity of the companies involved, little can be said except that the failure on the part of the acquiring corporation to supply timely information has placed the Government in the situation where it has had to rely almost exclusively on the Federal Rules of Civil Procedure to obtain evidence.

CASE STUDY NO. 8

On December 8, 195-, a large corporation acquired two corporations engaged in a business which was noncompetitive to that of the acquiring corporation but was related. The same commodity is an important component of the manufactured products of all three companies.

On December 11 we requested information on the transaction from the parties, suggesting that if some of the information were readily available, it could be submitted and the remainder supplied as it was prepared.

On December 15 the president of the corporation wrote stating the requested information would be assembled and furnished as soon as possible. By the middle of the following month, however, when the press reported the purchase by the acquiring corporation of a third corporation engaged in the same business as the first two, the Division still had received no information in response to the December 11 request.

CASE STUDY NO. 9

A significant retail chain acquired another retail chain in the late summer of 195-. Both chains operated in many of the same cities and in the same section of the country. On November 10 one of our field offices wrote to the acquiring corporation seeking pertinent information. On November 21 counsel for the acquiring corporation visited the field office and submitted very limited information and promised to furnish additional information.

On December 2 the field office wrote seeking additional data and reminding counsel he had promised to cooperate in supplying needed information. Counsel furnished profit and loss statements for a 3-year period but this was insufficient to determine whether the acquired corporation was a "failing company."

On December 12 the field office again wrote counsel for information requested on December 2. Several telephone conversations were held in the interim and on the following January 28 we again wrote to counsel seeking the information requested on December 2.

On February 2 the acquiring corporation replied:

"My dear Mr. ———; I haven't had a chance to answer your letter of January 28, ——— because of the hectic last days of my term of office at [State capital].

"I am thoroughly familiar with this transaction and do not feel that we have in any way violated the law. Since I feel this way about it, I am disinclined to give you the information.

"Since I am obliged to so advise my clients, they are disinclined to go to the trouble and expense to furnish the considerable additional information which you request, and I cannot say that I blame them.

"I might add that as to the information which you request in paragraph 1 of your letter of December 2, ———, I have already furnished you with the (acquired corporation's) statements, and [the acquiring corporation] being a public company, their financial statements must be readily available to you.

"Sincerely yours,

"(Signed.) ——— ———."

On August 4 the matter was referred to the Federal Trade Commission because of the acquired corporation's refusal to cooperate in supplying pertinent information.

CASE STUDY NO. 10

On October 11, 195-, we wrote the president of a very large corporation seeking certain data and information concerning the purchase by another corporation of a substantial volume of its stock. In the letter we asked that all readily accessible material be submitted while the balance of the requested data was being gathered or compiled. On October 14 a well-known law firm responded, stating they would furnish the information and would submit a timetable on when it would be supplied within 10 days.

On October 23 we wrote the law firm requesting, among other things, all details and documents relating to the appointment of the acquiring corporation's designees to the large corporation's board of directors. This letter also requested available material be supplied while the balance was being assembled. No reply having been received, the law firm on November 2 was asked by telegram when a reply would be forthcoming. Their reply consisted of a telephone call to a member of the Antitrust Division staff stating they desired to confer with us in Washington but that it would be impossible to do so prior to November 19. At this conference the first and only information up to this time as to the changes in the board of directors was submitted in the form of a press release which the large corporation had issued on October 7.

Thus, we waited until November 19 to secure information which had been released to the press on October 7. On December 14, with certain other material, we received a copy of a memorandum concerning a directors meeting held on

October 5. On the following January 12 we again wrote the law firm asking for the balance of the information and data requested.

As of that date, 3 months after the initial request, much of the important information we had requested had not yet been supplied, or had been supplied in such inadequate detail as to be of little help.

CASE STUDY NO. 11

Early in December 195- the press reported a meeting of stockholders of each of two large competing corporations was to take place on the following January 27, to vote on proposed merger of the two corporations. (One of the corporations the previous year had sales of over \$300 million.)

Subsequent to this announcement counsel for both companies met with Division attorneys to discuss the proposed merger. The attorney representing one of the companies stated the purpose of his visit was not to request a clearance of the merger, but an offer to furnish any information the Department requested. He also indicated he would like a comment from the Department as to whether we would seek to enjoin the merger.

On December 27 a letter of inquiry was sent to this attorney requesting certain information on the proposed merger. The information requested was forwarded to the Department piecemeal and the last of the information requested in this letter arrived at the Antitrust Division on the following January 16. A supplemental letter was forwarded to this attorney requesting additional information on January 18 and the reply to this request arrived in the Antitrust Division on January 30, 3 days after the merger had been consummated.

Thus, even though the attorney volunteered to supply the information, much of it was not received until after the merger had been consummated and consummation of the merger thwarted injunctive possibilities.

CASE STUDY NO. 12

On September 23, 195-, one of our field offices sent the usual inquiry letter to a large corporation concerning its acquisition of a smaller competitor. Frequently thereafter the field office communicated with the vice president and general counsel of the acquiring corporation regarding the requested and unfurnished information and was told a decision as to whether the information would be supplied was being considered by the corporation.

On November 19 this official appeared at the field office and asked for and received an explanation of all parts of the letter. At that time he stated the matter of whether to supply the information or not was still being considered by the corporation but that one of the congressional committees was absorbing all of the time of the corporation's legal staff. He added he would, however, within a week or two, advise the field office of the corporation's decision. No decision has been communicated to that office and their more recent approaches have met with the same explanation regarding the congressional investigation.

We concluded that the corporation would furnish little, if any of the desired information, and further would delay in giving any definitive reply as to what exactly it would do. Thus, we were forced to find information to the extent we could to evaluate this merger from sources other than the acquiring corporation.

CASE STUDY NO. 13

On April 16, 195-, the Division wrote to the vice president and secretary of a large corporation concerning the acquisition of a company engaged in the same field, which had just been announced. On April 24, counsel replied the information was being gathered and "will be submitted to you as soon as obtained." On June 24, having heard nothing further, we wrote asking the attorney when we might expect to receive the information. On July 5 we received certain information; on July 19 the acquisition was consummated.

On the following January 21, after gathering what information we could from other sources, our inquiry into this transaction was closed. The memorandum recommending closing stated: "In our several inquiries into [this corporation's] acquisitions, this company has been unable or unwilling to assist us materially."

A prior instance of this company's failure to cooperate voluntarily involved its acquisition of a small corporation in the Midwest about which we wrote to the corporation on December 9, 195-. On December 23, the corporation's

attorney replied the information will be submitted "as soon as it can be assembled." Later, the Wall Street Journal reported the corporation planned to acquire a retail chain.

On March 9 in a letter to the attorney, we combined a request for information regarding the latter acquisition, with a remainder that an appreciable period of time had elapsed since he promised to supply information about the earlier acquisition. On March 12 the company furnished information regarding the Midwest acquisition, and on March 14 the attorney furnished information regarding the retail chain. Thus, the company made a further acquisition prior to furnishing information on an earlier one.

CASE STUDY NO. 14

On July 22, 195-, we sent an inquiry letter to a corporation concerning a recent acquisition. (The acquiring corporation and another dominate the industry in which they are engaged.) The letter was acknowledged on July 26; on August 7 a more detailed inquiry letter was sent to the acquiring corporation. This was acknowledged on August 16, and some response to our inquiries was made. The letter, however, stated:

"As to the other information which you requested, we find that it would not only be exceedingly burdensome to compile, but much of it in fact would be impossible to obtain. We are giving this further study, however, and will be glad to advise you later if we can readily supply answers to some of your other queries."

On December 5 we again wrote the acquiring corporation, referred to the paragraph quoted above, and two specific questions in our August 7 letter about which we felt they should have answers readily available. On the following January 1 they answered the two questions and to date have not supplied us with answers to any other questions.

Thus, we received answers to two questions nearly 5 months after they could have been supplied, and the inadequate response forced us to try to find the information elsewhere. We are still trying (years later).

CASE STUDY NO. 15

On December 24, 195-, the press reported a proposed merger involving two corporations in a concentrated industry. On the following January 28 we wrote to the president of the acquiring corporation for information on the transaction. On February 6 a well-known law firm replied that the information was being collected and another letter dated March 19, in answer to our telegram of March 14, stated that a considerable portion of the information had been assembled.

On April 1 the law firm wrote that there would be a delay in replying and asked to meet with us to discuss the matter. On April 10 the company announced it had acquired another corporation. On April 16 we wrote counsel asking that at the conference scheduled for April 24 he be prepared to discuss the later acquisition as well as the earlier merger.

At the conference on April 24 counsel stated the companies were not competitive but could not explain in detail why he thought this was so. He promised to supply some information by letter. He refused to give any information on the relative positions of the companies in the industry as he felt it would be misleading and valueless because based on conjecture and indicated at length his belief that the merger was unobjectionable under the antitrust laws.

On June 18, in answer to our telegram of June 14, counsel phoned to say he hoped to supply some information when he completed litigation he was then engaged in. Our file on this matter has not yet been closed (years later).

CASE STUDY NO. 16

On June 28, 195-, we sent a letter of inquiry concerning a proposed acquisition of assets in which we requested 11 items of information including a request for drafts, if any, of the proposed purchase agreement.

On July 10, attorneys and officers of the acquiring corporation conferred at the Department. They stated no draft of the proposed agreement existed. They also stated that if there was a serious question of the legality of the acquisition, they would call off all negotiations. They stated they would inform us when and if any agreement was entered into. No documents were supplied.

On July 17, an attorney for the seller of the assets wrote: "* * * We now have the subject of your letter under consideration and study. We anticipate that we will be in touch with you fairly soon for future discussions on the subject." No data were supplied.

On August 6, we read in a trade publication that an agreement had been entered into on August 2. We sent a telegram requesting that they immediately supply us with a copy of the agreement and the data we had requested. The agreement was sent to us on August 8. The covering letter requested a conference be held "after you have had an opportunity to examine the enclosed and the other material which we will submit shortly."

Since the agreement indicated that performance was to begin September 1, we transmitted telegrams to both parties suggesting that a conference be held at once. The next day we received a telephone call from the seller stating their attorney was out of town but that he would arrange a date for the conference the following week.

We heard nothing for 3 weeks when, by telephone, the seller's attorney set September 30 for the previously requested conference. At that conference on September 30 we were, for the first time, supplied with documents and data, which were requested in our original letter of inquiry dated June 28. The remainder of the data was not supplied until October 23.

In our opinion, the data, which were requested in June and which were necessary for the proper evaluation of the August 2 agreement, could have been reasonably supplied within 3 or 4 weeks of the original request.

CASE STUDY NO. 17

On or about March 23, 195—, information was received that a corporation supplier of raw materials and a manufacturing corporation which utilized the raw materials were attempting to acquire control of a corporation selling a related product. More specifically, it appeared that certain officers and directors of the supplier and the manufacturer and others associated with them, were making large purchases of the related corporation's stock.

On March 23 and 24, we sent telegrams to those who had been reported as purchasing the stock, requesting pertinent information. Some of the information requested was supplied, some was not. We had asked, inter alia, for correspondence and memoranda pertaining to the acquisition by the supplier, the manufacturer, and others. Although we made repeated requests for such information, it was not supplied.

On May 11, the counsel for the supplier conferred with us, at which time we made further requests for correspondence and memoranda. He informed us that the supplier would decline to make the information available "because the documents relate to family problems and that it would be unpleasant to disclose their contents." He further replied that in any event he had examined the documents and they did not indicate to him any purpose on the part of the supplier to acquire a controlling interest in the related corporation. On the same day another attorney also representing the supplier stated there had been some disinclination by the supplier to open their files because in the course of recent litigation involving a proxy fight between the management of [related corporation] and the [supplier] group of stockholders, management had from time to time referred to the investigation by the Department of Justice as an excuse for not making disclosure of information requested by [the supplier]; on one occasion he even implied the [supplier] group of stockholders would be investigated by the FBI.

The above indicates, obviously, difficulties encountered in attempting to obtain, on a voluntary basis, pertinent information concerning a possible section 7 violation.

Had it been supplied within a reasonable time, we might have been in a position to seek a preliminary injunction prior to the date on which performance of the agreement was to commence.

CASE STUDY NO. 18

In January 19— the Wall Street Journal carried an article announcing the acquisition by the largest fully integrated firm in a highly concentrated industry of a corporation which was a large consumer of the acquiring company's products in its fabrication business. On February 1, 19—, we sent a detailed "inquiry" letter to the executive vice president and counsel of the acquiring company. On

February 3, 19—, he responded stating that the available staff was involved in compiling other data for us, but assured "we shall do the best we can and you will have our cooperation as always." On May 4, 19—, a member of the division staff called a member of a prominent Washington, D.C., law firm which had been retained by the acquiring corporation in this matter, and asked when we would receive the information requested in our February 1, 19—, letter. This lawyer stated that it was his view that the Department considered all acquisitions made by the acquiring company as violative of the act and that, therefore, he did not think the company should furnish the information and that he would so recommend to his client. He went on to say that he did not believe that the company should provide to the Department information which would help the Government in a suit against the company. He further stated that preparation of materials and data, had gone "a long way" toward completion and if it is decided to furnish the information and materials, their submission to the Department would be made within a short time.

At conferences with representatives of the division on May 17, 19—, the lawyer stated that the acquiring corporation had decided to change its policy of full cooperation with the Department and under its new policy would submit only information as to sales and products involved, the location of plants, financial statement, and a copy of the acquisition agreement. He stated that the reason the acquiring company changed its mind about cooperating is because he suspected and had so advised the company that the Department had already made up its mind to sue.

By letter dated May 26, 19—, the general counsel of the acquiring corporation transmitted the material the Washington lawyer said the company would make available. The letter stated that no further response to our February 1, 19—, letter was planned.

Thus the acquiring corporation, after first promising full cooperation, 5 months later reneged on its promise and supplied only meager data, in spite of the apparent fact that most if not all of the information we had requested had been compiled by it. The investigation of this matter is continuing but obviously under very difficult circumstances.

CASE STUDY NO. 19

The acquisitions in this case have become the subject matter of a section 7 complaint and a discussion of the details in the case would disclose the identity of the companies involved. It can be said, however, that documents which might have been of vital importance in determining the competitive effect of the acquisitions involved were specifically requested by this Division and that these requests were flatly denied.

CASE STUDY NO. 20

On May 1, 195—, A, manager of the ----- department, B company, refused information and declined a file search, referring us to the company's attorney, C. C refused cooperation except under grand jury subpoena. On May 2, 195—, D, Manager of F company, declined a file search and refused to give us any information. On May 2, 195— G, manager of H company, refused information and declined a file search. However G admitted that the correspondence requested was in his files.

On May 6, 195—, I, ----- department, J company, declined information and file search and referred us to the company attorney, K. On May 9, 195—, K said for us to get a subpoena. On May 9, 19—, L, director of my company, denied the existence of a ----- cartel and declined a file search as "pointless" because the correspondence requested did not exist. (Later the company produced considerable pertinent correspondence under a grand jury subpoena.) On May 31, 195—, N, vice president and general manager, O company, refused information and declined a file search on the grounds "there is nothing in the files." (A later grand jury subpoena proved otherwise.)

CASE STUDY NO. 21

On November 28, 195—, A, owner of ? company, stated that it would be practically impossible to give us the statistical information requested because of "the disorganized condition of his files." On December 3, 195—, C, secretary of D company, refused to give us statistical and sales information because of "clerical expense" and "impossibility."

On February 19, 195-, E, vice president and general manager of F company, stated that on numerous occasions companies had injured his business. When interviewed February 20, 195- to obtain details concerning his injuries, E said that after considering the matter further he did not wish to point the finger at anyone and declined further information.

In April 195-, G company, refused statistical and sales information on the grounds that the bookkeeper in charge of such records was absent. Later, on a second trip we were told that the company would furnish the information required if our request were put in writing. We then submitted a written request for information, but the company did not reply to that or subsequent letters of inquiry. Finally, H of this office, telephoned the company long distance and obtained orally part of the sales information requested. On May 16, 195-, I, general manager of J company, refused to give us sales and statistical information. Reason: too much work.

CASE STUDY NO. 22

On October 195- an investigation was authorized of the ----- industry. Voluntary file searches were sought at the office of A company and of B company, the principal groups in the industry.

On December 2, 195-, C, president of A company, was requested to permit the FBI to conduct a voluntary file search at the offices of A company. C indicated he was willing to cooperate with the Government, that their files were open, and that interviews of officers would be permitted. However, he stated he wished to clear the matter first with his counsel, and that he would advise us shortly of his decision. On December 11, 195-, we called C by telephone to inquire whether a decision was reached, and he stated he would advise us shortly after December 18, 195-. Subsequently, in February of 195- the A company submitted a very limited number of documents to the Division in response to specific requests. However, at a conference with D, cocounsel for A company, on October 21, 195-, D stated that it was not in his client's interest to permit a file search at this time, but that he would submit documents to us if we gave him specific written requests indicating by subject matter what documents were desired. D also stated that interviews of personnel would not be permitted until after completion of the requests for documents.

With respect to B company, at a conference on December 1, 195-, E, counsel, and F, assistant manager, E stated he would not allow F to answer any questions, and that under no circumstances would he permit officers or other personnel to be interviewed. With respect to a file search, E stated that he would determine whether information should be furnished to the Division only after he received a specific request for the type of information desired. S stated he was opposed to a broad file search unless he knew specifically what information the Division wanted. He said he would inform us of his final decision by January 9, 195-. No communication was received from E by January 9, but on February 13, 195- he submitted a limited number of documents in response to a prior specific request from us. On October 21, 195-, E advised us he had not changed his mind with respect to a file search or interviews, and on December 2, 195-, G, cocounsel, advised us that he did not favor further voluntary cooperation in this investigation.

In view of this history of unsuccessful attempts to obtain voluntary cooperation, a compulsory process became necessary to complete the investigation. A grand jury investigation was recently initiated.

CASE STUDY NO. 23

In April of 195- an investigation was authorized to determine whether the members of the A association and the B association were engaged in a conspiracy to stabilize prices for ----- and sold by ----- . Requests were made for permission to conduct voluntary file searches at the offices of both associations. On August 5, 195-, C, counsel for B association, and special counsel for D, stated that because of pending litigation in the State courts involving the same subject matter he anticipated that a complaint would be made to the Department of Justice. Since he was of the opinion that the antitrust inquiry stemmed from some complaint arising out of the State litigation, C stated that he would advise the appropriate officials of each association not to voluntarily

release the records of the association to the Department since this might "set up a defense for a pending law suit through the cooperation of the Federal Government."

In view of the refusal of both associations to grant access to their files, the necessary information required in this investigation can be obtained only through compulsory process. On January 12, 196-, the Attorney General authorized the Division to present this to a grand jury.

CASE STUDY NO. 24

On September 6, 195-, an FBI investigation of A Company, was undertaken for possible cartel arrangements and patent abuses relating to _____ and _____. Difficulty had already been encountered prior to this time in obtaining from A Company copies of pertinent licensing agreements. By letter of September 30, 195-, B, counsel for A Company, requested limitation of the scope of the FBI investigation. On October 10, 195-, we requested B to contact C of our staff for discussion of the matter. When B made no response, we asked the FBI on December 2, 195-, to proceed with the investigation. In April of 195-, A Company refused access on the grounds that B had furnished the desired information. We advised B to the contrary on May 16, 195-. On May 20, 195-, we again asked the FBI to return to A Company and make the search. On December 23, 195-, request for a status report developed that A Company had told the FBI through D, assistant secretary and treasurer, that the company was furnishing D the information direct to the Antitrust Division through B. B had made no contact with the Division in the interim. On February 18, 195-, we met with B and, following the meeting, wrote a letter to him limiting the scope of the investigation sharply, but insisting that we still might need all of the information originally requested. On March 11, 195-, we dispatched a new request to the Bureau asking that they conduct the more limited search. Thereafter, some material was furnished, but additional material was demanded in compliance with the agreement to limit the scope by a letter of May 28, 195-, to B. Finally, we learned on January 13, 196-, that A Company was finally prepared to submit the remainder of the material.

We are requesting the Bureau to complete the search (as limited) as soon as possible. However, after 2 years and 3 months we still do not have compliance with a sharply limited investigation.

CASE STUDY NO. 25

On January 6, 195-, A of our office reported that the following companies had refused permission to the Federal Bureau of Investigation to review their files: B, C, D, E, F, G, and H companies.

I, attorney for E Company, and G Company declined file searches, saying that his clients "would not benefit by cooperating with us." The attorney for C Company refused on the grounds of "bad relations" with the Antitrust Division in that in a former investigation he had allowed a file search and his clients had later been indicted. As a result of these refusals the investigation was stymied and we issued a request for grand jury authority in May 195- which request was recently renewed.

CASE STUDY NO. 26

On January 29, 195-, the Antitrust Division requested an investigation of the _____ industry. The principal company against which complaint was made is A Company.

On March 3, 195-, agents of the Federal Bureau of Investigation discussed with B and C, attorneys associated with the firm of _____, patent attorneys representing A Company, the information desired by the Antitrust Division and the documents which we wished to be produced pursuant to a file search.

Messrs. B and C advised that an examination of files by special agents of the FBI was not desirable insofar as A Company was concerned and would not be permitted. They requested that, due to the volume and detailed nature of the information desired from A Company, a written list of questions, setting forth exactly what information was desired, be furnished them. They advised further that upon receipt of a written listing setting forth what information

was desired and what specific documents and other material were to be examined, arrangements would be made for the review of this material by special agents of the FBI.

In view of the fact that the complaint against A Company involved possible violation of sections 1 and 2 of the Sherman Act, it was felt that a grand jury investigation would be desirable to obtain the documentary information originally sought through the file search by the FBI.

CASE STUDY NO. 27

Complaints against A Company, were made by ——— concerning a requirement by A Company that its wholesalers carry a full line of its products and maintain A Company's suggested prices "all the way through to the retailer." In addition, it was claimed that A Company uses a "shopper" system whereby a person employed by A Company poses as a customer and approaches A Company's distribution outlets for the purpose of determining whether the wholesaler will cut the A Company's suggested prices. On August 19, 195-, the Antitrust Division requested an FBI investigation.

On October 16, 195-, B, president of A Company, was contacted by the FBI. The company's attorney was also present. B, after being advised of the nature of the information desired, stated he would have his attorney submit to the ——— office of the FBI, by letter, the information requested by the Antitrust Division. B and C insisted that they would provide the information by letter only.

Subsequently, B and his attorney furnished most of the information requested. He stated, however, on November 26, 195-, that although he would permit a file review of correspondence between A Company and its distributors and various dealers and individuals, he would not permit a file review of intracompany correspondence under any circumstances.

We are contemplating requesting grand jury authority for the purpose of obtaining the documents which would have been produced during the FBI file search, together with such other information as may be pertinent to the investigation.

(A grand jury has not previously been requested since the FBI was continuing its investigation through interviews with ——— and it was believed desirable to wait until the FBI had completed its investigation before grand jury authority is requested. The FBI has now completed its investigation.)

CASE STUDY NO. 28

In June 195-, the ——— office of the Antitrust Division began an investigation into the activities of A Company, which had allegedly engaged in restrictive practices in the ——— industry. Thereafter an agent of the FBI called on A Company. B, vice president of A Company, said his company "desires to cooperate" but first wished answers to the following questions as background information:

1. Has a specific complaint been made against A Company?
2. If a complaint has been made, by whom?
3. What is the nature of the complaint, if one has been made?
4. Has investigation of complaint as alleged been substantiated?

B's questions were not, of course, answered. A grand jury investigation was authorized on June 8, 195-. This investigation determined that a civil action charging violation of section 1 of the Sherman Act would be more appropriate than a criminal suit. A complaint was filed on December 30, 195- and, on the same date, a consent judgment was entered in which A Company agreed to terminate the alleged unlawful practice.

CASE STUDY NO. 29

The FBI was requested to investigate alleged violations of the Sherman Act by two companies engaged in the manufacture and sale of a certain commodity.

A competitor of the companies investigated was requested to make its files available for examination by the FBI. The vice president and general counsel of the company replied by letter. "It is contrary to the established policy of this company to grant permission for the examination of its records and files and in view of this fact, I am unable to comply with the request in your letter of April 18."

EXTRACTS DELEGATING VISITORIAL POWER TO STATE ATTORNEYS
 GENERAL RE STATE ANTITRUST ENFORCEMENT

ARIZONA

[Arizona Revised Statutes, Annotated, vol. 14, pp. 530, 535]

ARTICLE 1. COMBINATIONS IN RESTRAINT OF TRADE

§ 44-1401. Trust defined; unlawful purposes; monopoly or attempt to create monopoly prohibited.

* * * * *

§ 44-1407. Subpoena of witnesses by superior court upon application of attorney general or county attorney; examination; immunity from prosecution; perjury.

A. The superior court shall, upon good cause shown and upon written application of the county attorney or attorney general, cause issuance and service of subpoenas upon witnesses named in the application, for the appearance in court of such witnesses. The witnesses shall testify to any knowledge they have of a violation of this article.

B. Any person subpoenaed and examined as provided by this section shall not be liable to criminal prosecution for the violation of this article about which he testifies, * * *.

IDAHO

[Idaho Code, vol. 8, pp. 588, 591]

TITLE 48—MONOPOLIES

§ 48-101. Combination in restraint of trade illegal—Penalty.

* * * * *

§ 48-105. Books subject to inspection.

All the books of record and papers of every corporation, joint stock company, or other association, engaged in business within this state shall be subject to inspection by the attorney general of this state, or by any agent he may designate for that purpose, and such corporation, joint stock company, or other association shall, at such times as he shall prescribe, make such returns duly verified by an officer of such corporation, joint stock company or association, as shall be by him prescribed either by general regulations or by special direction [1911, ch. 215, § 5, p. 688].

KANSAS

[General Statutes of Kansas, Annotated—1949, pp. 1452, 1461]

CHAPTER 50—MONOPOLIES AND UNFAIR TRADE

§ 50-101. Trusts defined and declared unlawful and void.

* * * * *

§ 50-153. Investigations and inquiries by attorney general; penalty for disobedience of process or refusal to testify.

Whenever the attorney general or assistant attorney general shall have knowledge of any violation of any of the provisions of any of the laws of the state of Kansas relating to trusts, monopolies, combinations in restraint of trade, unlawful discrimination, unfair trade or the unlawful buying, selling and dealing in commodities without the intention of delivering the same, * * *

* * * * *

* * * Such subpoenas may direct witnesses to bring with them any papers, documents and books that may be considered material, and may be served by any person and shall be served and returned to said attorney general, assistant attorney general or justice of the peace or judge, as the case may be, * * * (L. 1919, ch. 316, § 1).

LOUISIANA

[Louisiana Revised Statutes of 1950, pp. 572, 579, 580]

PART IV. MONOPOLIES

§ 122. Contracts, combinations and conspiracies in restraint of trade illegal; penalty.

* * * * *

§ 143. Discovery; application for order; notice.

The Attorney General or district attorney acting under him, or the governor, before beginning an action under this Part may present to the court a written application for an order directing any person, as the Attorney General or district attorney requires, to appear before any judge, clerk of court, or notary public designated in the order, and answer relevant and material questions put to them concerning any illegal contract, combination, or conspiracy in restraint of trade or commerce, or to create a monopoly under this Part, * * *.

* * * * *

§ 144. Discovery; order; production of books, papers, etc.

The order for examination shall be signed by the judge making it, and the service of a copy with an endorsement signed by the Attorney General or district attorney that the person named shall appear and be examined * * *.

* * * * *

The endorsement may require the person to produce on examination all books, papers and documents in his possession or under his control, relating to the subject of such examination * * *. (Source: Acts 1915, Ex. Sess., No. 12 § 2.)

MAINE

[Revised Statutes of Maine—1954, p. 228]

MONOPOLIES AND PROFITEERING

Sec. 43. Contracts in restraint of trade.

* * * * *

Sec. 48. Attorney general to investigate.

The attorney general upon his own initiative * * * shall investigate * * * all contracts, combinations of conspiracies in restraint of trade or commerce, and all monopolies, and may require * * * the production of books and papers before him relating to any such matter under investigation * * *.

MISSOURI

[Vernon's Annotated Missouri Statutes, vol. 21, pp. 848, 849, 898, 899]

CHAPTER 416—MONOPOLIES, DISCRIMINATIONS AND CONSPIRACIES

Sec. 416.010. Combined in restraint of trade declared a conspiracy.

* * * * *

Sec. 416.310. Procedure for securing testimony.

Whenever the attorney general deems it necessary or proper before beginning any action or proceeding against any pool, trust, conspiracy or combination made, arranged, agreed upon or entered into whereby a monopoly in the manufacture, production or sale in this state of any article or commodity is or may be sought to be created, established or maintained, or whereby competition in this state in the supply or price of any article of commodity is or may be restrained or prevented, then in such case the attorney general may present to any justice of the supreme court an application in writing, for an order directing such persons, as the attorney general may require, to appear before a justice of the supreme court * * *.

* * * * *

* * * Such endorsement may contain a clause requiring such person to produce on such examination all books, papers and documents in his possession or under his control relating to the subject of such examination; * * *.

MONTANA

[Revised Codes of Montana—1947, Annotated, vol. 8, p. 42]

CRIMES AND CRIMINAL PROCEDURE

§ 94-1108. Prosecutions by attorney general.

If complaint shall be made to the attorney general that any corporation is guilty of unfair discrimination, as defined by this act, he shall forthwith investigate such complaint, and for that purpose he shall subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, * * *. (History: En. Sec. 2, ch. 8, L. 1913.)

NEBRASKA

[Revised Statutes of Nebraska—1943, vol. 3A, pp. 1038, 1039]

MONOPOLIES AND UNLAWFUL COMBINATIONS

§ 59-804. Business of corporations, other associations; conduct; investigation by Attorney General; powers.

The Attorney General of this state * * * may especially require any such corporation, joint stock company or other association, to give a list of all contracts or transactions entered into within the twelve months preceding such requisition, * * *. (Source: Laws 1905, c. 162, § 5, p. 638.)

* * * * *

§ 59-807. Books, papers, records; inspection by Attorney General.

All the books of record and papers of every such corporation, joint stock company or other association engaged in business within this state, shall be subject to inspection by the Attorney General of this state, or by any agent he may designate for that purpose, * * *. (Source: Laws 1905, c. 162, § 8, p. 639.)

NEW YORK

[McKinney's Consolidated Laws of New York, Annotated, Book 19—General Business Law, pp. 297, 342, 343]

ARTICLE 22—MONOPOLIES

§ 340. Contracts or agreements for monopoly or in restraint of trade illegal and void.

* * * * *

§ 343. Investigation by the attorney general.

Whenever it shall appear to the attorney general, either upon complaint or otherwise, that any person or persons, partnership, corporation, company, trust or association shall have engaged in or engages in or is about to engage in any act or practice by this article prohibited or declared to be illegal,

* * * * *

The attorney general, his deputy, assistant, or other officer designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate, a court of record or a judge or justice thereof, and require the production of any books, or papers which he deems relevant or material to the inquiry. * * *

NORTH CAROLINA

[General Statutes of North Carolina, vol. 2B, pp. 768, 773]

CHAPTER 75—MONOPOLIES AND TRUSTS

§ 75-1. Combinations in restraint of trade illegal.

* * * * *

§ 75-9. Duty of Attorney General to investigate.

The Attorney General of the State of North Carolina shall have power, and it shall be his duty, to investigate, from time to time, the affairs of all corporations doing business in this State, which are or may be embraced within the

meaning of the statutes of this State defining and denouncing trusts and combinations against trade and commerce, * * *.

* * * * *
 § 75-10. Power to compel examination.

In performing the duty required in § 75-9, the Attorney General shall have power, at any and all times, to require the officers, agents or employees of any such corporation, and all other persons having knowledge with respect to the matters and affairs of such corporations, to submit themselves to examination by him, and produce for his inspection any of the books and papers of any such corporations, or which are in any way connected with the business thereof; * * * (1913, ch. 41, § 9; C.S., § 2568).

OKLAHOMA

[Oklahoma Statutes, Annotated, titles 71-81, pp. 658, 659]

CHAPTER 2—UNFAIR DISCRIMINATION OR COMPETITION

§ 82. Investigations of corporations—Actions—Revocation of charters and permits.

If complaint shall be made to the Attorney General that any corporation is guilty of unfair discrimination, as defined by this act (Sections 81-87 of this title), he shall investigate such complaint and for that purpose he may subpoena witnesses, administer oaths, take testimony, and require the production of books or other documents, * * * (Comp. St. 1921, § 11040).

SOUTH CAROLINA

[Code of Laws of South Carolina—1952, vol. 6, pp. 808, 817]

CHAPTER 2—TRUSTS, MONOPOLIES AND UNFAIR COMPETITION

§ 66-112. Application for discovery.

Whenever the Attorney General has determined to commence an action or proceeding under any law relating to the prohibition or prevention of trusts, combinations or monopolies or against any corporation, foreign or domestic, for any violation of any law, he may present to any justice of the Supreme Court or any circuit judge, either before or after beginning such action * * * in such order and answer such questions as may be put to them or to any of them and produce such papers, documents and books concerning any alleged illegal contract, arrangement, agreement, trust, monopoly or combination or corporate acts in violation of law * * * (1902 (23) 1961).

TEXAS

[Vernon's Civil Statutes of the State of Texas, Annotated, vol. 20, pp. 875, 921]

TITLE 126—TRUSTS—CONSPIRACIES AGAINST TRADE

Art. 7439. 7810. Evidence preliminary to prosecutions.

Upon the application of the Attorney General, or of any of his assistants, or of any district or county attorney, acting under the direction of the Attorney General made to any country judge or any justice of the peace in this State, stating that he has reason to believe * * * knows of a violation of any provision of the preceding subdivision, it shall be the duty of such county judge or justice to have summoned as in criminal cases and to have examined such witness in relation to violations of any provision of said subdivision * * *. (Derivation. From Vernon's Civ. St. 1914, Rev. Civ. St. 1911, art. 7810.)

UTAH

[Utah Code, Annotated—1953, vol. 8, pp. 479, 480]

CHAPTER 58—TRADE AND COMMERCE

§ 76-58-1. Fraudulent practices to affect market prices.

* * * * *
 § 76-58-3. Violations by corporations—Attorney General to prosecute.

If complaint is made to the attorney general that any corporation is guilty of unfair discrimination as defined by the preceding section, he shall investigate such complaint, and for that purpose he may subpoena witnesses, administer

oaths, take testimony, and require the production of books or other documents, * * *. (History: L. 1913, ch. 41.)

WASHINGTON

[Washington Laws of 1961, ch. 216, approved March 20, 1961, effective June 8, 1961.]

SEC. 11. (1) Whenever the attorney general believes that any person may be in possession, custody, or control of any original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated, which he believes to be relevant to the subject matter of an investigation of a possible violation of sections 3, 4, 5, or 6 of this act, he may, prior to the institution of a civil proceeding thereon, execute in writing and cause to be served upon such a person, a civil investigative demand requiring such person to produce such documentary material and permit inspection and copying: PROVIDED, That this section shall not be applicable to criminal prosecutions.

(2) Each such demand shall:

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

(b) Describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to indicate the material demand;

(c) Prescribe a return date within which the documentary material is to be produced; and

(d) Identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

(3) No such demand shall:

(a) Contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this state; or

(b) Require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.

(4) Service of any such demand may be made by:

(a) Delivering a duly executed copy thereof to the person to be served, or, if such person is not a natural person, to any officer of the person to be served; or

(b) Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(c) Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in this state, or, if said person has no place of business in this state, to his principal office or place of business.

(5) 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 person served, or at such other times and places as may be agreed upon by the person served and the attorney general.

(6) No documentary material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a superior 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 attorney general, 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 inspection and copying by the person who produced such material or any duly authorized representative of such person. The attorney general or any assistant attorney general may use such copies of documentary material as he determined necessary in the enforcement of this act, including presentation before any court: PROVIDED, That any such material which contains trade secrets shall not be presented except with the approval of the court in which action is pending after adequate notice to the person furnishing such material.

(7) 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 extend the return date for, or to modify or set aside a demand issued pursuant to subsection (1), stating good cause, may be filed in the superior court for Thurston County, or in such other county where the parties reside. A petition,

by the person on whom the demand is served, stating good cause, to require the attorney general or any person to perform any duty imposed by the provisions of this section, and all other petitions in connection with a demand, may be filed in the superior court for Thurston County, or in the county where the parties reside.

(8) 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 subsection (7) hereof. Any person who, with intent to avoid, evade or prevent compliance, in whole or in part, with any civil investigative demand under this section, removes from any place, conceals, withholds, or 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 demand duly served upon any person shall be guilty of an offense against the state, and shall be subject, upon conviction, to a fine not to exceed five thousand dollars or to imprisonment for a term of not more than one year, or both.

[West's Wisconsin Statutes, Annotated, secs. 128 to 146, pp. 160, 173, 185]

CHAPTER 133—TRUSTS AND MONOPOLIES

§ 133.01. Unlawful contracts; conspiracies.

* * * * *

§ 133.06. Inquisitorial proceeding.

(1) Whenever the attorney-general files with any circuit court commissioner a statement that he has reason to believe and does believe that a contract, agreement, combination, trust or conspiracy in restraint of trade as defined by section 133.01 or 133.21 exists or that a violation of either of said sections has occurred said commissioner shall issue his subpoena for the persons requested by the attorney-general. * * *

* * * * *

(2) The testimony shall be taken by a stenographic reporter, * * *.

* * * * *

§ 133.22. Duty of attorney-general.

Whenever the attorney general shall be notified or have reason to believe that any such corporation has violated any provision of section 133.21 it shall be his duty forthwith to address to any such corporation or to any director or officer thereof such inquiries as he may deem necessary for the purpose of determining whether or not such corporation has violated any provision of said section, and it shall be the duty of such corporation, director or officer so addressed to promptly and fully answer in writing, under oath, such inquiries; * * *.

EXTRACTS DELEGATING VISITORIAL POWER TO FEDERAL OFFICIALS RE ENFORCEMENT RESPONSIBILITIES

SECRETARY OF AGRICULTURE

[United States Code, Annotated, title 7, p. 24]

CHAPTER 1—COMMODITY EXCHANGES

§ 7a. Duties of contract markets

* * * * *

(2) Access for inspection of books and records.

Allow inspection at all times by an authorized representative of the United States Department of Agriculture or United States Department of Justice of the books, records, and all minutes and journals of proceedings of such contract market, its governing board and all committees, and of all subsidiaries and affiliates of such contract market, which books, records, minutes, and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct; * * *.

[United States Code, Annotated, title 7, p. 723]

CHAPTER 35—AGRICULTURAL ADJUSTMENT ACT OF 1935

§ 1373. Reports and records—Persons reporting.

(a) This subsection shall apply to warehousemen, processors, and common carriers of corn, wheat, cotton, rice, peanuts, or tobacco, and all ginners of cotton, all persons engaged in the business of purchasing corn, wheat, cotton, rice, peanuts, or tobacco from producers, all persons engaged in the business of redrying, prizing, or stemming tobacco for producers, all brokers and dealers in peanuts, all agents marketing peanuts for producers, or requiring peanuts for buyers and dealers, and all peanut growers' cooperative associations, all persons engaged in the business of cleaning, shelling, crushing, and salting of peanuts and the manufacture of peanut products, and all persons owning or operating peanut-picking or peanut-threshing machines. Any such person shall, from time to time on request of the Secretary, report to the Secretary * * *.

* * * * *

For the purpose of ascertaining the correctness of any report made or report kept, or of obtaining information required to be furnished in any report, but not so furnished, the Secretary is authorized to examine such books, papers, records, accounts, correspondence, contracts, documents, and memoranda as he has reason to believe are relevant and are within the control of such person * * *.

[United States Code, Annotated, title 7, p. 799]

CHAPTER 37—SEEDS

§ 1571. Prohibitions relating to interstate commerce in certain seeds.

* * * * *

§ 1603. Procedural powers; witness fees and mileage

(a) In carrying on the work herein authorized, the Secretary of Agriculture, or any officer or employee designated by him for such purpose, shall have power to hold hearings, administer oaths, sign and issue subpoenas, examine witnesses, take depositions, and require the production of books, records, accounts, memoranda, and papers, and have access to office and warehouse premises * * *.

SECRETARY OF THE ARMY

[United States Code Annotated, title 33, p. 226]

CHAPTER 11—BRIDGES OVER NAVIGABLE WATERS

§ 503. Tolls; reasonableness; bridges to which provisions not applicable

* * * * *

§ 504. Same; determination of reasonableness by Secretary of the Army; effect of order prescribing toll

* * * * *

§ 505. Same; review of order

* * * * *

§ 506. Same; hearings to determine reasonableness; attendance of witnesses; punishment for failure to attend

In the execution of his functions under sections 504 and 505 of this title and this section the Secretary of the Army, or any officer or employee designated by him, is authorized to hold hearings, examine witnesses, and receive evidence at any place designated by him, and to administer oaths and affirmations, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, and documents from any place in the United States * * *.

SECRETARY OF LABOR

[United States Code Annotated, titles 5 and 6, p. 409]

CHAPTER 15—COMPENSATION FOR INJURIES TO EMPLOYEES OF UNITED STATES

§ 780. Subpoenas for witnesses

The Secretary shall have power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles, to require the production of books, papers, documents, and other evidence, to administer oaths, and to examine witnesses, upon any matter within the jurisdiction of the Secretary * * *.

SECRETARY OF THE NAVY

[United States Code Annotated, title 31, pp. 409, 476]

CHAPTER 10—THE PUBLIC MONEYS

§ 478. Member banks as depositaries.

Nothing in sections 476-479 of this title shall be construed to deny the right of the Secretary of the Treasury to use member banks of the Federal reserve system as depositaries as authorized by law. May 29, 1920, c. 214, § 41 Stat. 655.

* * * * *

§ 548. Examination of depositaries.

The Secretary of the Treasury is authorized to cause examinations to be made of the books, accounts, and money on hand, of the several depositaries; and for that purpose to appoint special agents, as occasion may require, with such compensation, not exceeding \$6 per day and traveling expenses, as he may think reasonable, to be fixed and declared at the time of each appointment. The agent selected to make these examinations shall be instructed to examine as well the books, accounts, and returns of the officer, as the money on hand, and the manner of its being kept, to the end that uniformity and accuracy in the accounts, as well as safety to the public moneys, may be secured thereby. R.S. § 3649.

SECRETARY OF THE TREASURY

[United States Code Annotated, title 26, pp. 32, 33]

CHAPTER 78—DISCOVERY OF LIABILITY AND ENFORCEMENT OF TITLE

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry. Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 63a Stat. 901.

DIRECTOR, NATIONAL SCIENCE FOUNDATION

[United States Code Annotated, title 42, p. 21]

CHAPTER 16—NATIONAL SCIENCE FOUNDATION

§ 1862. Functions; reports

* * * * *

§ 1872a.

(f) (1) The Director of the Foundation may obtain by regulation, subpoena, or otherwise such information in the form of testimony, books, records, or other writings, may require the keeping of and furnishing such reports and records, and may make such inspections of the books, records, and other writings and premises or property of any person or persons as may be deemed necessary or appropriate by him to carry out the provisions of section 1862(a)(9) of this title, but this authority shall not be exercised if adequate and authoritative data are available from any Federal agency * * *.

ADMINISTRATOR, VETERANS' ADMINISTRATION

[United States Code Annotated, title 38, p. 187]

CHAPTER 57—RECORDS AND INVESTIGATIONS—SUBCHAPTER II—INVESTIGATIONS

§ 3311. Authority to issue subpoenas

For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may be delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpoenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration * * *.

FEDERAL TRADE COMMISSION

[United States Code Annotated, title 15, p. 159]

CHAPTER 2—FEDERAL TRADE COMMISSION; PROMOTION OF EXPORT TRADE AND PREVENTION OF UNFAIR METHODS OF COMPETITION

§ 41. Federal Trade Commission established; membership; vacancies; seal

* * * * *

§ 49. Documentary evidence; depositions; witnesses.

For the purposes of sections 41-46 and 47-58 of this title, the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation, being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Senator KEFAUVER. We will have about a 2-minute recess at this point.

(A brief recess was taken.)

Senator KEFAUVER. The committee will come to order.

This is a rather unusual setting at the present time. For the first time we have Rand Dixon at the other end of the table. It seems a little unusual not to have him up at this end of the table with us.

For the record, we miss having him at this end of the table. Over a period of many years he did such a vigorous and intelligent and outstanding job as counsel and staff director of this committee. We

now have him at the other end of the table as Chairman of the Federal Trade Commission.

With Mr. Dixon is John Wheelock, Executive Director of the Federal Trade Commission, and John Buffington, Assistant to the Chairman.

Mr. Wheelock happens to be a very good friend of the Chairman and an old friend from Tennessee.

STATEMENT OF PAUL RAND DIXON, CHAIRMAN, FEDERAL TRADE COMMISSION, ACCOMPANIED BY JOHN WHEELOCK, EXECUTIVE DIRECTOR, AND JOHN V. BUFFINGTON, ASSISTANT TO THE CHAIRMAN

Mr. DIXON. Mr. Chairman, I appreciate your kind remarks. I have learned since leaving you that it is a lot easier to ask questions than to answer them.

I have a very short statement here which I shall read.

I appear today that the request of the chairman of this subcommittee to present the Commission's views on S. 167, 87th Congress, 1st session. The proposed legislation would authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of antitrust laws, and for other purposes. Under present law, the Department of Justice lacks authority to compel the production of documents during the investigatory stages of civil antitrust proceedings.

The bill, in addition to granting such authority to the Department of Justice, would allow other antitrust agencies, such as the Federal Trade Commission, to examine documentary material taken into custody by the Department of Justice under the provisions of the bill. Under the present working relationship between the Federal Trade Commission and the Department of Justice, representatives of the Commission are permitted to examine documentary material possessed by the Antitrust Division. The bill would confirm and remove any doubt as to the propriety of such examinations.

While the bill would not amend any of the laws administered by the Federal Trade Commission, the Commission, as a result of its experience in enforcing the provisions of the Federal Trade Commission Act, the Clayton Act, and related statutes, recognizes fully the necessity for adequate investigatory powers by antitrust agencies. 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 by this bill, to issue civil investigative demands for the production of documentary evidence before formal proceedings are brought. The grant of such authority would enable the Department of Justice to obtain facts upon which a reasonable determination could be made whether such proceeding should be initiated.

The Commission, having received notification from the Bureau of the Budget that there would be no objection to submission of the Commission's report on the bill to the chairman of the Judiciary Committee, did so on April 27, 1961. In its report the Commission expressed the view that it would be desirable for the Department of Justice to have the authority provided in this bill.

Mr. Chairman, when I served with you as counsel and we took this bill up before the same subcommittee, it occurred to me at that time that the Attorney General is the chief law enforcement officer of the United States, and that too long he has not been empowered with all the tools, in my opinion, necessary to do a full and competent job.

As you well know, the Federal Trade Commission, since its early inception, has had similar, if not much broader powers under section 6 of the basic act, the Federal Trade Act, and we have the authority to compel the production of a special report from corporations.

Senator KEFAUVER. That is title 15, section 49?

Mr. DIXON. I think that is correct, sir.

Senator KEFAUVER. Title 15, United States Code, section 49.

Mr. DIXON. It may be section 45 which is the basic act and the subsections as we go along. It is not listed here, but if it is necessary to get it, we will get it for you.

Senator KEFAUVER. In the digest of laws of the States and of Federal agencies which has been put in the record by Judge Loevinger, I think this would be a good time to read what has been put in, and if there are other provisions coming under your jurisdiction, I wish you would include them also.

Mr. DIXON. I shall.

Senator KEFAUVER. Title 15, United States Code Annotated, section 49 reads:

Documentary evidence, depositions, witnesses

For the purposes of sections 41, 46, 47, and 58 of this title, the Commission or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination and the right to copy, any documentary evidence of any corporation being investigated or proceeded against, and the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all documentary evidence relating to any matters under investigation.

Any member of the Commission may sign subpoenas and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Mr. DIXON. Mr. Chairman, that is our section 9. That is section 9 of the basic act. I had started by alluding to section 6 which was a similar power which we use. We have more powers than is actually provided, in my opinion, in S. 167.

Senator KEFAUVER. Let's put section 6 in the record also.

Mr. DIXON. Section 6 and section 9 certainly are pertinent.

(The material referred to follows:)

15 U.S.C.A. 46 (sec. 6 of Federal Trade Commission Act) is as follows in part:

Sec. 46. Additional powers of commission

The commission shall also have power—

(a) Investigation of corporations

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) Reports by corporations

To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission

in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Investigation of compliance with antitrust decrees

Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

15 U.S.C.A. 49 (sec. 9 of Federal Trade Commission) is as follows in part:

Sec. 49. Documentary evidence; depositions; witnesses

For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41-46 and 47-58 of this title or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under sections 41-46 and 47-58 of this title at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Senator KEFAUVER. I agree with you that this is very broad power.

Mr. DIXON. You see, this has been here since 1914. Some people I remember alluded to this bill here in the past and I am not sure whether it won't come up again, but this is an unusual grant of power and it might be abused. I point out to you that the Federal Trade Commission has had this power since 1914, has consistently used it, and I know of no abuse for power.

Section 6 was tested by specific case. I think in the *Morton Salt Company* case, the Supreme Court confirmed the Commission's use of section 6, for instance, in determining a compliance matter as to whether its order to cease and desist was being lived up to.

Section 9, our routine section that we have used for investigational purposes over the years. We are going to begin to use both of these sections as a matter of routine at the Federal Trade Commission in order to, we hope, get more effective enforcement. But I think that some note should be taken of the fact that what you are trying to do here is to empower the chief enforcement officer of the United States, the Attorney General, with the same power that the Congress gave to the Federal Trade Commission some 47 years ago.

Senator KEFAUVER. I think it is interesting, and I think we should emphasize for the record that the power in section 9 and section 6 of the Federal Trade Commission Act has been in the law since 1914 and has been used since that time, these are broader powers than are contained in S. 167.

Mr. DIXON. That is correct, sir.

Senator KEFAUVER. You have all been with the Federal Trade Commission a long time. In all of your jobs, Mr. Buffington and Mr. Wheelock, there has never been an abuse of this broad power.

Mr. DIXON. We have had differences, but there has never been any court decision that would indicate that we have abused it, sir, because certainly I know it is the will of Congress and it is the will of the land that we live within our free, competitive enterprise system. The laws are very clear—the Sherman Act, the Federal Trade Commission Act, the Clayton Act, the other antitrust acts, but if we are to enforce them fully in the public interest, the Congress must give to the enforcement agencies the tools with which to do this.

I think that Judge Loevinger's statement was eloquent and very clear on the point as to the needs of the Department of Justice.

Senator KEFAUVER. The Federal Trade Commission also has the right within its discretion to allow the chairman of the Judiciary Committee, and the Antitrust Subcommittee, to see documents that have been subpoenaed and on limited occasions that request has been granted.

Has there ever been any record of abuse of that privilege?

Mr. DIXON. I came to the commission in 1938. I think Mr. Wheelock preceded me by several years, or maybe a few years. I know of no abuse as the result of the Federal Trade Commission disclosing to any committee of the Congress any information that they had before them, sir.

Senator KEFAUVER. What is your feeling about the desirability under limited circumstances of letting the committees having jurisdiction of some matters they are investigating to see documents within the discretion of the Federal Trade Commission?

Mr. DIXON. Well, having served with you I got a pretty good education on the need for the relevant committees of the Congress to have access to information and documents that are down in the enforcement agencies. These litigated matters go on for years. Sometimes it is not clear as to whether the law is sufficiently strong enough in order to accomplish the purpose.

The only way, in my opinion, that the Congress can ever determine whether the law should be supplemented or strengthened or changed is for them to have hearings.

Now, a very pertinent part of those hearings could be evidence and documents and material facts that are in the possession of the enforcement agencies.

Unless the Congress wants to legislate in a vacuum, I think they are going to have to have access to information that is in the enforcement agencies.

I know of no reason why it should not be done.

The Congress, the Department of Justice, the FTC and any of the other regulatory and enforcement bodies are only there basically because the Congress, under its constitutional authority, has created the power, a law or an agency, and given them or delegated to them the responsibility of actually regulating commerce as the Congress is required to do in the Constitution.

Now if it is not being done properly, of course, you have oversight responsibility over us and I think it is well that you call us here and take us to task.

I also think that you call us here and you can have access to this information in order to determine whether or not, in the age that we are living in, that we should strengthen these laws because we have to preserve our free enterprise system. If you don't have this information, if it is going to be locked away from you because someone would say this is an executive privilege or this is being considered down here and you shouldn't look at it, I think you should have access to all the information that can be legally turned over to you.

Senator KEFAUVER. Does it not happen sometimes that a case has been finished, files are not active, nobody's rights are being litigated, but the historical memoranda and the other information in a particular file would be of benefit to the Congress?

Is there any reason in a situation like that why the Congress should not have the benefit of that information?

Mr. DIXON. I can think of none, Mr. Chairman, because actually, by virtue of this very authority in the Federal Trade Commission's documents, they have been preserved ever since its very inception. I think they once had a fire down there and lost some of it, but the documents have been preserved over the years. Conspiracies, unlawful agreements in restraint of trade, are not very easily seen. Sometimes it takes literally years to really understand them. If documents are destroyed regularly and are never vested any place, you will never have a place, a common place to go. We have been the repository in a sense for such information as that over the years, and this has been made available to the Department of Justice and I think it is well that in this bill it is recognized that we, a sister enforcement agency, will say we will have access to their records and documents because if we operate these agencies right, we are going to be using the best tool in the public interest at the right moment.

In my opinion it does not behoove either agency or any enforcement agency to try to say we are going to do this and we do not care what you want to do.

We should be doing what is best for the public interest and this shall be our purpose, our continued purpose and we want a free exchange of this information and I was very happy to hear Judge Loevinger say to you that he could see no objection to the Congress having access to information when you thought you needed it to understand something.

Senator KEFAUVER. Mr. Dixon, if the Federal Trade Commission cannot have access to documents subpoenaed and secured by the Department of Justice under S. 167, if it is passed, might not that result in a case where the Department of Justice comes to the conclusion that this is a Federal Trade Commission case and prevent them from transferring the case over to you?

Mr. DIXON. It could result in that and then unless you pass this bill, it might result in the fact that we would not have been in this particular area and the corporation might have destroyed the documents.

In other words, you are going to have two repositories now once this bill is passed.

It is true that if you pass the bill and with a restriction that we, the Federal Trade Commission, could not have access to the information we have the powers to go seek ourselves, and suppose we went to seek it and the corporation had destroyed the information and the only thing that was left was a copy over in the Department of Justice, and we could not have access to it. We would have kind of a blank spot in our thinking. We would be missing something that in my opinion we should have access to.

Senator KEFAUVER. Might the result be some time in your having to go through the whole process of subpoenaing the same thing?

Mr. DIXON. Certainly could. That is correct.

Senator KEFAUVER. Very well.

Mr. FLURRY, do you have any questions?

Mr. FLURRY. I have no questions.

Senator KEFAUVER. Mr. Chumbris?

Mr. CHUMBRIS. The only thought that I had and that is what was brought out by Senator Dirksen during the course of the discussion on the floor of the Senate, that is, to make sure that the necessary safeguards are there, and I will just read briefly what he stated on the floor.

I think everybody knows what a drastic weapon a subpoena duces tecum is. Very often, there has been duces and it has been necessary for those who have been the objects of the targets of subpoenas of that kind to go to court and insist that the demand has been entirely unreasonable. There are safeguards along the line in the pending bill in that the Attorney General, instead of resorting to criminal action, can file a civil action and amplify the investigators demand of the antitrust field.

What disturbs me and disturbs other members of the committee was a provision which was submitted and incorporated in the bill with respect to making copies and submitting such copies of the antitrust agencies to the committees of Congress.

There is a provision in the bill that if the Attorney General is unreasonable in his demand, the person toward whom the subpoena is directed can go into court with it in 20 days and file a petition in order to safeguard his rights against any unreasonable demands and ask for a modification of the order.

But what we are concerned about is that after the data, the documents, the information, and records have been procured, they might, the first instance, under the original language proposed in the bill, be made available in copy form

to committees of Congress. Two things could happen. If such copies are in possession and under the jurisdiction of Congress and the Attorney General, after going through the documents which were subpoenaed discovers there actually was no violation, the documents could go back to the person from whom they were procured, but the copies would still be in possession of a congressional committee or in possession of an antitrust agency.

That is one situation that might arise.

Then he goes on and says this :

Secondly, the Attorney General, after investigation of the case, might conclude there was a good predicate upon which to proceed with antimonopoly action. Therefore, the difficulty would then arise with the copies outside of the Department of Justice as to how the Department would negotiate with an individual or industry in order to procure a consent decree so the violation complained of might be brought to an end.

The only comment is that we know we want to help as much as possible in the machinery of government. But under our constitutional form of government and the American way of life—take the narcotics peddler, the worst type of activity in American life, he is protected under the Constitution; he is protected when a warrant is issued against him; he is protected under subpoenas and everything else. I just want to reflect on the record that it is not a question so much of not giving necessary information to the Government, but to make sure that the basic protections will be in the law to insure justice to everyone involved.

Mr. DIXON. Mr. Chumbris, speaking only to the Federal Trade Commission's having access to this information, in section 10 of the Federal Trade Commission Act, this language appears :

Any officer or employer of the Commission who shall make public information obtained by the Commission without its authority unless directed by Court, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine not exceeding \$5,000 or by imprisonment not exceeding one year or by fine and imprisonment in the discretion of the Court.

That is quite a bit, Mr. Chumbris, and I assure you, everyone is aware of that and information is not piddled out of the FTC.

Mr. CHUMBRIS. I understand that to be the law and I am glad you read it into the record, but I thought I would repeat the comments of Senator Dirksen, that as long as the necessary safeguards are there, that is why the Dirksen amendment was put in.

Mr. DIXON. I heard that statement made and I remember documents that came to this committee when I was counsel for the committee that were submitted by the Commission under an agreement of restriction. They are still here. Some of them would be quite pertinent to law enforcement agencies right now. They are locked up because of an agreement and they are still here.

I know this committee never abused anybody when they got information and I have the fullest faith and confidence in the committees of the Congress on not passing out any information, but on the other hand when I speak as to the Federal Trade Commission, we are under compulsion of law here, law passed by the Congress.

We have always felt that this relationship did exist between the Congress and the Federal Trade Commission; that we were there to carry out the responsibility of the statute that was passed by the Congress and that whenever Congress deemed they needed information for whatever purpose, that is, the particular committee saw fit

to have the information, that we would give it to them. This has been the consistent view of the Commission over the years.

As I said, I was very happy to hear Judge Loevinger endorse that because he is purely in the executive branch of the Government.

Mr. CHUMBRIS. Mr. Chairman, I know Mr. Wallace has some questions and I assume Mr. Kittrie has and so I will yield.

Senator KEFAUVER. All right, Mr. Kittrie.

Mr. KITTRIE. Thank you, Mr. Chairman. I do not want to repeat any of the questions I asked of Judge Loevinger but if the witness has any comments on those particular points, I certainly would appreciate any that he cares to make.

Mr. DIXON. Mr. Kittrie, I listened very carefully to Judge Loevinger's question. I think it would be unduly repetitious if I repeated what he said. I agree with what he told you. I think he was very clear and precise.

Mr. KITTRIE. That is all I have at this time.

Senator KEFAUVER. Mr. Wallace.

Mr. WALLACE. Mr. Dixon, what would you think about a suggested amendment which would allow the documents to go to the various judiciary committees of the House and Senate after they had been made public by disclosure in a court proceeding?

Mr. DIXON. I think that that would give to the Congress and committees a study of, for instance, a study of administered prices. Up until 4 years ago, no one had actually entered into this kind of undertaking. A great deal of thinking needs yet to be done in this area. You need access to all the information wherever you can go to get it and this includes the cases you do not proceed in because in this area is where there was no proceeding. It is very simple to say a determination can be made when you find clear-cut evidence of unlawful agreement of conspiracy either by the testimony or statements of the witnesses or of documents. When you find the footprints and tracks, what do you do? Are the laws sufficient? Do we have a law broad enough to reach?

Now, how are you going to make that determination except by examining and studying the failures to proceed?

Now we do not proceed because you have documents somewhere. And, now, who should have access? We do not pass the laws down there. The Congress passes the laws. It is based upon our failures and our inability to proceed that only you can realize where the problem is and if you do not have access to that information, you are sitting out in the middle of the field with nothing except your own imagination to work with.

Mr. WALLACE. As I understand it, the committee here, for example, would have subpoena powers. They can at this time subpoena.

Mr. DIXON. You will go and subpoena documents written in 1930 and see if you can find them.

Mr. WALLACE. Of course, if they are not present under this bill, we would not get them anyhow.

Mr. DIXON. They would begin to be present in the Department of Justice once this bill is passed. In the FTC, we have a great deal of information in this area and have had since 1914.

Mr. WALLACE. Do you think there is any danger in not providing for any provision of nondisclosure after material gets to the committees?

Mr. DIXON. Well sir, I think that depends upon the committee. This is a decision for the Congress to make and not mine. My experience was I saw very little or no danger. When you measure it by the public interest, I think the decision is easy to answer.

Mr. WALLACE. In the bill, there is a provision for the custodian to be named by the Department of Justice. In fact without quoting the language, it boils down to the fact that the Department of Justice may determine where that custodian is situated.

Mr. DIXON. That is a practical thing, Mr. Wallace. Our act provides the secretary is the custodian. Suppose the secretary dies? I will appoint a new secretary. He is the custodian. He will name a custodian. If something happens to him, he will name another custodian. There must be some central place and somebody responsible is what I would say.

Mr. WALLACE. I agree with that.

My next question is, Do you agree with Judge Loevinger's opinion that if materials were furnished under this law to a custodian located in the District of Columbia, that if the corporation was based in Nebraska, the laws of Nebraska would apply as to the determination of privilege and not the law of the District of Columbia?

Mr. DIXON. I would endorse the statements that he made on that.

Mr. WALLACE. What, in your opinion, would be privileged material under this bill?

Mr. DIXON. Well, you are getting into an area that is just about as broad as the subject matter is. Our law is very broad on what is privileged and what is not. I think there is a section in our law that would provide any information and we have access to any information. We do not have any secrets in the Federal Trade Commission. We can get them, but what we make public there is restriction on it. In section 6-F we have the right to make public from time to time such portions of information obtained by it except trade secrets and names of customers as it shall deem expedient in the public interest. In other words, we have that restriction.

Mr. WALLACE. Why could not that be put in this bill—trade secrets for example?

Mr. DIXON. To be made public?

Mr. WALLACE. No.

Mr. DIXON. This is only make public. You understand this. You do not want to take away from them the right to get a trade secret. This may be the very crux around which a price-fixing agreement may be determined. Now why do you want to take away from them the very thing they may need to look at—what he is going to do with it is something else.

Mr. WALLACE. That is my point, the congressional committees.

Mr. DIXON. We cannot give this to the congressional committees. This is one of the things we do not give to the congressional committees and he will not give it to you either.

Mr. WALLACE. The problem I think that might arise is this. With the various States having different laws on what is privileged and interpreted differently by the district courts across the country as

they would, then if the custodian was located in the District of Columbia, it would be very difficult for a corporation in Omaha to determine what to give. They would have to come back here first of all to file their objection.

Mr. DIXON. I think not.

Mr. WALLACE. They have to file it where the custodian is situated.

Mr. DIXON. Yes.

Mr. WALLACE. So they would have to come back here, if the custodian was in Washington, and they would have to determine what law should apply as far as privilege is concerned. In other words, it seems to me that what is privileged is left up in the air quite a bit and it might be difficult to determine whether or not he wanted to object because this material would go into the Department of Justice. It might be fine with him, but he might not want this material going to the House Committee on the Judiciary and the Senate Committee on the Judiciary because he might feel they would use it in the public hearing and it might come out and he would be prejudiced by this.

Mr. DIXON. It would be very difficult to write any statute as Judge Loevinger told you. I think the rules of practice today are competent enough to resolve these matters and resolve them quickly.

I do not think that you will find the Department of Justice exercising them in an unreasonable manner. It seems to me broadly speaking, that as dear to us as is due process and in the end the protection of private rights, we are going pretty far in this country when these corporations are clothing themselves with all these rights.

I want to tell you now that once in this great country we had the right of visitation upon the great corporations. Today, we are limited on how you visit one of these corporations. But if we want our system to work, we had better get busy worrying about making it work instead of worrying about making it more difficult to work.

Any time you grant a power there is an attendant risk attached to it as to whether someone is going to exercise it reasonably or unreasonably.

The instant a power is used unreasonably, there are so many checks and balances under our way of life that the person who does it will be called to halt very quickly. It will happen in the political party very quickly and it will happen if you are in the enforcement body. You will spend your days before the committees answering questions if you are unreasonable.

Mr. CHUMBRIS. Mr. Dixon, did you state a moment ago that the Federal Trade Commission would not now release to congressional committees any trade secrets?

Mr. DIXON. That is correct.

Mr. CHUMBRIS. Would you now, under existing law, release trade secrets to the antitrust division of the Department of Justice?

Mr. DIXON. Correct.

Mr. CHUMBRIS. You would or you would not?

Mr. DIXON. We would have, under an agreement that they would not disclose it publicly if it was for use in the enforcement processes. We would give it to them and we would do this, Mr. Chumbris, because it is very clear that we have information here that is of a criminal nature and we should see to it that the bigger tool is used.

Mr. CHUMBRIS. Then I wanted to carry this one point further.

If you now would turn it over to the antitrust division, with the stipulation that you have noted, would that also prevent them from turning it over to a congressional committee?

Mr. DIXON. I would think so. I would think it would.

To my way of thinking, no Congress, no committee of the Congress has ever asked for such information. In other words, they can resolve their problems without having it. They do not need this.

Mr. CHUMBRIS. Thank you.

Mr. WALLACE. Just one more question, Mr. Chairman.

I noticed that in the Federal Trade Commission Act there is a provision for immunity of prosecution to natural persons.

Mr. DIXON. Correct, that is in section 9.

Mr. WALLACE. That section gives authority for the production of not only documents but testimony, and of course, this bill that we have before us involves only corporations, not natural persons.

Mr. DIXON. That is correct.

Mr. WALLACE. But in the last part of that section, I might just read the last six lines of section 49 of title 15 of the United States Code:

But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, manner or theme concerning which he may testify or produce evidence, documentary or otherwise, before the Commission in obedience to a subpoena issued by it.

Do you think maybe this bill ought to have a provision on immunity from prosecution of natural persons—

Mr. DIXON. Your bill does not apply to natural persons.

Mr. WALLACE. Let me finish my question—which may be subject to prosecution on account of documents furnished to the Justice Department?

Mr. DIXON. I see no reason for it, sir. Of course, our authority is much broader than this bill. That is the reason this is written.

Mr. WALLACE. As I understand it here, no person shall be prosecuted on account of documents furnished, even though he may not testify.

Mr. DIXON. Who is under subpoena.

Mr. WALLACE. Under subpoena, yes.

Mr. DIXON. I want to tell you we are very careful not to immunize people because we find that we can subpoena without picking that person up.

Senator KEFAUVER. Anything else?

Thank you very much, Mr. Dixon and gentlemen. We appreciate your appearance here.

We will stand in recess now until 2:15 p.m. this afternoon.

(Whereupon, at 12:40 p.m. the subcommittee recessed to reconvene at 2:15 p.m. of the same day.)

AFTERNOON SESSION

Senator KEFAUVER. Mr. Boyd, will you come around, sir?

Mr. BOYD. Thank you very kindly, Senator.

STATEMENT OF GEORGE BOYD, JR., OF DUNNINGTON, BARTHOLOW & MILLER, NEW YORK, N.Y., ON BEHALF OF THE AMERICAN PAPER & PULP ASSOCIATION

Senator KEFAUVER. We are glad to have you with us again, Mr. Boyd.

Mr. BOYD. It is a privilege to be here, Senator.

Senator KEFAUVER. Do you have a statement, sir?

Mr. BOYD. I have a statement which has been submitted to you and to the subcommittee, Senator, which I would request be incorporated as a part of the record.

Senator KEFAUVER. We will let it be printed in full at this point in the record.

Mr. BOYD. Thank you very kindly.

My name is George Boyd, Jr.

Senator KEFAUVER. Is this the statement you are going to read?

Mr. BOYD. May I read the statement for the record?

Senator KEFAUVER. You may read it. I thought you wanted it incorporated in the record. It is not long, so go ahead and read it.

Mr. BOYD. My name is George Boyd, Jr. I am a member of the firm of Dunnington, Bartholow & Miller, at 161 East 42d Street, New York City, and I am appearing on behalf of the American Paper & Pulp Association.

The American Paper & Pulp Association is the overall national association of the paper and pulp industry. The paper and allied products industry operates mills or plants in 47 of our 50 States. The industry includes 479 different companies which produce the primary products of pulp or paper in approximately 850 mills. In addition, there are upwards of 4,000 plants making converted paper products. Some 560,000 employees, together with more than 2 million of their dependents derive their livelihood from the paper and allied products industry. Our annual total industry payroll exceeds \$3 billion.

S. 167 which would authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws is similar to S. 716 and S. 1003 which were considered by the Subcommittee on Antitrust and Monopoly Legislation during the 86th Congress. When hearings were held during the last session of Congress on these last two bills, the American Paper & Pulp Association submitted to the subcommittee and its chairman, Senator Kefauver, under date of March 3, 1959, a letter expressing opposition to these bills.

As we understand S. 167, it provides that whenever the Attorney General or the Assistant Attorney General in charge of the Antitrust Division 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 a civil investigation demand requiring such person to produce such pertinent material for examination. The demand would have to state the "nature of the conduct constituting the alleged antitrust violation" and the provision of law applicable thereto, describe the class or classes of material to be produced with such definiteness and certainty as to permit the material to be fairly identified, prescribe a return date, identify the custodian

to whom such material would have to be delivered, and specify a place at which such delivery would have to be made.

The authorization thus provided by S. 167 would be in addition to the well-established and far-reaching authority now in effect which permits a grand jury subpoena duces tecum.

We should like to emphasize that the Attorney General is charged by law, and properly so, with the enforcement of the antitrust laws. We are in full accord with their purposes and their intent. Let us make it perfectly clear that if there is any valid reason to believe that there is a violation of the Sherman or Clayton Acts, there is a 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.

If the Attorney General is granted authority to compel the production of documentary evidence in a civil proceeding, as he would be under S. 167, the end result in our opinion would be to grant to him a licence to indulge in what could only properly be termed as a "fishing expedition." "Fishing expeditions" cannot and would not, in any manner whatsoever, facilitate the enforcement of the antitrust laws and, in most instances, would consume needlessly both the time of the Antitrust Division and of corporate employees, with the inevitable waste of public and private funds and the interruption of the function of business and Government which has been termed to "keep America on the move."

We feel that we should object to any erosions of the American tradition that interference with the private affairs of citizens and private enterprises should be limited to cases of necessity. This bill is based upon the concept that private business is apt to attempt to conceal illegal activities from Government investigators and is unwilling to cooperate with such investigations. We think this is a false assumption. The American Paper & Pulp Association is firmly of the view that the cooperation which companies and industry generally afford the Attorney General in making available voluntarily pertinent documentary material in the course of a bona fide civil investigation provides the Department of Justice with all the information to which it is legitimately entitled. If there are exceptions to this cooperation there is always available to the Government enforcement authorities sweeping subpoena powers that have traditionally been the fully recognized powers of a grand jury.

S. 167 would include, within the definition of "antitrust laws," section 3 of the Robinson-Patman Act (15 U.S.C. 13a). The U.S. Supreme Court has held in 1958 that section 3 of the Robinson-Patman Act is not one of the "antitrust laws." Although the bill indicates that the inclusion of section 3 in the definition of "antitrust law" is limited to "as used in this act," there is danger that it might erroneously be construed as intending to overrule the Supreme Court decision.

It is our understanding that S. 167's purpose is related solely to civil proceedings. The inclusion in it of the solely criminal provision section 3 of the Robinson-Patman Act is highly irregular. It is well known that there is considerable controversy as to section 3 of the Robinson-Patman Act. Indeed, in the report by the Attorney

General's National Committee to study the Antitrust Laws, dated March 31, 1955, at page 200, it was stated:

In our view, 18 years of section 3 enforcement have neither furthered the national interest nor realized the congressional purpose. Enforcement organs of the United States have abstained from invoking this provision. Private plaintiffs have emerged as the principal enforcers of its difficult prohibitions, rushing in where the Government perhaps fears to tread. Yet, by challenging apparently normal competitive price reductions as predatory slashes under this nebulous law, indiscriminate private enforcement may well impede the downward price adjustments which mark the effective working of a competitive system.

In the self-same report, at page 201, the Attorney General's Committee recommended:

At all events, we recommend repeal of section 3 as dangerous surplusage. Doubts besetting section 3's constitutionality seems well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law. It does not serve the public interest of antitrust policy.

We think that it is pertinent to bring to the attention of this able subcommittee the following excerpt from the Wall Street Journal of May 24, 1961, at page 1, which deals with the matter of section 3 of the Robinson-Patman Act:

For their part, company attorneys seem likely to remind the trustbusters that at least one court, the Federal District Court in Kansas City, Mo., has questioned the constitutionality of the unreasonably low provision of the law as being too vague. The ruling came recently from Federal Judge Jasper Smith, in dismissing several counts in a Government criminal antitrust case in the milk industry. * * *

The American Paper & Pulp Association strongly recommends that subparagraph (a) (3) of section 2 of S. 167 be deleted (p. 2, lines 7 to 14, inclusive). Any proposal which might conceivably be construed to make section 3 of the Robinson-Patman Act "a part of the antitrust laws" for purposes of private suits should be subject to public hearings called for that specific purpose alone. The inclusion of the criminal provisions of the Robinson-Patman Act in this bill relating to civil proceedings is unwarranted and is completely, I suggest, unrelated to the purpose of the bill.

The provision in S. 167 which would permit the Attorney General to make subpoenaed material or material produced in accordance with what is called a civil investigative demand available to congressional committees would establish a unique and dangerous precedent, inasmuch as it departs from the traditional concept of separation of powers and trespasses on the inherent power of the Executive to keep appropriate records confidential in the public interest. Subpoenaed documents in the hands of congressional committees could conceivably be prejudicial both to the Attorney General and to the person who produced the material. We respectfully point out to this subcommittee that even if no violation should be found as a result of the investigation by the Attorney General, it is conceivable that a congressional committee could use the subpoenaed documents in such a manner as to be more damaging to the person who produced them than would proceeding by the Attorney General. We fail to understand why it should become necessary to include this proposal in S. 167 since congressional committees now possess adequate authority to obtain any documentary material which may be relevant to legislative inquiries.

Accordingly, we recommend strongly that the language in subparagraph (c) of section 4 of this bill be deleted (p. 8, line 3, beginning with the word "provided" to line 6 through the word "Congress," inclusive).

S. 167 provides that the civil investigative demand shall "prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and produced" (lines 21 to 23, inclusive, p. 4). Presumably in an effort to protect from abuse persons upon whom investigative demands are served, S. 167 would authorize such persons to file in the U.S. district court for the judicial district within which the office of the custodian is situated, a petition for an order by the court modifying or setting aside such demand. However, such petition must be filed "within 20 days after service of the demand or at any time before the return date specified in the demand, whichever period is shorter, * * *" (lines 3 to 5, inclusive, at p. 11). This provision would enable the Government, by a simple expedient of specifying an earlier return date or designating a custodian in a judicial district far removed from the person served, to deprive the person of any real opportunity to move against the demand. There can be no urgency which would require that the Attorney General receive material in less than 20 days. This bill would confer additional investigative powers upon the Attorney General that certainly are not needed when litigation is actually underway, and, until this occurs, there certainly can be no urgency.

In addition, S. 167 does not contain any provision for tolling the civil investigative demand during the pendency of a petition to modify or set aside the demand.

Finally, S. 167 is deficient in that it fails to specify, with any degree of necessary particularity, what the investigative demand must contain regarding the alleged antitrust violation which must constitute the basis for its issuance.

Therefore, we respectfully request the Antitrust and Monopoly Subcommittee not to report S. 167 or any other "antitrust civil process act."

Senator KEFAUVER. Thank you, Mr. Boyd, for your statement and for your statement of position.

Mr. FLURRY, do you have some questions to ask?

Mr. FLURRY. I would like to ask Mr. Boyd first, how many companies are members of the association?

Mr. BOYD. There is no company member of American Paper & Pulp Association.

May I explain that?

Mr. FLURRY. Yes.

Mr. BOYD. The American Paper & Pulp Association is a federated State composed of trade associations. It has, as I recall, 13 divisions who are members of the American Paper & Pulp Association; companies in the paper and pulp industry belong to these other trade associations which are in turn members of American Paper & Pulp Association.

Mr. FLURRY. Do the trade associations which are members of the American Paper & Pulp Association consist of manufacturers in the production of paper and pulp?

Mr. BOYD. The companies that belong to the divisional associations are manufacturers of pulp and paper.

Mr. FLURRY. Are those member associations divided according to the different types of the industry affected? That is, different types of companies in the industry, such as pulp companies in one class and paper manufacturers in another?

Mr. BOYD. Well, actually, you have some of the associations set up on what I would call a furnish basis and others are perhaps on an end-use basis. You have such associations as the printing paper manufacturers' association. I believe the name is self-explanatory—manufacturers of printing grades of paper.

The writing paper manufacturers' association manufacturers of fine papers belong to the WPMA. The members of U.S. Pulp Producers Association, Inc., are market pulp producers. That is, they are people who manufacture pulp for sale. They belong to the U.S. Pulp Producers Associations, and so on.

Then you have an association such as the Tissue Association which will have primary producers of tissue and, indeed, some converters into the end products, don't you see.

I cite that by way of illustration.

Mr. FLURRY. Are the larger paper manufacturers, such as International Paper and Kraft, members of these member associations?

Mr. BOYD. International Paper Co. belongs to the divisions, various divisions of the AP and PA.

Mr. FLURRY. What percentage of the total number of manufacturers in the pulp and paper manufacturing industry are members of the member associations?

Mr. BOYD. This would only be a guess. I would say 80-85 percent. That is an educated guess.

Mr. FLURRY. On page 2 of your statement, you say:

The authorization thus provided by S. 167 would be in addition to the well-established and far-reaching authority now in effect which permits a grand jury subpena duces tecum.

This bill being limited to the obtaining of information for civil cases only, would that statement be exactly correct in connection with cases where no criminal case was contemplated, where no criminal case could be brought, such as under section 7 of the Clayton Act?

Mr. BOYD. I thought it was appropriate for several reasons:

1. For the reason later stated, the apparent conflict between section 3 of the Robinson-Patman Act, which is a criminal provision, and also by reason of the fact that the Federal Trade Commission, of course, also has the complete authority ably described by its Chairman this morning.

Senator KEFAUVER. On that point, Mr. Flurry, if you will let me interrupt, Judge Loevinger pointed out this morning, as you heard, that the Supreme Court, in the *United States v. Proctor and Gamble* case, 356 U.S. 677, cited in 1958, that an abuse of the use of a grand jury in an antitrust investigation would come about where was no real intention of bringing a criminal case.

Mr. BOYD. That's correct, Senator. That is the holding of the case.

Senator KEFAUVER. So that if it is only a civil case they have in mind, which is envisioned in S. 167, they could not use a criminal grand jury for the purpose of getting evidence.

Mr. BOYD. In the case of the Department of Justice. But I have also suggested in our statement that it is our belief, at least based upon the companies with which I have familiarity, that there is the degree of cooperation afforded by the voluntary process so far as the Department of Justice, and I am assuming a noncriminal case—

Senator KEFAUVER. Mr. Boyd, if the Federal Trade Commission is going to get evidence under its power, which it has no intention of using, but is merely doing it for the accomodation of the Department of Justice, say, to bring a Sherman Act case, isn't that rather an indirect way to go about it?

Mr. BOYD. I would respectfully suggest to the Senator that it seems to me—

Senator KEFAUVER. And, furthermore, if you recommend that the Federal Trade Commission subpoena the information and turn it over to the Department of Justice, why not let the Department of Justice do it in the first place?

Mr. BOYD. I am not recommending that the Federal Trade Commission do the work of the Department of Justice. I sought to make it clear that under the present law, in the present state of the law, there is cooperation being afforded in the civil, or where civil proceedings are contemplated, to the Attorney General's office, to the Antitrust Division.

I would further suggest that there is this power enjoyed under section 6 and section 9 of the Federal Trade Commission Act by the Federal Trade Commission, and that it would possibly constitute a duplication to give to another agency of the Government authority which, in effect, is duplicating that now enjoyed by the Federal Trade Commission.

Senator KEFAUVER. Proceed, Mr. Flurry.

Mr. FLURRY. I take it from the middle paragraph on page 3 of your statement that what you are saying there in effect is that no real necessity for this legislation exists because of voluntary cooperation by the companies in turning over to the Department of Justice the information necessary in these civil cases. Is that correct?

Mr. BOYD. That is a fair statement.

Mr. FLURRY. Now, Judge Loevinger, the Assistant Attorney General, submitted to the committee this morning a long list of civil cases conducted in recent years in which that cooperation was not afforded. I don't know how many of those were submitted. I think there were at least 29 in the summary. So there must have been at least 29 instances in recent years in which that cooperation has been denied.

Of course, I am not saying that that is in the paper industry, but it seems to me that does show a considerable need for some remedy to be used by the Department of Justice.

In the paper industry itself, I would like to ask you if you are familiar with the case in the southern district of New York in 1947 in which the Department of Justice sought, in a civil case, to obtain the records of the Canadian International Paper Corp.

Mr. BOYD. I am familiar with that case.

Mr. FLURRY. I believe the outcome of the case was that the judge in the southern district of New York held that the corporation had possession of the documents although they were located in Canada and would have to produce them. But shortly thereafter, there was action

taken by the Canadian Government—I have here a note in the Attorney General's committee report, a footnote beginning at page 73 on that matter. I would like to read that footnote into the record.

Certain officers of International there moved to quash on the grounds "that they do not have control of the books and records of Canadian since a quorum of the board of directors of Canadian, all residents of Canada, passed a resolution in Montreal * * * to the effect that the records of Canadian shall be maintained in the custody of the board of directors * * * and should in no case be allowed to be taken outside of Canada."

After detailed review of Canadian's extensive business here, the court concluded, "The papers are, so far as appears now, in the possession of the corporation. The corporation may not evade complying with the subpoena by a resolution of this character."

But the footnote goes on to say :

But see the Business Records Protection Act (1 Revised Statutes of Ontario, 1950, ch. 44) which now prohibits removal of business records from Ontario unless such removal is authorized by act of Ontario or of the Parliament of Canada.

It is my recollection in that case that the Government never procured those documents and no case was brought, or the case was dismissed because of the inability of the Government to obtain the documents even under subpoena after refusal of the corporation to cooperate in producing the documents.

So isn't that a very good example of lack of cooperation, even in the paper industry itself?

Mr. BOYD. May I respectfully suggest, as you have already pointed out to the subcommittee, to have produced the material certainly after the enactment of the Records Act in the Province of Ontario would have involved a violation of law of the Province of the Canadian Government? That would really pose a very difficult question, wouldn't it, if we had such a law enacted as S. 167 because someone might be in violation of Canadian or Ontario law and be in compliance with U.S. law and one couldn't be in compliance with the law of both countries?

Mr. FLURRY. That's true, but the Government was unable to obtain access to the documents through the cooperation of the company?

Mr. BOYD. I am not familiar with the documents.

Mr. FLURRY. And after issuing a subpoena for it, they were not able to obtain it because of this act in Canada.

Mr. BOYD. Perhaps the documents were not relevant. They may have been pertinent, but the plain words this morning, Senator, I think—I am not familiar, though, with the documents sought.

Senator KEFAUVER. All right.

Mr. FLURRY. You say on page 5 that—

The provision in S. 167 which would permit the Attorney General to make subpoenaed material or material produced in accordance with what is called a civil investigative demand available to congressional committees would establish a unique and dangerous precedent, inasmuch as it departs from the traditional concept of separation of powers and trespasses on the inherent power of the Executive to keep appropriate records confidential in the public interest.

That problem has already been passed over by the Congress in the Federal Trade Commission Act, has it not, many years ago—1914?

Mr. BOYD. I thought it was brought out by the able Chairman of the Federal Trade Commission this morning that in the case of documents submitted to the Federal Trade Commission, certainly

anything that should be kept confidential must be kept confidential under penalty of committing a misdemeanor.

Mr. FLURRY. The Congress in the passage of the Federal Trade Commission Act saw fit to restrict the letting out of that information by the Federal Trade Commission to Congress when it was referred to trade secrets.

Mr. BOYD. That's correct, sir.

Mr. FLURRY. But as to other material, there was no such restriction. I assume that the Attorney General in the discretion which he now has could exercise that discretion in somewhat the same manner.

Mr. BOYD. May I respectfully suggest that, as did the Congress in the case of the Federal Trade Commission Act in 1914, and I think we have used the words "appropriate records" in any bill of this nature, there should be a similar provision as in the Federal Trade Commission Act relating to confidentiality of trade secrets.

Mr. FLURRY. Do I understand you correctly to mean that you have objection to such documents being made available to a committee of the Congress provided there was some protection or restriction with respect to trade secrets, such as in the Federal Trade Commission Act?

Mr. BOYD. I think my statement speaks for itself, but I would think that you would certainly have to insure that any trade secrets, whether they are produced to an agency of the executive branch, or to a committee of the legislative branch, be kept confidential.

Mr. FLURRY. I would like to ask you one question with respect to this question of time for the filing of a petition by the company upon which demand was served.

You heard Judge Loevinger's testimony this morning with respect to the acute situation with respect to time involved in merger cases in some instances.

Mr. BOYD. I think it was with respect to a particular situation which is involving a bank and I believe there is some jurisdictional question involved as between the Federal Reserve Board and also the Antitrust Division. Is that not the case? I think he referred to a merger situation in Louisville in his testimony this morning.

Senator KEFAUVER. Lexington.

Mr. BOYD. Beg your pardon, Lexington.

Mr. FLURRY. That, I think, he gave as an illustration of the problem involved.

I might give you another illustration of the problem involved from my experience in the Antitrust Division.

Shortly before I left the Antitrust Division, one of the large companies in a certain industry submitted a request to the Antitrust Division for a so-called railroad release in the acquisition by that company of a smaller company in the industry. They were advised that the Department of Justice would oppose the acquisition and if the large company went through with it, they would file a suit against them. The large company desisted. But a couple of days later this large company notified the Antitrust Division that another large company, approximately the same size, had proceeded to acquire the company which this company had proposed to acquire. When the Department of Justice looked into the matter, they found the acquisition had been completed and the circumstances were such that no relief could be obtained. There was no way to restore the small com-

pany to its former competitive position because of the intermingling of the assets and certain other aspects peculiar to that particular case.

Now, if the Department of Justice had to wait 20 days in a case of that sort, the horse would be out of the barn before the door could be locked.

So how would you get around that, consistent with your statements here about the time aspect?

Mr. BOYD. I would respectfully suggest that in the case you have posed about the merger which was consummated, then there could be intervention of the Celler-Kefauver amendment; that I would rather imagine that if only 20 days had elapsed from the time of the certifying of the civil investigation, the civil investigative demand, that the Department of Justice, Antitrust Division, could move rapidly and take advantage of the Celler-Kefauver amendment.

I am somewhat at a loss to understand why it would be necessary to move even in the case you posed sooner than 20 days.

Mr. FLURRY. How can they move without information upon which to move?

Mr. BOYD. I assume there was a report filed; that this may have been lodged with the SEC, covered by the newspapers, trade press.

Mr. FLURRY. In that particular instance, they had no information until the first company, which had abstained from acquiring the smaller company because of the objection of the Department of Justice, notified the Department of Justice that the other company had accepted it. Their large competitors had stepped in and acquired the company which they had intended to acquire so that the Department of Justice had no facts upon which to base a complaint at that time.

It was necessary to obtain facts before a case was filed in court and when a case was filed in court, they found that there was no remedy. The companies themselves acknowledged that they had violated the law and could not come up with a remedy which would restore the smaller company to its original competitive position.

Senator KEFAUVER. All right. Mr. Chumbris.

Mr. CHUMBRIS. I yield to Mr. Wallace and Mr. Kittrie.

Mr. KITTRIE. In connection with this last comment, I would like to say this: There is always an argument against observing due process by saying that things could be done much faster if we wouldn't have to have hearings, if we wouldn't have to have a fair trial or an opportunity for the parties to be heard.

Have you felt from what was discussed here today that there are a sufficient number of instances for the horse to get out of the barn, for this protection to be waived for people upon whom these demands are being made?

Mr. BOYD. No; I have not, sir.

Mr. KITTRIE. There was one instance mentioned here, but in the name of expediency, you can always say, we should not have any guarantees of hearings and opportunities to appeal, and so on. Yet, somehow, we have to sometimes take a chance that a person may commit a crime or some evil would result, primarily to protect the great majority of the other parties that need protection.

Mr. BOYD. I agree.

Mr. KITTRIE. That's all, Mr. Chairman.

Senator KEFAUVER. All right. Mr. Wallace.

Mr. WALLACE. Mr. Boyd, we haven't been told your age. What is your experience? You are a practicing lawyer in New York?

Mr. BOYD. I am a member of the firm of Dunnington, Bartholow & Miller. I have been practicing law in New York City for upward of 20 years and have been associated, except for some service with the U.S. Navy during World War II, intimately with the pulp and paper industry.

Mr. WALLACE. Does a considerable amount of your work require antitrust—

Mr. BOYD. It does.

Mr. WALLACE. Mr. Boyd, the Attorney General's report from which you quoted, dated March 31, 1955, on page 348, sets out some of the objections to a bill of this nature that some of the committee members had. On page 348, in the first paragraph, the minority is quoted as saying:

But the fact is that not more than 10 percent of those who are asked for data refuse to cooperate.

Are you acquainted with this particular part of this report?

Mr. BOYD. I am.

Mr. WALLACE. Of course, I understand that this is 1955 and these figures might be different today. But I thought that should be brought out—10 percent.

Mr. BOYD. Thank you, sir.

Mr. WALLACE. Mr. Boyd, on page 5 of your statement, Mr. Flurry pointed out a quotation therein, and following his quotation, you start out by saying:

Subpenaed documents in the hands of congressional committees could be prejudicial both to the Attorney General and to the person who produced the material.

Would you mind giving us a little example of that, or clarify that a little bit, about what you mean?

Mr. BOYD. Frankly, I think that it could develop, not in the hands of this particular subcommittee as presently constituted, but perhaps at some future time, that if subpenaed material were in the hands of a committee of the Congress or some committee, that it would be released to the public press for whatever use, and would build up a concept of lack of respect to the Attorney General.

It would also build up, it seems to me, a prejudice as to something that may have occurred years before on which the corporation or corporations were cleared and got a clean bill of health by the governmental agency investigating, whether it is Justice or FTC, and everyone has gone from the scene, and it would just create a prejudicial atmosphere.

That was what was meant by that statement, Mr. Wallace.

Mr. WALLACE. Do you see any danger of a committee which would have full access to this information, and not have any confidential requirement placed on it, releasing this information through public hearings even prior to a suit filed by the Attorney General or criminal prosecution? Do you see any danger there that would have prejudicial effect?

Mr. BOYD. That could be very prejudicial. In fact, as I understand it, a Member of Congress, some Member of the Senate, would

be able even on the floor of the Senate to employ information in a speech or to make it available to the public and that is another example of where, in the case of pending litigation, it is conceivable that the documents that were favorable, or the information which would be favorable to the Government could be leaked, and could prejudice the Government's case.

Senator KEFAUVER. Mr. Boyd, remember this is not a mandatory requirement on the part of the Attorney General. The committee of Congress could only get information that he was willing to let them see. In the first place I do not know of any cases since 1914, where any Member of Congress has abused the confidence of the Federal Trade Commission.

Secondly, I can't imagine any Attorney General who would get bitten twice if some committee of Congress didn't keep the confidence. He certainly wouldn't have more experience of that kind with them.

Mr. BOYD. I would respectfully suggest to the Senator that in the event that the committee in its wisdom would take action on the bill, favorable, that it would certainly be desirable to provide for some measure of confidentiality as to certain information which, in addition to the other suggestions for improvement in the bill which I have respectfully presented on behalf of the association.

Mr. WALLACE. Let me ask you this: Do you know whether in the State of New York trade secrets are confidential information? Would this information be treated by the courts in the State of New York as privileged information? I am using the term "trade secrets" as used in the Federal Trade Commission Act.

Mr. BOYD. I think it would be, Mr. Wallace.

Mr. WALLACE. You think it would be?

Mr. BOYD. I think it would be.

Mr. WALLACE. That leads to my next question. You have heard the hypothetical question put here today—were you here this morning?

Mr. BOYD. I was.

Mr. WALLACE. What is your opinion about this conflicts-of-law situation? Would the law of the District of Columbia apply or would the law of Nebraska apply in that hypothetical situation that I gave?

Mr. BOYD. I wish you were asking Mr. Beal a question, but I would think that perhaps it might be the law of the District of Columbia rather than the law of the State of Nebraska.

I believe it was suggested that the Nebraska law might apply, but I would have some doubt.

Mr. WALLACE. Do you see some dangers, then, in having a law which would allow the Attorney General to sort of pick his forum, so to speak? By that, I mean determining whether he wants the custodian for this particular situation by State in order to best suit his purposes for interpretation of what is privileged and what isn't.

Mr. BOYD. I think it poses a definite problem, Mr. Wallace.

Mr. WALLACE. Do you also see a problem about the distance involved in the filing of an objection by the corporation at the place where the Attorney General designates the custodian should be situated?

Mr. BOYD. Very definitely.

Of course, that was implicit in the suggestion that there should be a minimum time of 20 days. That was one of the thoughts on the 20.

Mr. WALLACE. Just one other question and I am through.

You talked about rule 26-B of the Federal Rules of Civil Procedure and I think we discussed it in regard to whether or not the petition for the civil investigative demand should state that this material is relevant to the investigation.

You will note in section 3-A the Department of Justice has reason to believe that when any documentary material is pertinent to the investigation, then they shall file a petition; but in that petition they do not have to allege that it is pertinent; nor do they have to allege that it is relevant.

Now, Judge Loevinger said he thought that might create a lot of litigation back and forth. I would think that if you used the term "relevant," and maybe employed the rules of discovery proceedings in Federal district courts, that there would be less chance of litigation because these matters have been litigated to some extent and depositions and interrogatories taken and a lawyer would be able to tell easier whether or not this material he must submit that he is called upon to give, if he does not want to submit it, or whether he does.

Do you have any opinion on that?

Mr. BOYD. I would agree with you that it would definitely be an improvement if this bill should be amended to include the changes you suggest.

Mr. WALLACE. I am not saying that they do this, but the Attorney General could file a petition setting out the alleged antitrust violation and describe what he wants and perhaps what he wants is tax information. According to this bill, there is nothing to prohibit him from doing that.

Mr. BOYD. That's right.

Mr. WALLACE. That's all I have.

Senator KEFAUVER. Thank you very much, Mr. Boyd.

Mr. BOYD. Thank you, Senator.

Senator KEFAUVER. Mr. Simon, will you come around and give us the benefit of your views.

STATEMENT OF WILLIAM SIMON, OF HOWREY, SIMON, BAKER & MURCHISON, WASHINGTON, D.C., ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. SIMON. May I suggest in the interest of expediting the matter—

Senator KEFAUVER. First, let's identify you as William Simon of the law firm of Howrey, Simon, Baker & Murchison of the District of Columbia.

Mr. SIMON. Thank you, Mr. Chairman. I am appearing for the American Bar Association. I am a former chairman of the Antitrust Section of the American Bar Association and I was a member of the Attorney General's National Committee To Study the Antitrust Laws which, as the chairman pointed out this morning, had recommended legislation in this field and I believe it was the first to suggest that legislation.

I have a prepared statement, Mr. Chairman, which was prepared by the Committee on Practice and Procedure of the Antitrust Section of the American Bar.

I did not participate in the drafting of the statement, but I do subscribe to everything that is said in it and I would like to suggest, if I may, that if the statement and the draft bill which is attached to it could be incorporated in your record, I might save time by merely pointing out to you what all the differences between the ABA bill and S-167.

Senator KEFAUVER. Yes sir.

The statement of Mr. Decker to which you subscribe will be placed in the record; following that the suggested bill of the American Bar Association Committee will be printed.

(The statement of Richard K. Decker and draft bill of the American Bar Association follow:)

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 authorized the officers and council of the section of antitrust law to recommend to the Congress that legislation be enacted which would authorize the Attorney General or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, under appropriate safeguards, 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.

S. 167, 87th Congress, 1st session, was introduced by Senator Kefauver on January 5, 1961, and was referred to the Committee on the Judiciary. S. 167 is with two minor exceptions, identical to S. 716, which passed the Senate on July 29, 1959, but was not acted upon by the House of Representatives. We strongly oppose S. 167 for the reasons which will be stated hereinafter, and we urge its disapproval. We attach hereto 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. We desire that the draft of this bill be made a part of this statement.

THE NEED FOR SUCH LEGISLATION

We believe that adequate investigatory processes are essential to 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 a 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 investigations, however, the Department must either depend upon voluntary cooperation by those under investigation or file a skeleton complaint in order to avail themselves of the discovery processes afforded by the Federal Rules of Civil Procedure. The Judicial Conference of the United States has said that no plaintiff should "pretend to bring charges in order to determine whether actual charges should be brought." 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. This is especially true now that the Supreme Court has held that the Department was

mistaken in its view that the grand jury could be used as a general investigative body in situations in which criminal proceedings were considered to be in appropriate and inadequate to obtain the relief believed to be desirable. See *U.S. v. Proctor and Gamble*, 356 U.S. 677 (1957).

COMMENT ON S. 167

The antitrust section of the American Bar Association is in agreement with the basic objective of S. 167, which 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. In many respects, however, S. 167 fails to conform to the recommendations of this section. A comparison of the draft bill, which is attached hereto and made a part hereof, with S. 167 will disclose the differences which we think are significant and which we think should be incorporated into S. 167. Some of these points will be discussed herein.

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. However, since this would lodge in the executive department considerable power in the nature of a subpoena, it is also desirable that this power be exercised with restraint, and that its exercise be surrounded with adequate safeguards against abuse.

At the outset, we would like to register a strong objection to including within the definition of "antitrust laws" section 3 of the Robinson-Patman Act (15 U.S.C. 13a). In *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), the United States Supreme Court held that section 3 is not one of the antitrust laws. Despite the fact that S. 167 indicates that the inclusion of section 3 in the definition of "antitrust laws" is limited to "As used in this bill" there is danger that it might erroneously be construed as intending to overrule the *Nashville Milk* case. Since the purpose of S. 167 relates solely to civil suits, the inclusion in it of the solely criminal provision of section 3 of the Robinson-Patman Act is highly irregular. There has been considerable controversy with respect to this section and any proposal which might conceivably be construed to make section 3 of the Robinson-Patman Act a part of the antitrust laws for purposes of private suit, should be subject to public hearings called for that specific purpose. The inclusion of this provision in this bill is unwarranted and is completely unrelated to the purpose of the bill.

We believe that the civil investigative demand should be authorized to require the production only of those documents which are relevant to the subject matter of the investigation. The language used in S. 167 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. The draft of the bill attached hereto provides for application of these rules when not inconsistent with other provisions of the bill. This would make these decisions available for guidance. We believe, moreover, that 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. 167 does not provide for either of these safeguards.

S. 167 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 not appropriate for civil investigations. The section of antitrust law of the American Bar Association proposes that there be substituted for this production and delivery concept, the procedure of making relevant material available for inspection and copying. This is similar to the post-complaint discovery procedures provided by the Federal Rules of Civil Procedure 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 an undue hardship on the investigatee. It has the additional beneficial effect of encouraging antitrust investigators to take a selective, rather than a wholesale approach in drafting the demand.

Section 3(b)(1) should, in our opinion, provide that the demand state the subject matter of the investigation in some detail. In addition to setting forth the statutes 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 the proposed bill attached hereto, in section 3(b)(1), will adequately provide the desirable safeguards and at the same time would not be restrictive on the Antitrust Division. It is important that the language used in this section, when related to that part of section 1 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).

A similar problem is created by 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. 167, the words "or improper" after the word "unreasonable" in line 5 of page 5. In section 3(c)(2) of S. 167 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 10 of page 5. 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 that 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 our proposed draft, service of the demand is separated from service of the petition. Section 5 provides for court jurisdiction and power with respect to petitions.

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 demand or going to court to seek relief from its terms. Such a provision does not appear in S. 167 but is provided in our draft in section 3(f). 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 procedures. We believe also that the existing statutory provisions (18 U.S.C. sec. 1001), for punishment of 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 criminal penalty section appearing in S. 167.

By utilizing the procedure of inspection and copying at the principal place of business of the company being served with the demand, rather than the production and delivery technique provided for by S. 167, 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. 167. In any event, the custodian provided for in S. 167 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 documents or 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) will accomplish this.

The antitrust section of the American Bar Association disapproves of provisions in S. 167 which apparently would authorize perpetual retention of copies of documents produced under demand. It 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. Such a practice would be contrary to the holding of the Supreme Court in *U.S. v. Wallace & Tiernan Co.*, 336 U.S. 793, 801 (1949).

S. 167 provides no real basis for ascertaining when documents must be returned to the company from whom they have been obtained. Section 4(f) of S. 167 provides that any person who has produced material under the act may demand the return of his 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." No individual company knows the extent of an investigation or the number of companies subpoenaed in an investigation and, therefore, would not be in any position to know when a reasonable time has elapsed "after completion of examination and analysis of all evidence assembled" in the course of such investigation. Moreover, an investigatee when served with such a demand is placed under other burdens than mere production of documents for inspection and copying. The investigatee must retain all related documents to those submitted to the Department so as to be in a position to meet or explain any charges which may be brought at some subsequent time. Consequently, the absence of some means of determining when documents should be returned places heavy burdens upon an investigatee. 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 order of court, upon a showing of good cause, that period has been extended. In our draft of the bill, this period is 18 months, which coincides with the maximum period of duration of a grand jury.

The section of antitrust law believes further that copies of documents obtained as a result of the demand should not be disclosed to anyone 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. In view of the fact that the Congress and 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 not necessary. Moreover, the provisions making such documents available to Congress and 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 arm of the Government is investigating them and perhaps contemplating commencement of proceedings. This is not only desirable from a sense of fairplay, but it may well be beneficial both to the investigating group and the company. Since the scope of an investigation being conducted by the Congress or by an agency of the Government is not likely to be coincident with that of any other investigating body, 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 effect the decisions of the subsequently interested agency.

In our proposed bill 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 are a considerable improvement over the language used in S. 167 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. S. 167 provides for a maximum of 20 days in 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, investigatees 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 his documents for inspection. As with subpoena, this could rarely be less than 20 days and for this reason we believe a maximum of 20 days is too restrictive.

As we have indicated above, we do not believe that section 6 headed "Criminal penalties" is either desirable or necessary. We believe that establishing criminal penalties for persons who "with intent to * * * obstruct compliance * * * willfully * * * withhold * * * 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 invites of criminal prosecution for perhaps wrongly appraising a document as privileged or nonresponsive, carrying out established procedures for the retrieval of old records, etc., is an unfair burden upon businessmen and their counsel.

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. 167 does not provide the Antitrust Division with the proper tool nor does it provide adequate safeguards for the investigated company. We believe that the draft of a proposed bill which we attach hereto and make part hereof, does these things and we urgently recommend that S. 167 not be adopted and that in lieu thereof, a bill providing substantially as is provided in our draft bill be adopted.

Respectfully submitted.

SECTION OF ANTITRUST LAW,
AMERICAN BAR ASSOCIATION,
By RICHARD K. DECKER,
Chairman, Practice and Procedure Committee.

Attachment: Draft of bill.

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 America in Congress assembled, That:

SEC. 1. This Act may be cited as the "Antitrust Civil Process Act of 1956."

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; 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, at his discretion, 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 eighteen 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 any 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 eighteen months.

JUDICIAL PROCEEDINGS

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 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 United States 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 provisions of this Act may be filed by the person upon whom such demand was served in any United States 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 United States 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 United States 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.

Mr. SIMON. I would like to say at the outset, Mr. Chairman, and I am sure the American Bar joins in the suggestion Mr. Flurry made this morning, which I believe Judge Levinger adopted, that it is not in the interest of anybody, including the prospective defendants, to force the Department of Justice to call a grand jury in a proceeding which is and ought to be essentially a civil proceeding.

I might say from my standpoint, after they are forced to call a grand jury, they are prone to use it.

I think we are all better off if the Antitrust Division has appropriate means of obtaining documents in a civil case without the use of the grand jury proceeding.

Senator KEFAUVER. Or without the use of subterfuge of going through the Federal Trade Commission?

Mr. SIMON. Yes, sir, I certainly would subscribe to that.

Mr. FLURRY. May I interrupt?

Mr. SIMON. Yes, Mr. Flurry.

Mr. FLURRY. According to the decision in the *Proctor and Gamble* case, is it not true that the Department of Justice, if they can't get the information otherwise, and they call a grand jury, they are practically forced to return an indictment in order to bring the civil case?

Mr. SIMON. Let's put it a little differently. In order not to be accused of having used the grand jury for a civil case, they might be prone to protect their integrity by bringing back an indictment.

I certainly don't think that is in the interest of the prospective defendant and I certainly don't think it is in the interest of the Government.

Senator KEFAUVER. Off the record.

(Discussion off the record.)

Senator KEFAUVER. We are all in agreement on the philosophy of this bill.

Mr. SIMON. The house of delegates of the American Bar Association has authorized the section to state that it does recommend legislation with appropriate safeguards for a civil investigative demand but that it opposes S. 167 and urges that it not be enacted.

The first difference between the ABA bill and this committee's bill of any significance appears in section 2 where, for purposes of this act, you define the antitrust laws and S. 167's definition of the antitrust laws includes section 3 of the Robinson-Patman Act.

This is deleted in the ABA bill for two reasons:

1. Section 3 is not a civil statute at all; it is a criminal statute.
2. It is not an antitrust statute, as the Supreme Court held in the *Nashville Milk* case.

Senator KEFAUVER. Suppose, for the purpose of having the record clear, that we have printed at this point section 13a of title 15, U.S.C.A., which is section 3 of the Robinson-Patman Act.

Mr. SIMON. Isn't section 13a section 2a of the Robinson-Patman Act, Mr. Chairman?

I am told, Mr. Chairman, that both of them are 13a. Section 2a of the Robinson-Patman Act is 13(a) in parentheses and section 3 is 13a without the parentheses.

Senator KEFAUVER. Let's print 13a without the parentheses. That is the one I am reading.

Mr. SIMON. Yes, sir.

(The material referred to follows:)

Title 15, U.S.C.A., 13a, is as follows:

"Sec. 13a. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both (June 19, 1936, c. 592, sec. 3, 49 Stat. 1528)."

Mr. SIMON. The second is that ABA would delete reference to the Federal Trade Commission Act, first because it is not an anti-trust statute and, secondly, the Attorney General has no power to enforce the Federal Trade Commission Act, and there would be no need for his getting documents in connection with that statute.

Thirdly, they would omit the paragraph which includes within the definition of antitrust laws any future act of Congress which relates to restraint of trade or unfair trade practice.

This is inherently a very vague mandate because there are many existing statutes relating to restraints of trade that are not anti-trust laws. For example, the Commodity Exchange Act relates to restraint of trade on the commodity exchanges but it is not an anti-trust act and presumably if a similar statute were passed next year it would be within this definition of restraint of trade even though not intended as an anti-trust statute.

In section 3-A of S. 167 there are four significant changes:

The first is to provide that the Attorney General may issue a civil investigative demand against a person under investigation. The words "under investigation" are added. The reasons are obvious. Under the present bill the demand could be issued to one who is purely a witness, whereas this amendment would limit it to a company who was being investigated.

Senator KEFAUVER. Where would you put "under investigation"?

Mr. SIMON. Where it says that the Antitrust Division has reason to believe that any person, and to put after the word "person" in line 8 on page 4, any person, and then insert "under investigation".

Mr. FLURRY. May I question there?

Mr. SIMON. Yes, sir.

Mr. FLURRY. I am sure you realize in your vast anti-trust experience that it is not uncommon at all that the very valuable evidence

with respect to antitrust violation is obtained from companies which are not prospective defendants?

Mr. SIMON. Certainly true.

Mr. FLURRY. Would you deny that source of information to the Department of Justice for the purpose of enforcing the antitrust law?

Mr. SIMON. My experience also is that where you tell a man he is not under investigation he is generally quite happy to cooperate with you and give you the documents.

Mr. FLURRY. That is true, but I have had instances in which it was not true because of a fear of retribution by competitors who were involved and the information was withheld for that reason. They refused to cooperate expressly on that ground.

Mr. SIMON. I must assume that that is theoretically possible. On the other hand, you must always balance equities and as against giving up that theoretical right which may well exist one day, and on the other hand subjecting people who are merely witnesses to the burdens of this bill, I would choose—

Mr. FLURRY. I would submit, to you, Mr. Simon, that from personal experience it is not hypothetical or theoretical; that in the *National Food Chain* cases, for example, we found it very difficult to obtain cooperation of people who were not involved as prospective defendants because of the fear of retribution, and they refused to cooperate expressly on that ground.

Mr. SIMON. I say I am sure that happens. It is just a matter of balancing equities, I think.

The second change that the Bar Association would make is to substitute in the next line the word "relevant" for "pertinent." This has already been discussed today, Mr. Chairman, and basically all that we are talking about is that there is a large body of Federal law in grand jury subpoenas and in other similar cases where the courts have dealt with the precise question in terms of relevance.

When Congress uses a different word, the court will have to struggle with the question of whether Congress meant a different standard.

If you use the word that the courts have been using for generations, it would be clear that Congress intended the existing body of law.

The third change is in the next line, to insert the word "prior" ahead of institution of a suit prior to the institution of a similar criminal proceeding.

The purpose of this, of course, is clear. Once a civil proceeding has been filed, the Attorney General doesn't need a civil investigative demand. He has available to him the Rules of Civil Procedure which provide for discovery of every character.

Therefore, this remedy should be limited to the area where he does not now have the discovery, namely, prior to the filing of a suit.

Fourth, perhaps the most important of these changes, the bar association bill would change the word "examination," which is the last word in the section, to the words "inspection and copying."

Under the present bill, the original documents would be produced and the Attorney General could keep them. Under the bar association bill the original documents would be produced but the Department of Justice could merely inspect and copy them.

Judge Loevinger pointed out this morning that copies were not enough, that they had to see the original because there might be long-hand notes on the side. I would concur in this, but once the Department has seen the original and has determined whether there are any long-hand notes on it that are relevant, it seems to me that then all they need is to make a photostat of the document which they have already inspected.

The reasons for this I think are fourfold :

One, it might be very difficult for a company to continue carrying on its business if all of its original books and records, or a large volume of them, have been turned over to the Antitrust Division to be kept either for a long period or indefinitely.

Secondly, no company, of course, could turn over its original books to the Department without first making photostats of them themselves, and therefore you put a substantial financial burden on the company of photostating all of these records before they turn them over.

On the other hand, if the Department were to photostat that which they wanted, they would no doubt be more selective. They might out of 20,000 documents pick out only 200 that they wanted and would photostat only the 200 that they wanted rather the company photostating all 20,000 before they were delivered.

Third, the Federal Rules of Civil Procedure provide only for inspection and copying and this would be consistent with that.

Fourth, I raise the point which I think the committee would want to well consider, and that is the impact that this provision would have on treble damage suits. You would insulate a defendant against being required to produce documents in a treble damage suit if they had been demanded by the Department of Justice.

For example, of about the same time the Attorney General investigates, somebody brings a treble damage suit and the Attorney General serves a civil investigative demand pursuant to which the company produces all its original records to the Attorney General.

This bill says that once the Attorney General has the documents he can do nothing with them except to introduce them in evidence in a suit he brings or to let a congressional committee look at them; which means he could not be compelled to produce them in a treble damage suit brought by some third party against this respondent.

The respondent itself, of course, could not be compelled to produce them because it would not have them.

Senator KEFAUVER. Mr. Simon, you have stated, as has Judge Loevinger, that sometimes copies or photostats were not satisfactory. I didn't know that the photostat didn't catch everything on a piece of paper, but he says sometimes it doesn't.

Mr. SIMON. I think that's true. If you write lightly in pencil, a photostat may not catch it and more importantly, if you write with a ballpoint pen, most photostating machines won't catch it. As I understand it, you have to have carbon in what you are using to write or the photostat machine doesn't catch it.

So you could well have a ballpoint notation in the margin which the photostating wouldn't reproduce.

Senator KEFAUVER. I think that in 99.9 percent of the cases, copying or photostating would serve the purpose, but what are we going to do with these rare cases where the photostat does not catch the nota-

tion and the Attorney General feels that it is important to present the full contents of that document?

Mr. SIMON. I think in every case, Mr. Chairman, there is a process which would reproduce everything on the paper. Just the normal photostating machine wouldn't. But if the bill gave the Attorney General power to inspect the document and he found something on it he wanted, there are many processes that would permit him to reproduce it. Just the normal photostating machine wouldn't do it.

Our suggestion: we don't ask that the respondent be permitted to just furnish photostats to the Attorney General; we would say, let the Attorney General have the originals, inspect them, make what copies he wants, and return the originals.

There is a process which would reproduce anything even though the normal photostating would not.

Senator KEFAUVER. What are the better processes? I don't know of them.

Mr. CHUMBRIS. Couldn't you use a certification? For example, when documents go over from the State Department to Europe, the certification is on them from the Secretary of State's Office that they are authentic reproductions, or actual word-for-word statements of whatever is in that particular document.

They may reproduce it and it will have a certification to go with it.

Mr. SIMON. I think what the chairman had in mind is that some reproduction machines operate on a chemical basis of picking up carbon on the paper and if the writing instrument you use doesn't have carbon in it, it won't pick it up.

On the other hand, there are photographic machines which take a picture, like I would with my Brownie camera. Such a process doesn't operate on the basis of the carbon and will photograph any piece of paper and get any marking that is on it.

In this rare case, he would have to use some different reproducing equipment, but he could reproduce all the data on the paper.

Senator KEFAUVER. You think "copying" would cover whatever is necessary to be done with it?

Mr. SIMON. Yes.

After the Attorney General has made the copies he wants, he would return the originals to the company.

Senator KEFAUVER. As I understand it, Judge Loevinger's only objection to returning the originals was because of these exceptional cases that I have spoken of where he didn't seem to be aware of any method of copying which would get everything on every paper.

Mr. SIMON. If I heard him right, Mr. Chairman, what he was saying is that it wouldn't be enough for the Department to be merely furnished with the photostats. It is the normal process for a company who has been requested to furnish documents to just give the Department photostats and the Department never sees the original.

Senator KEFAUVER. I believe you are right about what he said. I think that is a very worthwhile suggestion.

Mr. FLURRY. May I ask a question at this point?

Would not that problem be solved for both the Department of Justice and the parties involved if the requirements remained as they are, but put in an alternative, relating to copies in accordance with

the agreement between the Department of Justice and the party on whom the demand is served?

Mr. SIMON. I wouldn't think so, Mr. Flurry, for two reasons:

One, in the suggestion I make, you put the burden on the Department to ask for the minimum number of documents because the Department is going to pay for photostating. We are talking about cases where the photostating bill can be \$50,000 or \$60,000, as has frequently been the case.

I think if the company produces them, then the Department is free to copy all they want with no restriction, in order that the Government gets all it really needs.

Mr. FLURRY. I have some question as to the correctness of your assumption on that.

It has been my experience that where you send investigators out to do these jobs and the head of the staff people on the case cannot be present at all of these places, of course the thing flies in the opposite direction and they copy photostats of all documents which may appear to have any relevance to the subject matter, for the fear that before the door is closed on them, they will have failed to copy documents which may, on examination of the total material, prove to be very relevant and very substantial in its value.

Mr. SIMON. If you will forgive me for saying this, if that is the premise on which they are doing the selecting, then the Government ought to pay the photostating bill.

If the theory is, we will take anything that might possibly be relevant, then it seems to me that the Department ought to pay for photostating.

Mr. FLURRY. In most cases I was involved with, we had to pay for it.

Mr. SIMON. That's right.

Senator KEFAUVER. How does that work out? You send an investigator out under this bill; he brings the originals back, and the Government would pay.

If he made photostats, wouldn't the Government pay just the same?

Mr. SIMON. Under this, the Department of Justice would be entitled to receive the original documents and keep them throughout the investigation and if the company wanted to have any records left to run its business on, they would have no alternative but to photostat everything before they turned it over to the Department of Justice because this might include ledger sheets, correspondence, anything. I think they would have to reproduce it.

Senator KEFAUVER. Would you need a provision in the bill to say that the copy should then be acceptable in evidence?

Mr. SIMON. I would see no objection to that, Senator, but I don't think you need it.

The reason I say that is that under the rules of civil procedure, and we are now talking about a civil case, the Attorney General can serve a written interrogatory asking the company to admit the authenticity of a long list of documents and they do this all the time.

I have never known of a case where anybody would refuse to admit the authenticity of a document which was in fact authentic because then, under the rules, he has to pay the costs of the proof; so it could be handled by pretrial discovery, avoiding any problem of admissibility in evidence.

Senator KEFAUVER. But there is the best evidence which is sometimes technically raised.

Mr. SIMON. Yes, sir; but if it were to be raised, it would have to be raised in answer to interrogatories under the Rules of Civil Procedure.

This would give the Department of Justice many months' advance notice and in that case they could subpoena that particular document and if the response to the subpoena—if, in response to the subpoena, the company said, we don't have it anymore, we destroyed it; then, of course, your photostat would be admissible because then it would be the best evidence.

Senator KEFAUVER. But in order to avoid the interrogatories, we might work out language that the copy could be admitted as evidence.

Mr. SIMON. You aren't going to be able to avoid interrogatories in any civil antitrust suit. You might avoid the need for this additional interrogatory, but there will be interrogatories, I think, in all of them because both sides use them.

This is just a matter of adding one more question to the list that I am sure will be served in any case.

Mr. FENSTERWALD. Mr. Simon, would it be possible to draft this bill in such a way that you could get the original documents, bring them back to Washington, and keep them for a minimum period of time for examination and then if you want to keep certain ones, to photostat them and send the rest of them back?

Mr. SIMON. Yes, sir. But that destroys the very objective, or at least one of the very objectives which I was talking of, namely, if a company has to give all of their books and records covered by the demand which may be very voluminous to the Department for even 60 or 90 days, inherently they have to photostat them all before they turn them over. I don't see how any company, certainly I would never recommend to a client that you turn over original records and books in large volume for 90 days without making a copy of everything before you turn it over.

Mr. FENSTERWALD. Conversely, I don't see how any investigator going into the field can look at a raft of documents and pick out of 20,000 the 200 he wants.

Mr. SIMON. It is done all the time. It is not at all uncommon for two, four, six, or eight FBI agents to spend 2, 3, or 4 months in a company's office going through the files. I am sure Mr. Flurry has shepherded that many times. They will go through them. It may take 2 or 3 months to pick out what they want and then get them photostated. This is done voluntarily in what I think has been described here as 90 percent of the cases. What we suggest is to give them the power to do that very same thing compulsorily in the 10 percent of the cases where people aren't willing to do it voluntarily.

Senator KEFAUVER. Maybe we can work out something along that line you are talking about.

Mr. SIMON. The next suggested change is in 3(b)(2) where S. 167 refers to describing classes of documents and the bar association bill leaves out the words "class or classes" and says, describe the documentary material.

Judge Loevinger said this morning, and I would completely agree with him, that both bills say the same thing, if all the bar association bill means is that you have to say you want the correspondence be-

tween the president of A company and president of B company, with respect to a particular product.

I am sure he would add, "over a particular period of time," and this is all the bar bill means.

On the other hand, I think S. 167 could very well be held to mean that all of the correspondence of the president of X company is a class of document, whether this correspondence related to a personal matter or business matter or anything else. The correspondence of the president of the X company could very well be a class of documents.

I think all either of us has in mind is that it be narrowed to the point where you say, within a limited period of time correspondence between Mr. A and Mr. X on this particular subject and we don't suggest that you have to describe the date the letter was written and what it says in order to get it because, obviously, you wouldn't need the investigative demand if you could describe it that accurately.

Mr. FLURRY. As I understood Judge Loevinger, he said he assumed that is what the bar association bill meant but that could not be determined until the court had passed upon it and we didn't know whether or not the court would agree with that viewpoint.

Mr. SIMON. May I say conversely—

Mr. FLURRY. On your objection to the class or classes of documents, as I see the bill, when you read the section as a whole, they are definitely limited to documents which would be pertinent or relevant, whichever word is used, to the subject matter of the investigation which must be stated. You must state the nature constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto.

I don't think you will ever get by with any court, would you, if you just asked for all of the letters written by the president of X-Y-Z company?

Mr. SIMON. I hope not.

Mr. FLURRY. Because on the face of it, it would be presumed that all the letters written by the president are not going to be relevant or pertinent to the subject matter of the investigation.

So it seems to me that your defect in your specification with respect to the class or classes of documents is limited by the fact that it must be pertinent to the investigation or subject matter of the investigation.

Mr. SIMON. I can conceive, Mr. Flurry, a section 2 monopoly case in which one could make an argument that since at issue is the economic power of this company, in a section 2 of the Sherman monopoly case, that everything the president wrote during a stated period of time in the corporation might be relevant to that issue, and I can conceive of a prosecutor making a demand for all of the correspondence from the president of the company during a period of time.

If we are in agreement that isn't what is intended, it seems to me it is easy to use language that says that.

Mr. FLURRY. Isn't the language in subsection 2 in the same form as subpenas duces tecum are usually drawn up?

Mr. SIMON. Certainly some are in the same form. They are sometimes drawn that way and sometimes quashed.

Mr. FLURRY. The Supreme Court, I think, has held, has it not, that that is sufficient—a description of the document by class—if it is

limited to subject matter and product, for example, and the specified period of time?

Mr. SIMON. Well, sir, maybe I am fortunate but I just recently had a case where almost precisely that language was used and we were arguing in the court that this would include every customer the company had in all 50 States, and that they did business in all 50 States, and the court said this was too broad and the court limited the subpoenas to any four cities that the prosecutor cared to name. But he had complied with this language perfectly and he was covering the whole country.

Mr. FLURRY. Of course, the court will hold that a subpoena is reasonable and it depends upon the circumstances in each case.

Mr. SIMON. Right.

Mr. FLURRY. So that you have in the digest, for example, a tremendous volume of cases with respect to the validity of subpoenas because of the fact they have to be applied in each case to determine whether or not they are reasonable.

Senator KEFAUVER. It seems to me that following the statement of Judge Loevinger and the colloquy that has taken place if in the report it is specified what is meant, this ought to settle the matter fairly well.

Mr. SIMON. The next change, Mr. Chairman, is in 3(b)(4) where S. 167 provides that the custodian should be identified.

The bar association bill provides for the investigator to be identified, and the principal reason for this is the bar association bill contains no provision for a custodian, but would have the documents delivered direct to the investigator. I would like to come back to that in connection with the provisions of S. 167 relating to the custodian.

In section 3(c)(1), S. 167 provides that no such demands shall require the production of any document which would be unreasonable if contained in a subpoena duces tecum.

The bar bill would add the words, "or improper," so there would be no requirement for anything that would be unreasonable or improper if contained in the subpoena.

The reason for this is there is a substantial body of cases in which the courts have distinguished between an unreasonable demand and an improper demand.

Reasonableness relates to whether it is within the scope of the issues of the case. Propriety is a different matter and, if I may give you one illustration, Judge Loevinger talked about the *Hickman* case this morning in which the Supreme Court said an attorney's work product couldn't be required to be produced under the Federal Rules of Civil Procedure. The attorney's work product was not without the scope of the inquiry. It was certainly relevant to the inquiry, but the court said it wasn't proper to have it produced, and I don't think this is adding anything that was not intended by S. 167, but does cover that additional body of law.

Mr. FLURRY. Would a situation like the work papers of the attorney be covered by the bill in subparagraph (2) of 3(c)?

Mr. SIMON. I am not sure. A privileged communication is a communication from a lawyer to his client, or from a doctor to his patient, or vice versa. I don't believe that the cases have held that the attorney's work product is privileged, as such. They have held it is not subject to subpoena. But I don't believe it is on the basis of a

privileged communication because it is no communication at all. It is the work product which he alone saw, but I think at any rate if you had the three provisions in there, the unreasonable or improper plus the privilege, you would cover the entire area.

Now, the six most important changes that the bar bill recommends come in sections 4 and 5, and these six changes are the following:

First, the bar bill has no provision for a custodian. We think there is no need for a custodian and that the documents should be turned over to the antitrust investigator whom I assume will be the lawyer in the Antitrust Division who is handling the case.

Senator KEFAUVER. Do you want to discuss the custodian matter further?

Mr. SIMON. If I may, Mr. Chairman, its relevance comes in with some of these other points, and if I could discuss the six points at once, it will be clearer.

Senator KEFAUVER. All right.

Mr. SIMON. Secondly, we would provide for inspection and copying. I have already explained the reasons for that.

Third, that the demand would be returnable at the respondent's place of business and this is one important reason, Mr. Chairman, for no custodian.

Presumably, under S. 167 there would be one custodian or maybe a custodian and a deputy custodian. This would be proper if all the documents were going to be brought to Washington, but the bar bill provides that the inspection and copying take place at the respondent's place of business, and this makes it necessary, of course, that they be delivered to the antitrust investigator who is working on the particular case since you wouldn't want to have a custodian for every separate case, and we think that if you accept the premise that they are merely to be inspected and copied without putting the burden on the corporation of photostating everything in advance of turning it over, then inherently, the inspection and copying should take place at the company's place of business.

This was expressly recommended in the Attorney General's committee report. It is the way the matter is handled in practice in 90 percent of the cases where voluntary access is given, and we think while putting a slightly greater burden on the Government is far more than offset by the burden it relieves a company of not being required to bring thousands of documents to Washington which it turns out may not be wanted at all.

Fourth, in the same area there is no authority in the bar bill to turn over documents to congressional committees.

On this point I would raise only the question of constitutional doubts. The *Watkins* case holds that a congressional committee may obtain by subpoena duces tecum any document, or oral testimony, that is relative to its legislative inquiry.

To the extent we are talking about documents that are relative to a legislative inquiry of the committee, the committee can obtain the documents themselves by subpoenaing them from whoever has them.

The only documents that the committee could get through S. 167 which they could not otherwise get themselves are documents which are not relevant to a legislative inquiry, and with the broad scope of this committee, I can't offhand think of anything that wouldn't be

relative to a legislative inquiry, but in any event, this would permit you to get documents that are not relevant to a legislative inquiry and that is the only thing it would permit you to get that you couldn't get on your own, and therefore it raises constitutional doubt as to giving you something by this route, that is giving the committee something by this route, it could not obtain directly.

Fifth, the bar association bill provides for a return of the documents at the close of the investigation and provides that in any event they shall be returned in 18 months unless a district court extends the time.

Now the reason for the 18 months is that by statute, a grand jury can survive only for 18 months, and when grand jury documents are subpoenaed they must be returned at the expiration of the life of the grand jury unless the district court extends the time.

This would apply the same rule to the civil documents that now exists as to criminal documents.

Now I think this is most important. In fact, I think this is my most important point that is made it all. In the bar bill, the district court in the district where the corporation resides or has its principal place of business is given exclusive jurisdiction over the subject of the civil investigative demand.

Under S. 167, if a corporation in Oregon or in New Mexico or Wyoming or where have you is served with a civil investigative demand requiring it to produce documents before a custodian located in Washington, D.C., he must, prior to the return date, or in any event within 20 days, come to court and state all of his objections to the demand. If he fails to affirmatively come to court, and he must come to the District of Columbia within either the period prior to the return date or at most 20 days, he loses all rights to contest the validity of the civil investigative demand.

Now the bill provides that if, after the return date, it has not complied, the Attorney General may then go into the district court in the jurisdiction where the company has its principal place of business to enforce the subpoena. But as I would read the bill, at that point, the corporation may not question the propriety of the demand because the Attorney General would not seek enforcement until after the return date, and the bill expressly says that it must question the demand before the return day.

I think this could be very burdensome to small companies. I assume that a large corporation with its own law department could very probably promptly file a petition in the District Court for the District of Columbia to attack the validity of the demand. But many small companies, perhaps, without lawyers on their payrolls, might not realize that unless they did this within 20 days, and raised all the points they wanted to raise, they would forever be barred.

I would like in this connection to point out that while it is true, as Judge Loevinger said and Chairman Dixon said this morning, that the scope of S. 167, so far as the documents it compels the production of, is no greater than section 9 of the Federal Trade Commission Act; in the area I am now talking about, S. 167 goes far beyond section 9 of the Federal Trade Commission Act.

Under section 9, the Commission may ask for a broad variety of documents, but if the company served with the subpoena declines to comply, then the Commission must go into the district court and seek an order of enforcement in the district court, and in the district court proceedings the company can contest the validity of the subpoena.

In fact, under section 9, that is the only way it can contest it. It cannot file a suit of its own. It must wait until the Commission files a proceeding for enforcement and then it can argue every objection in the world that it has to the validity of the Commission's subpoena.

I think it is very important that this bill would cut off that right to attack the validity of the demand when the Government seeks enforcement and say that the price you must pay for questioning the propriety of demand is, one, you do your litigating in the District of Columbia and, two, you state all of your objections to the civil investigative demand within the period prior to the return day, or at most 20 days.

I might add here, Mr. Chairman, this is not in my own self-interest because if all these suits have to be brought in the District of Columbia, we who practice here might be a little better off. But I do think it is a hardship on many companies.

Senator KEFAUVER. As I understand you, the enforcement by the Federal Trade Commission of section 9 has to be brought in the district court, or the district court where the corporation has its principal place of business.

Mr. SIMON. No, sir; I didn't mean to say that.

Senator KEFAUVER. Where does it have to be brought?

Mr. SIMON. It can be brought in the district where the corporation has its place of business or at the place where the subpoena was returnable.

Senator KEFAUVER. The subpoena is returnable to Washington.

Mr. SIMON. In the case of section 9, it is possible, Senator, for the Federal Trade Commission to issue a subpoena to a man in Oregon, returnable in Washington, and thereby make him litigate the question in the courts of the District of Columbia. But even in that case he can wait until the Commission came against him for enforcement, and he would then be free to raise any objection there was to the civil investigative demand.

What the bar association bill proposes is not only that you give him that right, but you give him the additional right of having it attacked in his own area, so to speak, and one reason for this is that all Federal Trade Commission cases are inherently brought out of the Federal Trade Commission at 6th and Pennsylvania Avenue Northwest.

The Department of Justice traditionally brings their cases all over the country. They have their trial staffs in Chicago, New York, San Francisco and Los Angeles. They are equipped to try cases in the district courts all over the country. The Federal Trade Commission isn't.

Mr. FLURRY. Don't they have their field offices also?

Mr. SIMON. Not with lawyers in them, Mr. Flurry.

Mr. FLURRY. I am not familiar with that.

Mr. SIMON. The field offices are staffed by investigators and when the Commission has a case in some other city, they have to send lawyers out to try them.

Senator KEFAUVER. I thought the district attorney brought the case in the district court for the Federal Trade Commission.

Mr. SIMON. They, sir, as a matter of fact by law, the district attorney must be the attorney of record for the Commission in the district court. But in practice, the Commission feels it would like to protect its own interests and they send a Commission lawyer out to either help the district attorney or take over and argue the case for him.

Senator KEFAUVER. Mr. Simon, what has been the experience of the Federal Trade Commission in respect to where they bring their suits for the production of documents under section 9? Do they bring them customarily here in the District, or do they go to the place of business of the corporation?

Mr. SIMON. They customarily go to the place of business of the corporation. I recently had a case where our client was in Stockton, Calif. We were served with a subpoena by the Federal Trade Commission for the production of a lot of documents. The case I mentioned to Mr. Flurry a minute ago. The Commission brought their case in the district court in San Francisco. A Commission lawyer and I both went to San Francisco to try the case, but it was brought in the jurisdiction where the company had its place of business and in the great majority of cases they bring it in the district where the corporation has its principal place of business.

Senator KEFAUVER. All right, sir.

Mr. SIMON. Those six points I wanted to make. And I believe I have covered what I promised you, Mr. Chairman, as to the reason for no custodian, which is that since the bar bill would provide for an examination of the documents at the company's place of business, it would be impractical to have a custodian do it since you would want the attorney handling the case to do it.

Senator KEFAUVER. Do you want to talk further about the custodian matter now?

Mr. SIMON. Yes, sir.

Senator KEFAUVER. I remember in the hearings last year that this custodian matter was gone into in some detail, more than it has today. The Department's position was, and I assume still is, that it wouldn't be very practical to have these documents even for a period of 18 months in the hands of some investigator out in the field. In the first place they all ought to be kept in a central place so they can be given proper study, and in the second place, there are restrictions on who can see them to be sure they are kept confidential, and that wouldn't be possible if they were in the hands of 25 or 30 investigators out in the field.

Mr. SIMON. Yes, Mr. Chairman.

Senator KEFAUVER. In one investigation there might be in one case 20 investigators, and 1 would have one set of documents and the other investigator would have another set of documents, and being in different hands they wouldn't be so secure, and it would be detrimental to the Department and the corporation to have this leak out.

The proper and best thing to do would be to have them all located at one point in the hands of a custodian, or at least a deputy custodian.

Mr. SIMON. Mr. Chairman, I would like to make two points on that: One, I know of no security requirement between people working on a case. If there are 20 lawyers in the Department of Justice working on a given case and any one of them has any information, he is certainly free to discuss it with the other 19.

Senator KEFAUVER. I am not talking about the security of the matter as between the lawyers. I am talking about your security as to somebody who might want to know what is in the documents. It would be greater if there was one person responsible for all of them.

Mr. SIMON. Only in the sense of being able to pin responsibility on one person.

Senator KEFAUVER. And in the sense of having the files locked up and properly kept in one place so they can have a safekeeping of documents. If you have 20 investigators out, each one with a certain number of documents in his pocket or briefcase, you are not going to have the same kind of security as you would have under a custodian.

Mr. SIMON. Mr. Chairman, there are many cases, I think this happens at least once a week where a grand jury subpoena calls for a large volume of documents. They are produced before a grand jury sometimes in many cartons. I am sure Mr. Flurry had this in Alexandria. And after the witness has left them with the grand jury, the Department of Justice gets permission of the court to withdraw them from the grand jury room and bring them back to Washington.

Grand jury documents that were subpoenaed for Los Angeles or New York or any place in between I am sure are now at 10th and Constitution Avenue, NW., and are being studied by the people in the Department of Justice. This has gone on for 70 years without any custodian.

Senator KEFAUVER. I know, but there you have a court where they are taken to. They are taken to the grand jury which is part of the district court.

Mr. SIMON. But they are withdrawn from the court and brought back to Washington to the Department of Justice.

Senator KEFAUVER. In the American Bar Association's bill, as I have read it, the investigator himself is the custodian, at least for the time he has the documents. He is not working under the direction of the district court in that place.

Mr. SIMON. That is right.

Senator KEFAUVER. He is only responsible to Washington.

Mr. SIMON. As I would envisage the way the American bar bill would work, if the Department wanted documents from 10 companies and it was a big enough case to have 10 people working on it, they would send 10 lawyers to these 10 companies and each lawyer would work in that company's office from 9 to 6, or whatever the hours were, going through these documents and reproducing those that he wanted, and when he had finished or as he went along, he would send back to Washington those that he selected that he wanted copies of.

Senator KEFAUVER. Isn't there some merit when they get to Washington to have one person responsible for their safekeeping?

Mr. SIMON. I would see no merit. I have had a lot of experience with the people in the Antitrust Division, and there isn't one I wouldn't trust, and as far as I am concerned I don't think that the client needs one person to say, you are the culprit, if a document is lost or publicized.

Senator KEFAUVER. Let me ask just one further question: If it is just sent to the Department of Justice, which is a fine part of our Government—we don't question the honesty of anybody down there—but how many people work in the Antitrust Division of the Department of Justice?

Mr. FLURRY. I don't know, but I imagine they have over 300 lawyers.

Senator KEFAUVER. In the Antitrust Division, there are 300 people in Washington. If there is a leak or if some paper gets out or is lost, you are in a lot better position, it seems to me, to say, "Well, Mr. Smith, it was your responsibility to keep these papers."

Mr. SIMON. Even if you have a custodian it is going to be run pretty much the way it is now with the lawyer working on the case, checking out a file of documents, and if he loses one this committee may be able to blame the custodian, but the custodian is going to be no more personally to be the one to blame for it than he would be if it weren't a custodian.

Senator KEFAUVER. I can't exactly see, if your other objections are met about not having to send all the original papers in here, how it makes any major difference, even to you.

Mr. SIMON. I certainly agree with that, Mr. Chairman.

Senator KEFAUVER. Mr. Kittrie?

Mr. KITTRIE. I was going to make the same point. Actually, as long as it is just simply a housekeeping provision of the Department of Justice, it wouldn't make any difference to the American Bar Association if there is a custodian or not.

All you want to be sure of is that you have investigators going out to the place of business of the company and making the copies there rather than to send the documents back here.

Mr. SIMON. As a matter of fact, I would assume that the Attorney General could create the office of custodian right now without legislative authority if he wanted to, and certainly this would not be improper.

Senator KEFAUVER. I imagine he could. He could designate the Assistant Attorney General in charge of antitrust as custodian.

I want to talk about another section. You provide that the records have to be sent back in 18 months unless the time is extended.

Mr. SIMON. Yes, which is the grand jury term.

Senator KEFAUVER. I have always understood that with the Federal Trade Commission studying the background of litigation, that it is of considerable value to them to have a library of past transactions, of how litigation was handled at previous times, and what kind of testimony may have been secured back in 1914 or 1920.

What would be the objection to the Department of Justice to the custodian keeping copies of the records?

Mr. SIMON. Mr. Chairman, I was going to say later, and I would like to say in answer to that question, this bill is unprecedented. There is no other instance in Federal law where a prosecutor has been given subpoena power. It is true, as everybody has pointed out, that there are a great many administrative agencies, the ICC, FCC, as well as the FTC, that do have subpoena power, and a great many people in the executive branch of the Government have subpoena power for administrative functions, including the Attorney General himself who has subpoena power in immigration matters.

But these are all matters, whether Agricultural, Federal Trade, Federal Communications, where someone in the executive branch or a quasi-judicial agency is intended to acquire expertise, a rich background of information and knowledge on which he makes policy decisions.

The Federal Trade Commission is not a prosecuting agency. The same people are the judge and the jury, the prosecutor, and they take all those functions and Congress intended them to put them together as experts in the field to make judgments as to whether the policy should be something else or should be this.

The Attorney General in the case of the Antitrust Division is purely a prosecutor. He has no other function. He is not intended to be an expert who decides questions of policy.

As I read the statute, when there is a violation of the antitrust law, the Attorney General is supposed to prosecute, whereas the FTC may say this is not in the public interest and we are going to encourage this rather than that.

So I think you have a big distinction, and the reason I would think the Attorney General doesn't need these documents is, being purely a prosecutor, and when this prosecution is over, the documents should be returned to people from whom they got them, and not like the situation in the Federal Trade Commission.

Senator KEFAUVER. As a matter of practical practice, now, doesn't the Department of Justice at least keep photostats of documents they have secured in evidence?

Mr. SIMON. Well, sir, the law is very unclear on that. There are many cases where people have tried to get their documents back, and in some cases the courts have ordered them to give them back. In those cases they do, but this is a fuzzy area.

Senator KEFAUVER. Mr. Flurry, where a case has been completed, doesn't the Department of Justice make copies of the documents they think might be of some possible use to keep in their files?

Mr. FLURRY. In many, many cases today, particularly where the defendants are cooperating, they accept photostats and as Mr. Simon says, unless the defendant demands in court that the documents be returned when the case is concluded, they are kept in the files of the Department of Justice.

As he said with respect to the return of them on a petition to the court, the courts have not agreed in some instances, of course, that they have granted the petition and in other cases they have denied them. Where they have denied it, those files also remain in the Department of Justice.

Senator KEFAUVER. I won't state the type of case, but we understood there was a long proceeding in a case before the Department of Justice which has been terminated a long time ago. There wasn't anything active taking place in connection with it. I thought it might be helpful in studying a type of matter that we had before us in this committee, too, by way of background, similar to reading a book on the subject, to have an opportunity of examining some parts of the file in that case. I understood there were various memorandums of lawyers which had been made a part of the file.

I asked the Attorney General on that occasion and he said yes, they were all there, but he would not let us see them. He said they

were of value to the Department of Justice in its continuing study of the techniques of antitrust behavior.

Mr. SIMON. Even though the Attorney General returned to the corporation involved the documents or copies of documents, he would still retain the trial briefs and the trial memorandums that the staff prepared which presumably would review all of the important documents that they obtained, and this would be a part of the permanent files.

Senator KEFAUVER. Mr. Kittrie?

Mr. KITTRIE. Since Mr. Simon has been so helpful in analyzing not only technical provisions but also the philosophy behind it, what is the philosophy which would require the Department of Justice to give these documents back, especially since these are copies? If we are adopting your procedure whereby the original is kept by the company, all they are giving is actual copies which they do not need for their own management.

What would be the reason for the Department of Justice to deprive itself of this background information?

Mr. SIMON. When the Department of Justice first asks for documents, grand jury subpoena or otherwise, if the defendant came into court and said, "I have only two pieces of paper in my file relevant to this case," the court would say, "we are not going to make the Attorney General take your word for it; you have to show him these papers so he can decide whether they are relevant."

Once the case is tried and disposed of, whether the Government won or lost the case, there was presumably offered in evidence all the documents that were relevant to the case. Whatever wasn't offered in evidence presumably wasn't relevant.

Now the Attorney General got these other documents in the first place only because the court said he had the right to look at them to see if they were relevant.

Now having looked at them and found they weren't relevant, the only purpose he got them for in the first place is ended. He didn't offer them in evidence at the trial and he should return them to the man who gave them to him.

Mr. KITTRIE. Why should the companies want it back? What interest is being protected by them getting it back?

Mr. SIMON. Well, I am not a very good one to answer that question because I frequently do not agree with businessmen in their feelings of secrecy, but I find it uniform among businessmen, big, small, or in between, that all of the data with respect to their business, they consider it quite confidential. You people here don't consider your salaries confidential because anybody who reads the Congressional Record can find out how much you make, but in private business most people are very jealous about their salaries and how much life insurance they have and what their wife's allowance is, and businessmen feel exactly the same way about their records and it is a uniform and very strong feeling.

There are three other differences in the American Bar Association bill from S. 167 that I would like to call attention to.

One, that already has been referred to, and I think is of importance, is an express provision providing that compliance with the demand

is stayed pending the determination of a properly brought court proceeding.

S. 167 provides that you may bring a court proceeding within 20 days or before the return date. It seems to me inherent in that right is the privilege of not complying until the court has ruled, because if the court had to rule within the 20 days, you could be denied a court review merely by the court not getting around to making a decision within the 20 days.

I would assume inherent in the right to go to court is the right not to comply until the court has made its decision.

In any event, I think this should be spelled out, and I would add if that isn't the fact, then the right to go to court is meaningless because only rarely would a court ever render its decision within the 20 days, and having in mind that in most cases the company might not be able to file its lawsuit until the 18th or 19th day, the company would be at a disadvantage.

Mr. FLURRY. May I ask a question?

Mr. SIMON. Yes.

Mr. FLURRY. Isn't it true under Federal Rules of Civil Procedure that the court has the power to stay the compliance when the petition questioning the demand is filed in a court? Would the court, under civil rules, have the power to stay the compliance with the demand until a decision of the court on its appropriateness is rendered?

Mr. SIMON. I cannot answer that question. There is a similar provision in section 6(b) of the Federal Trade Commission Act, and the second circuit has just held in the *St. Regis Paper* case that if the document isn't filed, if the report isn't filed on the return date, that it is mandatory that the court levy a \$100-a-day penalty.

The district court said these people were in good faith even though they didn't give FTC all it was entitled to, and the court waived the penalty.

I am not sure a court wouldn't say that under S. 167 that Congress didn't intend you to have a stay beyond the 20 days. I would think there is a good chance that the court would say that inherent in the right to review is the right to hold things up until we do review.

Mr. FLURRY. I have been under the impression that the civil rules apply to all civil cases in the Federal courts today regardless of the nature of that civil case, and that when this is created by Congress as a civil procedure, the Rules of Civil Procedure would apply to these just like all other civil cases in the Federal courts. Therefore the power of the court to extend the compliance date would be inherent under the rules in the court.

That is why I have felt that there was no necessity for a specific or expressed provision in here making this act subject to the rules of civil procedure, because it seems to me that since you are creating civil procedure in the act itself, that the moment it is created the rules of civil procedure apply to it.

Mr. SIMON. I would certainly argue that if this bill became law and this situation arose, that that would be true. But I also have no doubt that Congress can, within constitutional limitations, pass legislation which creates a civil remedy that is not within the Rules of Civil Procedure.

Mr. FLURRY. Oh, yes, I agree with you there, but I think it would express exception to the rule. If you just simply create a civil procedure, then I think the rules become applicable to it.

Mr. SIMON. I wouldn't disagree with that.

Mr. FLURRY. Unless the Congress places it outside.

Mr. SIMON. I do think if it is intended what you have just suggested that it would certainly be a lot more secure to put it in the bill.

Senator KEFAUVER. Mr. Simon, don't the rules of civil procedure either expressly say, by the terms of the act, that they apply not only to procedures on the books at the time it was passed, but otherwise?

Mr. SIMON. Yes, Mr. Chairman, but there is nothing in the Federal Rules of Civil Procedure that says the district court may change a time fixed by Congress for the performance of an act.

For example, I cannot go into court and sue the collector of internal revenue on some grounds and then get the court to enter an order extending the time for filing my income tax return beyond April 15.

Now, Congress has fixed the date for the filing of the return, and no court, in a suit against a collector of internal revenue, can extend that date.

Mr. WALLACE. A case like that would be an appeal from the district court to the court of appeals. Within a specified period of time, you have to take certain action or the court loses jurisdiction.

Mr. SIMON. You must apply for certiorari to the Supreme Court within 90 days. Once you have applied, the court can extend your time to file the brief. But if you ask the court on the 92d day to let you in, the Supreme Court has held in a recent case of the Federal Trade Commission that the case was out because the FTC filed the case 2 days too late.

In respect to what Mr. Flurry said, we can't say with any degree of certainty that this is what a court would hold.

Senator KEFAUVER. As I understand it, the American Bar Association's recommendation is that section 5, subsection (b), would only become operative when a petition is filed in the district court.

Mr. SIMON. The exact provision of the Bar Association recommendation is this, Mr. Chairman, and I will read.

Senator KEFAUVER. What section are you reading from?

Mr. SIMON. Page 7 of their proposal. It is subsection (f). It is headed "Stay of Performance Pending Court Proceedings."

It reads:

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 United States District Court of a petition under this Act.

Mr. FLURRY. I would like to ask a question with respect to that. You heard Judge Loevinger speak this morning with respect to the urgency of obtaining information in connection with the 20-day limit on a return date in the case of mergers under section 7 of the Clayton Act.

Senator KEFAUVER. The Celler-Kefauver bill.

Mr. SIMON. Yes.

Mr. FLURRY. Suppose that you have a case where it is urgent under section 7 to obtain the information in order to prevent the mixing or scrambling of assets and so forth, and the demand, or the demandee, if

I may call him such, files, under your section (f), objections to the demands, then automatically the compliance would be stopped until the judge had decided on the petition with respect to the reasonableness and so forth of the demand so that the need for extradition would have been defeated.

I was wondering if it would not be better if that situation could not be taken care of, and at the same time meeting your objection to S. 167, by providing that the petitioner could at the time of filing the petition request the court to extend the time for compliance, and the court then would consider whether or not the balance was in favor of the Government or in favor of the demandee with respect to having the documents furnished before the petition had been decided.

In other words, if the Government shows that there is an emergency existing and that this common harm will be done if immediate action is not obtained, the court can consider that in exercising its discretion as to whether or not the period of compliance would be extended.

Mr. SIMON. Let me say first that I think the district court could hear a petition to quash an investigative demand the day after it was filed in the event of an emergency.

Now we have all seen cases like that; the steel strike is a good example. The court there heard the case within days after it was filed and it was in the Supreme Court the following week. But you might just as well deny the right to go to court if you don't give the man the stay because once he has produced the documents it is an idle gesture to have the court say next week this demand was no good, it should have been quashed. The court would no doubt hold it was moot and then dismiss the case once the documents were produced.

It seems to me in your emergency, the way to handle it is to have the court told how important it was, and the court would give you a hearing that day or the next day, but to produce them is to decide the case.

Secondly, I fear that even if you had S. 167 in its present form on the books today, it wouldn't be of any help to you in the *Bank* case that Judge Loevinger talked about or the case you give, the hypothetical case in questioning Mr. Boyd, in both of those cases the merger had taken place before the Department knew of it.

I know of no merger case where a meaningful request for documents could be complied with in less than 15 or 20 days.

Mr. FLURRY. In the case I gave as an illustration which was an actual case, I did not name the companies involved because I didn't feel it necessary. The Department knew that the agreement to acquire or merge had been entered into but that the merger had not been consummated. They might have acted if they had the means of getting this information.

Mr. SIMON. But two facts are inescapable. Merger cases, the kind we are talking about now, are big enough that nobody can comply with the type of investigative demand that the Department would issue in less than a couple of weeks. You could not search your files in less than that no matter how many people you put on it.

On the other hand, I recall about a year and a half ago when the Standard Oil Co. of Ohio proposed to acquire Leonard Refineries, the Government went in a week or so before the eggs were scrambled, so to speak, and asked for a temporary injunction, and by agreement

the matter was held up, and even under existing law the Government had no difficulty holding up the scrambling until they could get enough evidence. You recall that with the filing of a complaint they promptly issued subpoenas for discovery as provided for under the rules, and ultimately the merger was called off. But even if it hadn't been called off, the Rules of Civil Procedure provided for discovery the moment the Government had filed its complaint, they got very quick discovery there, and you couldn't get any quicker discovery under S. 167. I think we must grant the fact that people just can't push a button and give you all the documents that you are going to need.

Mr. FLURRY. That may be true. I hadn't thought that one through.

Senator KEFAUVER. In the *Bank* case that Judge Loevinger gave, they heard about it and had a man on the train going out to Kentucky to get papers which they thought would be necessary to file a suit, and while the man was on the train the assets were scrambled. Why they didn't send him by plane I don't know.

Mr. SIMON. But even if S. 167 had been the law, it wouldn't have helped him any because presumably by the time their letter got down there the eggs would have been scrambled, unless they sent the letter air mail.

Mr. FLURRY. Of course, that is a gap in which the present pre-merger notification bill would serve a very useful purpose.

Mr. SIMON. Yes; I assume, of course, that if it is a national bank the Comptroller of the Currency had notice of it well in advance, and even if not a national bank, the Federal Deposit Insurance Corporation had notice well in advance, so operating on the theory that someone did hear it, this is all one Government, the Government did hear about it.

Mr. FLURRY. It has been my experience that the Antitrust Division does not always know what the other agencies know.

Mr. KITTRIE. Just one point.

Mr. Flurry has suggested that the provision be possibly one that would say there is no stay unless the person specifically requested that the judge grant an extension.

How about doing it the reverse way whereby there would be a provision requiring there be a stay as long as the court procedure is going on unless the Department of Justice shows the judge that there is an emergency and therefore asks him to proceed?

Mr. SIMON. This would be preferable, but I would still urge even more preferable is to have the judge hear it right now. This doesn't have to be a long, drawn-out matter if it is urgent enough, because if the court denies the stay, the court is denying the petition and therefore instead of merely saying I am denying the stay, I prefer to have the court say what he is frankly doing, and that is denying the entire petition.

Mr. WALLACE. You eliminate the remedy entirely.

Mr. SIMON. That is right.

Mr. KITTRIE. Thank you.

Mr. SIMON. It has already been pointed out there is no provision for criminal penalty in the bar association bill. This was deemed unnecessary on two counts: One is that the court ordering compliance of course has the inherent power to punish for contempt anyone who

doesn't comply; and secondly, section 1001 of the Criminal Code already provides criminal penalties for anyone obstructing justice.

One of the worries that the bar association committee had is many companies have standard procedures for the destruction of documents. The procedure may be that all correspondence is destroyed at the end of 3 years, sales tickets may be destroyed at the end of 5 years. This goes on routinely and automatically it was felt that there should be no possibility that normal, routine destruction of documents prior to the receipt of a civil investigative demand could be held to be a willful destruction.

Now, the Department has contended, and successfully in at least one case, that the destruction of documents after a subpoena has been served on the company is a violation of section 1001 of the Criminal Code, and I would think that it would be analogous that the willful destruction of documents after a civil investigative demand had been served would equally be a violation of section 1001 of the Criminal Code. If this is intended to go beyond that, I think it is unduly harsh. If it is intended only to say that the willful destruction of a document after you have received the investigative demand is a crime, I believe that is already covered by section 1001.

SENATOR KEFAUVER. Mr. Simon, on the section about obstruction of antitrust civil processes, it seems to make it quite clear that it would not apply to a case where there is a system of destroying documents because that wouldn't be the intent to avoid or to obstruct in whole or in part the investigative demands before the fact.

MR. SIMON. The only worry that I would have there, Senator, is under present law the charge of obstructing justice would have to be based upon the willful destruction of documents after the subpoena or civil investigative demand were served.

But let us assume, and I agree this is a hypothetical case and would be hard to prove in court, but just let us assume a company adopted the policy of destroying all correspondence after 3 years and one of the reasons they did it was they didn't want to accumulate a lot of correspondence which someday might be subpoenaed in an antitrust case; but at the time they reached that decision nobody had thought of bringing an antitrust case.

Now would that be within the scope of your language, not your language, but the language of S. 167 which says that anyone who with intent to evade compliance with the civil processes, destroys a document, and so on, and if 20 years prior to that a company routinely destroyed documents, one of the things they had in mind being that someday they might be called upon to produce these documents, what then?

MR. KITTRIE. At line 14, immediately after the word "any" could you add the words "with any pending civil investigative demand?"

MR. SIMON. It would help a lot.

I have one suggestion, Mr. Chairman, that I would like to make on my own and I hasten to emphasize what I am about to say I do not say for the bar association, only because it has never been considered by it. But it seems to me, and everything I have heard today confirms wholly, that the answer to this problem is a simple one-sentence statute that would give the Attorney General the power to obtain a civil subpoena comparable to a grand jury subpoena. For 175 years now

the Attorney General has been getting all the documents he needs in criminal cases by grand jury subpoena and nobody questions the adequacy of the grand jury subpoena.

We all agree that he shouldn't be forced to go to the grand jury when he wants to bring what is properly a civil case. I would suggest that if the Attorney General needs some documents which he can't get that he be authorized to go to the district court just as he would go to the district court in a criminal case and file a petition in the district court asking for a civil subpoena; and I would suggest that the statute say he be permitted to get anything on a civil subpoena that he could get in a grand jury criminal subpoena; the law would be the same; and that it be returnable before any person named by the court for this purpose and that the Attorney General be permitted to nominate someone before whom it would be returned.

I assume that in 99 cases out of 100 the district court would accept the Attorney General's nominee.

In this case, all the body of law that we have built up over 100 years on the propriety of grand jury subpoenas would be applicable. We wouldn't need any safeguards because we would have in mind that the Congress would be legislating against the background of more than 100 years of grand jury subpoenas and more than 70 years of Sherman Act subpoenas behind us. The bill can say that anything the Attorney General could get by a criminal antitrust subpoena he should be permitted to have in a civil subpoena returnable before anyone the court designates, with the Attorney General having the right to nominate.

Senator KEFAUVER. By saying anything that he can get under the civil proceeding, he might not want the same documents under civil procedure that he would want under criminal procedure.

Mr. SIMON. I didn't mean the same documents, but the same test of relevancy, the same test of propriety.

In other words, instead of spelling out in 12 pages the safeguards that you intend to give to the respondent, you would merely say that the body of Federal district court law that has developed over these years as to what the court will and will not allow shall be applicable and I think the courts in the criminal antitrust cases have consistently given the Department of Justice everything they needed. They might only admit they got it in 99 percent of the cases but I think even they would admit that generally the courts give them all they need and we would have a Federal district judge who would decide whether the Government needs these documents for a civil case; applying the very same standards that the courts have been applying for over 100 years in criminal cases.

Senator KEFAUVER. We go along with you on the idea that a Department of Justice investigator should come in and have the right to see the documents and make copies of the ones that he wants and that would comply with what is intended here. Then, by requiring the defendant to answer a petition in court, would you be placing an undue burden on him and perhaps the stigma of being a defendant in a lawsuit?

Mr. SIMON. I do not believe so, sir.

Senator KEFAUVER. In other words, I should think corporation X would a whole lot rather have an investigator come in and make copies

of such documents as he thought pertinent rather than seeing a notice of a lawsuit in the paper that he be required to bring in certain documents, and have to employ a lawyer.

Mr. SIMON. May I suggest, Mr. Chairman, that all of this, whether under S. 167 or under the procedure that I have suggested, would apply only to a company who refuses to do this voluntarily.

I assume that even if S. 167 became law, that the Department would still, in the first place, initially ask for the data voluntarily so this applies only to the company who says that it is not going to give the documents up voluntarily and I think they would be better off in that case, having the protection of the Federal district court than under the present bill. The civil investigative demand is drawn by the Department of Justice and nobody sees it except the Department of Justice until it is served, whereas when they prepare a grand jury subpoena they have to take it to a Federal district judge to get him to approve it and I think in most cases, the judge reads it before he approves it.

In every case they know he is likely to read it before he approves it and I think these are safeguards for the citizen against an unreasonable demand. My suggestion would really put the power, the very broad power, in the hands of the Federal district judges and I think that is where it ought to be so that both sides get protection.

Mr. FENSTERWALD. Under your bill, are any original documents taken back to Washington or are they all photostats or reproductions?

Mr. SIMON. Reproductions.

Mr. FENSTERWALD. There wouldn't be anything for the custodian to be custodian of, then, other than the reproductions.

Mr. SIMON. That is right.

Mr. FENSTERWALD. So there wouldn't be much point in having a custodian if we adopted that system.

Mr. SIMON. That is right.

Mr. FENSTERWALD. And if we adopt it, at what point would the person being served go to court—when the FBI man shows up and says "I want to look at your files?"

Mr. SIMON. In the bar association proposal he would have his choice of going to court or quash it or waiting, or saying to the Government "I respectfully decline" and having the Government go to court; and he could then attack the scope of the demand when the Government applied for enforcement; which is exactly the procedure under section 9 of the Federal Trade Commission Act.

Mr. FENSTERWALD. As I understand it, under S. 167 they are required to produce certain documents.

Under the bar association bill, someone comes in and examines the documents and he reproduces the ones they want. Isn't there a difference there?

Mr. SIMON. There are two different areas. First, there is getting into court. Under S. 167 if the respondee wants to attack the demand in court, it must affirmatively go to court within 20 days or prior to the return date; and if it fails to go to court within that time, it has lost its right to question the demand. It may not question the demand when the Attorney General proceeds against him for enforcement, assuming he has failed to comply.

Under the bar bill when the Attorney General went to court to enforce the demand, the respondee could defend on the grounds that it was an unreasonable demand and have the court hear him then.

Now this is as to court proceedings. As to compliance, whether the compliance is before or after the court proceedings, under S. 167 the respondee would deliver the original documents to the custodian, presumably in Washington.

Now the custodian would take the original documents and keep them for as long as he needed them.

Under the bar association bill, on the date for compliance, again whether it be before or after court proceedings, the respondee would deliver the original documents at his own place of business to the antitrust investigator who would then have the right to examine each of them and make copies of any he wanted copied and the antitrust investigator would then take back with him, presumably to Washington, the copies that he had made.

Mr. FENSTERWALD. Or the respondee would say, "No, I am not going to let you look at these. I refuse your demand."

Mr. SIMON. And then we go back to what we talked about first. We go to court. I was distinguishing the court proceeding from compliance whether before or after a court proceeding.

Mr. FENSTERWALD. I just wanted to be sure that the record was clear on these differences.

Mr. WALLACE. It also eliminates any other form but that where the defendant resides. With the custodian bill, he could be here in Washington. They had to come to Washington from Omaha.

Mr. SIMON. Under S. 167, if the Attorney General is going to enforce compliance, he must go to the place where the corporation has its principal place of business, but by that time they have lost the right to contest the demand.

Mr. WALLACE. That is to enforce the compliance but not for modification or objection filed by the respondee.

Mr. SIMON. That is right. The objection may be raised only in the district where the custodian has his office which is presumably in Washington.

Mr. WALLACE. That satisfies at least one of the objections that we have been raising today.

Senator KEFAUVER. Mr. Collins, do you have any questions?

Mr. TOM COLLINS. No, sir.

Mr. WALLACE. Can I ask just one question?

Senator KEFAUVER. Yes.

Mr. WALLACE. Do you think the Committees of the Judiciary need this information from the Department of Justice, especially when you say that they are prosecutor and there may be some interference in legislative and executive branches of the Government.

Mr. SIMON. I have such a high admiration for the staff of this committee that I don't think you need any help from anybody, including the Department of Justice.

Senator KEFAUVER. That is a good note to end the hearing on.

What I think we should do in this matter is to ask Mr. Flurry or Mr. Fensterwald to send the testimony this afternoon down to Judge Loevinger for his consideration and for his response on the various points that have been made and give him such reasonable

me as he needs. Let us say we will keep the record open for 1 week. That will be for the purpose of receiving his response and any other submissions that might be made.

As far as I know, we have had no other requests for witnesses to be heard on this bill.

Mr. CHUMBRIS. Are you going to keep the record open for about a week in case some people want to submit a written statement?

Senator KEFAUVER. Yes.

Very well, that will conclude the hearing.

(Whereupon, at 5:10 p.m., the committee adjourned.)

Intentional Blank Page

EXHIBITS AND APPENDIX

ANTITRUST LAW OF HAWAII

H. B. No. 2
H. D. 2
S. D. 2
C. D. 1

AN ACT Relating to the regulation of the conduct of trade and commerce

Be it enacted by the Legislature of the State of Hawaii:

SECTION 1. *Definitions.* As used in this Act.

(1) "Commodity" shall include, but not be restricted to, goods, merchandise, produce, choses in action and any other article of commerce. It also include trade or business in service trades, transportation, insurance, banking, lending, advertising, bonding and any other business.

(2) "Person" or "persons" includes individuals, corporations, firms, trusts, partnerships and incorporated or unincorporated associations, existing under or authorized by the laws of this State, or any other state, or any foreign country.

(3) "Purchase" or "buy" includes, "contract to buy," "lease," "contract to lease," "acquire a license" and "contract to acquire a license."

(4) "Purchaser" includes the equivalent terms of "purchase" and "buy."

(5) "Sale" or "sell" includes "contract to sell," "lease," "contract to lease," "license" and "contract to license."

(6) "Seller" includes the equivalent terms of "sale" and "sell."

SECTION 2. *Combinations in Restraint of Trade, Price-Fixing and Limitation of Production Prohibited.*

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is declared illegal.

(2) Without limiting the generality of the foregoing no person, exclusive of members of a single business entity consisting of a sole proprietorship, partnership, trust or corporation, shall agree, combine, or conspire with any other person or persons, or enter into, become a member of, or participate in, any understanding, arrangement, pool, or trust, to do, directly or indirectly, any of the following acts, in the State or any section of the State:

(a) fix, control, or maintain, the price of any commodity;

(b) limit, control, or discontinue, the production, manufacture, or sale of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;

(c) fix, control, or maintain, any standard of quality of any commodity for the purpose or with the result of fixing, controlling or maintaining its price;

(d) refuse to deal with any other person or persons for the purpose of effecting any of the acts described in (a) to (c) of this subsection.

(3) Notwithstanding the foregoing subsection (2) and without limiting the application of the foregoing subsection (1), it shall be lawful for a person to enter into any of the following restrictive covenants or agreements ancillary to a legitimate purpose not violative of this Act, unless the effect thereof may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State:

(a) A covenant or agreement by the transferor of a business not to compete within a reasonable area and within a reasonable period of time in connection with the sale of said business;

(b) A covenant or agreement between partners not to compete with the partnership within a reasonable area and for a reasonable period of time upon the withdrawal of a partner from the partnership;

(c) A covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business or agricultural uses, or covenant or agreement of the lessee to be restricted in the use of the leased premises to certain business uses and of the lessor to be restricted in the use of premises reasonably proximate to any such leased premises to certain business uses;

(d) A covenant or agreement by an employee or agent not to use the trade secrets of the employer or principal in competition with his employer or principal, during the term of the agency or thereafter, or after the termination of employment, within such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

(4) Any price-fixing arrangement authorized under sections 205-20 through 205-26, Revised Laws of Hawaii 1955, as amended, shall be excluded from the prohibition of this section.

SECTION 3. *Requirements and output contracts; tying agreements.*

No person shall sell or buy any commodity, or fix a price or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the other person or persons shall not deal in the commodity of a competitor of the seller, or shall not deal with the competitor of the purchaser, as the case may be, when the effect of the sale or purchase or the condition, agreement, or understanding, may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the State.

SECTION 4. *Refusal to deal.*

No person shall refuse to sell any commodity to, or to buy any commodity from, any other person or persons, when the refusal is for the purpose of compelling or inducing the other person or persons to agree to or engage in acts which, if acceded to, are prohibited by other sections of this Act.

SECTION 5. *Mergers, Acquisitions, Holdings and Divestitures.*

(1) No corporation shall acquire and hold, directly or indirectly, from and after the effective date of this Act, the whole or any part of the stock or other share capital of any other corporation, or the whole or any part of the assets of any other corporation where the effect of such acquisition and holding may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. Provided that this subsection shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this subsection prevent a corporation from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporation, when the effect of such formation is not substantially to lessen competition.

(2) No corporation shall hold directly or indirectly, the whole or any part of the stock or other share capital of any other corporation, or the whole or any part of the assets of any other corporation, acquired prior to the effective date of this Act, where the effect of such holding is substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. Where the Court shall find that the holding of such stock, share capital, or assets is substantially to lessen competition or tend to create a monopoly, and is therefore not in the public interest, then the Court shall order the divestiture or other disposition of such stocks, share capital, or assets of such corporation, and shall prescribe a reasonable time, manner and degree of such divestiture or other disposition thereof, provided that the court shall not order the divestiture or other disposition of the assets of such corporation unless it is necessary to eliminate the lessening of competition.

SECTION 6. *Interlocking Directorates and Relationships.*

(a) That from and after six months from the effective date of this Act no person shall be at the same time a director, officer, partner, or trustee in any two or more firms, partnerships, trusts, associations or corporations or any combinations thereof, engaged in whole or in part in commerce, if such firms, partnerships, trusts, associations or corporations or any combination thereof, are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of this Act.

(b) From and after six months from the effective date of this Act, no person shall be at the same time a director, officer, partner, or trustee in any two or more non-competing firms, trusts, partnerships or corporations or any combination thereof, any one of which has a total net worth aggregating more than \$100,000, or a total net worth of all of the business entities aggregating more than \$300,000, engaged in whole or in part in trade or commerce in this State where the effect of a merger between such business entities whether legally possible or not may be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the State. The total net worth herein mentioned with reference to a corporation shall consist of the capital, surplus and undivided profits; the total net worth with reference to a firm or partnership shall consist of the capital account; and the total net worth with reference to a trust shall consist of the principal of the trust.

This subsection shall not apply to an interlocking directorship between a bank doing a banking business and any other business firm or entity.

(c) No person shall by the use of a representative or representatives effectuate the result prohibited in the preceding subsections where the act or acts of such representative or representatives acting in their capacities as directors, officers, partners or trustees of such business entities indicate an attempt directly or indirectly to manipulate the conduct of the business entities to the detriment of any of such entities and to the benefit of any other entity in which such person has an interest.

(d) The validity or invalidity of any act of any director, officer or trustee done by such director, officer or trustee while occupying such position in violation of the provisions of this section shall be determined by the statutory and common law of the State of Hawaii relating to corporations, trust or association as the case may be except that it shall not be affected by the provisions of Section 1-9, Revised Laws of Hawaii 1955. The non-applicability of Section 1-9, Revised Laws of Hawaii 1955 shall be limited to this section only.

The state attorney general may bring an action at any time to cause a director, officer or trustee who may be occupying such position in violation of this section, to vacate the office or offices to effectuate the termination of the prohibited interlocking relationship. The state attorney general or any person affected by any act or acts of such director, officer or trustee may move to cause such director, officer or trustee who may be occupying such position in violation of this section to vacate the office or offices to effectuate the termination of the prohibited interlocking relationship, in any action or proceeding in which the person affected, and any such director, officer, or trustee, or the legal entities in which such director, officer or trustee holds office are parties to the action or proceeding, without the necessity of bringing a separate action to try title to office. The court upon finding that a director, officer or trustee is holding office in contravention of this section shall order such person to terminate the interlocking relationship, and in the case of a trustee, the court may, when it deems appropriate, order the state attorney general to institute proceedings for the removal of such trustee from his office, and the findings of the court of such violation of this section by such trustee shall be a sufficient cause of action to maintain such proceeding. Any remedy provided in this section shall not limit and is in addition and cumulative to any other remedy available under any other section of this Act or any other law.

SECTION 7. *Monopolization.*

No person shall monopolize, or attempt to monopolize or combine or conspire with any other person to monopolize any part of the trade or commerce in any commodity in any section of the State.

SECTION 8. *Exemption of Labor Organizations.*

The labor of a human being is not a commodity or article of commerce. Nothing contained in this Act shall be construed to forbid the existence and operation of labor organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profits, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, lawfully carrying out the legitimate objects thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under this Act.

The provisions of this Act shall not apply to the conduct or activities of labor organizations or their members which conduct or activities are regulated by federal or state legislation or over which the National Labor Relations Board or the Hawaii Employment Relations Board have jurisdiction.

SECTION 9. *Exemption of certain cooperative organizations; insurance transactions; approved mergers of federally regulated companies.*

(1) Nothing contained in this Act shall be construed to forbid the existence and operation of fishery or agricultural cooperative organizations or associations instituted for the purpose of mutual help, and which are organized and operating under Chapters 175A or 176, Revised Laws of Hawaii 1955, as amended, or which conform and continue to conform to the requirements of the Capper-Volstead Act (7 U.S.C. 291 and 292), provided that if any such organization or association monopolizes or restrains trade or commerce in any section of this State to such an extent that the price of any fishery or agricultural product is unduly enhanced by reason thereof the provisions of this Act shall apply to such acts.

(2) This Act shall not apply to any transaction in the business of insurance which is in violation of any section of this Act if such transaction is expressly permitted by the insurance laws of this State; and provided further that nothing contained in this section shall render this Act inapplicable to any agreement to boycott, coerce, or intimidate or act of boycott, coercion or intimidation.

(3) This Act shall not apply to mergers of companies where such mergers are approved by the federal regulatory agency which has jurisdiction and control over such mergers.

SECTION 10. *Contracts void.*

Any contract or agreement in violation of this Act is void and is not enforceable at law or in equity.

SECTION 11. *Suits by persons injured; amount of recovery, injunctions.*

(1) Any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this Act:

(a) may sue for damages sustained by him, and, if the judgment is for the plaintiff, he shall be awarded threefold damages by him sustained and reasonable attorneys' fees together with the costs of suit; and

(b) may bring proceedings to enjoin the unlawful practices, and if the decree is for the plaintiff, he shall be awarded reasonable attorneys' fees together with the costs of suit.

(2) The remedies provided in this section are cumulative and may be sought in one action.

SECTION 12. *Suits by the State; amount of recovery.*

Whenever the State of Hawaii, any county, or city and county is injured in its business or property by reason of anything forbidden or declared unlawful by this Act, it may sue to recover actual damages sustained by it. The Attorney General may bring an action on behalf of the State or any of its political subdivisions or governmental agencies to recover the damages provided for by this section, or by any comparable provisions of federal law.

SECTION 13. *Injunction by attorney general.*

The attorney general may bring proceeding to enjoin any violation of the provisions of this Act.

SECTION 14. *Violation a misdemeanor.*

(1) Any person who violates any of the provisions of Sections 2, 4, 7 or 15 of this Act, including any principal, manager, director, officer, agent, servant or employee, who had engaged in or has participated in the determination to engage in an activity that has been engaged in by any association, firm, partnership, trust, or corporation, which activity is a violation of any provision of Sections 2, 4, 7 or 15 of this Act, is punishable if a natural person by a fine not exceeding \$10,000 or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court; if such person is not a natural person then by a fine not exceeding \$20,000.

(2) The actions authorized by this section and Section 16 shall be brought in the circuit court of the circuit where the offense occurred.

SECTION 15. *Individual liability for corporate act.*

Whenever a corporation violates any of the penal provisions of this Act, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who have authorized, ordered or done any of the acts constituting in whole or in part such violation.

SECTION 16. *Investigation.*

(1) Whenever it appears to the attorney general, either upon complaint or otherwise, that any person or persons, has engaged in or engages in or is about to engage in any act or practice by this Act prohibited or delivered to be illegal, or that any person or persons, has assisted or participated in any plan,

scheme, agreement or combination of the nature described herein, or whenever he believes it to be in the public interest that an investigation be made, he may in his discretion either require or permit such complainant to file with him a statement in writing under oath or otherwise as to all the facts and circumstances concerning the subject matter which he believes to be in the public interest to investigate. The attorney general may also require such other data and information from such complainant as he may deem relevant and may make such special and independent investigations as he may deem necessary in connection with the matter.

(2) Whenever the attorney general has reason to believe that any person may be in possession, custody, or control of any documentary material, objects, tangible things or information (hereinafter referred to as "documentary evidence") pertinent to any investigation of a possible violation of this Act and before the filing of any complaint in court, he may issue in writing, and cause to be served upon such person, an investigative demand requiring such person to produce such documentary evidence for examination.

(3) Each such demand shall:

(a) state that an alleged violation of the section or sections of this Act which are under investigation;

(b) describe and fairly identify the documentary evidence to be produced, or to be answered;

(c) prescribe a return date within a reasonable period of time during which the documentary evidence demanded may be assembled and produced;

(d) identify the custodian to whom such documentary evidence are to be delivered; and

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

(4) No such demand shall:

(a) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of this State in aid of a grand jury investigation of such possible violation; or

(b) 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 this State in aid of a grand jury investigation of such possible violation.

(5) Any such demand may be served by any attorney employed by or other authorized employee of this State at any place within the territorial jurisdiction of any court of this State.

(6) Service of any such demand or of any petition filed under subsection 15 of this section, may be made upon a partnership, trust, corporation, association, or other legal entity by:

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

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

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

(7) A verified return by the individual service 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 or petition.

(8) The attorney general shall designate a representative to serve as custodian of any documentary evidence, and such additional representatives as he shall determine from time to time to be necessary to serve as deputies to such officer.

(9) Any person upon whom any demand issued under subsection (2) has been duly served shall deliver such documentary evidence 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 evidence to be made:

(a) at any place outside the territorial jurisdiction of this State without the consent of the person upon whom such demand was served; or

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

(10) The custodian to whom any documentary evidence 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 section. The custodian shall issue a receipt for such evidence received. The custodian may cause the preparation of such copies of such documentary evidence 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 evidence for examination. While in the possession of the custodian, no such evidence so produced shall be available for examination, without the consent of the person who produced such evidence, by any individual other than a duly authorized representative of the office of the attorney general. Under such reasonable terms and conditions as the attorney general shall prescribe, documentary evidence while in the possession of the custodian shall be available for examination by the person who produced such evidence or any duly authorized representative of such person.

(11) Whenever any attorney has been designated to appear on behalf of this State before any court or grand jury in any case or proceeding involving any alleged violation of this Act, the custodian may deliver to such attorney such documentary evidence 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 this State. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary evidence so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(12) Upon the completion of the investigation for which any documentary evidence was produced under this section, and any case or proceeding arising from such investigation, the custodian shall return to the person who produced such evidence all such evidence (other than copies thereof made by the attorney general or his representative pursuant to subsection (10) of this section) which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(13) When any documentary evidence has been produced by any person under this section for use in any 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 court of such investigation, such person shall be entitled, upon written demand made upon the attorney general to the return of all documentary evidence (other than copies thereof made by the attorney general or his representative pursuant to subsection (10) of this section) so produced by such person.

(14) In the event of the death, disability, or separation from service in the office of the attorney general of the custodian of any documentary evidence produced under any demand issued under this section, or the official relief of such custodian from responsibility for the custody and control of such evidence, the attorney general shall promptly designate another representative to serve as custodian thereof, and transmit notice in writing to the person who produced such evidence as to the identify and address of the successor so designated. Any successor so designated shall have with regard to such evidence all duties and responsibilities imposed by this section 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.

(15) Whenever any person fails to comply with any investigative demand duly served upon him under subsection (6) of this section, the attorney general, through such officers or attorneys as he may designate, may file, in the district court of any county 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 county such petition should be filed in the county in which such person maintains his principal place of business, or in such other county in which such person transacts business as may be agreed upon by the parties to such petition. Such person shall be entitled to be heard in opposition to the granting of any such petition.

(16) 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 county 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 section, or upon any constitutional right or privilege of such person.

If the court does not set aside such demand, such person shall be assessed court cost and reasonable attorneys' fees and such other penalties not greater than those specified under Section 14 of this Act. If the Court sets aside such demand, such person shall be given the total cost of such petition.

(17) At any time during which any custodian is in custody or control of any documentary evidence delivered by any person in compliance with any such demand, such person may file, in the district court of the county 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 section.

(18) Whenever the attorney general has reason to believe that any person has information pertinent to any investigation of a possible violation of this Act and before the filing of any complaint in court, he may seek a subpoena from the clerk of the district court in the county where such person resides, is found or transacts business, requiring his presence to appear before a district magistrate licensed to practice law in the Supreme Court of this State to give oral testimony under oath on a specified date, time and place. The clerk of the district court may also issue a subpoena duces tecum under like conditions at the request of the attorney general. Any witness subpoenaed shall be entitled to be represented by counsel and any subpoena shall state the alleged violation of the section or sections of this Act. The scope and manner of examination shall be in accordance with the rules governing depositions as provided in the Hawaii Rules of Civil Procedure. The person subpoenaed may at any time before the date specified for the taking of the oral testimony, move to quash any subpoena before said district magistrate from whose court any subpoena was issued for such grounds as may be provided for quashing a subpoena in accordance with the rules governing depositions as the Hawaii Rules of Civil Procedure.

(19) No person shall be excused from attending an inquiry pursuant to the mandates of a subpoena, or from producing any documentary evidence, or from being examined or required to answer questions on the ground of failure to tender or pay a witness fee or mileage unless demand therefor is made at the time testimony is about to be taken and as a condition precedent to offering such production or testimony and unless payment thereof be not thereupon made. The provisions for payment of witness fee and mileage do not apply to any officer, director or person in the employ of any person or persons whose conduct or practices are being investigated. No person who is subpoenaed to attend such inquiry, while in attendance upon such inquiry, shall, without reasonable cause, refuse to be sworn or to answer any question or to produce any book, paper, document, or other record when ordered to do so by the officer conducting such inquiry, or fail to perform any act hereunder required to be performed.

(20) Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part, by any person with any investigative demand made under this section, wilfully removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary evidence 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 \$5,000.00 or imprisoned not more than one year, or both. Any person wilfully failing to comply with a subpoena issued pursuant to subsection (18) of this section shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(21) Nothing contained in this section shall impair the authority of the attorney general or his representatives to lay before any grand jury impaneled before any circuit court of this State any evidence concerning any alleged violation of this Act, invoke the power of any such court to compel the production of any evidence before any such grand jury, or institute any proceedings 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.

(22) As used in this section the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

(23) It shall be the duty of all public officers, their deputies, assistants, clerks, subordinates and employees to render and furnish to the attorney general, his deputy or other designated representatives when so requested, all information and assistance in their possession or within their power.

(24) Any officer participating in such inquiry and any person examined as a witness upon such inquiry who shall wilfully disclose to any person other than the attorney general the name of any witness examined as a witness upon such inquiry or any other information obtained upon such inquiry, except as so directed by the attorney general shall be punishable by a fine of not more than \$1,000 or imprisonment for not more than one year, or both.

(25) The enumeration and specification of various processes do not preclude or limit the use of processes under the Hawaii Rules of Civil Procedure but are deemed to be supplementary to said rules or the use of any other lawful investigative methods which are available.

SECTION 17. *Additional parties defendant.*

Whenever it appears to the court before which any civil proceeding under this Act is pending that the ends of justice require that other parties be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside, engage in business, or have an agent, in the circuit where such action is pending.

SECTION 18. *Duty of the attorney general; duty of county attorney, etc.*

(1) The attorney general shall enforce the criminal and civil provisions of this Act. The county attorney of any county, the prosecuting attorney and the corporation counsel of the city and county shall investigate and report suspected violations of the provisions of this Act to the attorney general.

(2) Whenever the provisions of this Act authorize or require the attorney general to commence any action or proceedings, including proceedings under Section 16 of this Act, the attorney general may require the county attorney, prosecuting attorney, or corporation counsel, of any county or city and county, holding office in the circuit where the action or proceeding is to be commenced or maintained, to maintain the action or proceeding under the direction of the attorney general.

SECTION 19. *Court and venue.*

Any action or proceeding, whether civil or criminal, authorized by the provisions of this Act shall be brought in the circuit court for the circuit in which the defendant resides, engages in business, or has an agent, unless otherwise specifically provided herein.

SECTION 20. *Judgement in favor of the State of evidence in private action; suspension of limitation.*

(1) A final judgment or decree rendered in any civil or criminal proceeding brought by the State under the provisions of this Act shall be prima facie evidence against such defendant in any action or proceeding brought by any other party under the provisions of this Act, or by the State, county or city and county, under Section 12, against such defendant as to all matter respecting which said judgement or decree would be an estoppel as between the parties thereto. This section shall not apply to consent judgments or decrees entered before any complaint has been filed: provided, however, that when a consent judgment or decree is filed, the state attorney general shall set forth at the same time the alleged violations and reasons for entering into the consent judgment or decree. No such consent judgment or decree shall become final until sixty days from the filing of such consent judgment or decree or until the final determination of any exceptions filed, as hereinafter provided, whichever is later. During such sixty day period any interested party covered under Section 11 of this Act may file verified exceptions to the form and substance of said consent judgment or decree, and the court, upon a full hearing thereon, may approve, refuse to enter, or may modify such consent judgment or decree.

(2) A plea of nolo contendere in any criminal action under this Act shall have the effect of admitting each and every material allegation in the complaint, and a final judgment or decree rendered pursuant to such plea shall be prima facie evidence against such defendant in any action or proceeding brought by any other party under the provisions of this Act, or by the State, county or city and county, under Section 12 against such defendant as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

(3) Whenever any civil or criminal proceeding is instituted by the State to prevent, restrain, or punish violations of any provisions of this Act, but not including an action under Section 12, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter.

SECTION 21. *Immunity from prosecution.*

(1) In any investigation brought by the attorney general pursuant to Section 16 of this Act, no individual shall be excused from attending, testifying, or producing documentary materials, objects or tangible things in obedience to an investigative demand, subpoena or under order of court on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to any penalty.

(2) No individual shall be criminally prosecuted or subjected to any criminal penalty under this Act or on account of any transaction, matter or thing concerning which he may so testify or produce evidence in any investigation brought by the attorney general pursuant to Section 16 of this Act, or any county attorney, prosecuting attorney, or corporation counsel of any county or city and county, provided no individual so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying.

SECTION 22. *Limitation of actions.*

Any action to enforce a cause of action arising under the provisions of this Act shall be barred unless commenced within four years after the cause of action accrues, except as otherwise provided in Section 20 of this Act. For the purpose of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of such violation.

SECTION 23. *Severability.*

If any portion of this Act or its application to any person or circumstances is held to be invalid for any reason, then the remainder of this Act and each and every other provision thereof shall not be affected thereby.

SECTION 24. *Effective Date.*

This Act shall take effect on August 21, 1961.

STATEMENTS

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

COMMITTEE ON TRADE REGULATION

JUNE 21, 1961.

REPORT ON S. 167 "ANTITRUST CIVIL PROCESS ACT"

(87th Cong., 1st sess.)

The Committee on Trade Regulation of the Association of the Bar of the City of New York submits this report to the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary recommending amendments to S. 167. Even though this committee now approves the objectives of the bill as proposed by the Attorney General's National Committee to Study the Antitrust Laws, it strongly opposes two provisions of S. 167 which were not included in the proposal of the Attorney General's committee, and which are unrelated to the objectives of the bill. The first provision is section 2(a) (3) which proposes to include section 3 of the Robinson-Patman Act within the definition of "antitrust law." The second provision is in section 4(c) which authorizes the Attorney General to make available to the Senate and House Committees on the Judiciary, material obtained by use of a civil investigative demand. Our reasons for advocating that the two provisions should be deleted are set forth below:

OBJECTIONS TO INCLUDING SECTION 3 OF THE ROBINSON-PATMAN ACT WITHIN DEFINITION OF THE "ANTITRUST LAWS"

This bill would include within the definition of "antitrust laws" section 3 of the Robinson-Patman Act (15 U.S.C. 13a). In *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373 (1958), the Supreme Court held that section 3 is not one of the "antitrust laws." So far as we are aware there does not appear to have

been any testimony presented at hearings on the bill or any predecessor bill either for or against this treatment of section 3. Nor do either the majority or minority reports of the Senate Judiciary Committee with respect to S. 716 in the 86th Congress refer to it. Although the bill indicates that the inclusion of section 3 in the definition of "antitrust laws" is limited to "As used in this act" there is danger that it might erroneously be construed as intending to overrule the *Nashville Milk* case.

Since the purpose of S. 167 relates solely to civil suits, the inclusion in it of the solely criminal provision section 3 of the Robinson-Patman Act is highly irregular. There has been considerable controversy with respect to this section, sharply illustrated by the recommendation of the Attorney General's committee that it be repealed. Its report stated:

"In our view, 18 years of section 3 enforcement have neither furthered the national interest nor realized the congressional purpose. Enforcement organs of the United States have abstained from invoking this provision. Private plaintiffs have emerged as the principal enforcers of its difficult prohibitions, rushing in where the Government perhaps fears to tread. Yet by challenging apparently normal competitive price reductions as predatory slashes under this nebulous law, indiscriminate private enforcement may well impede the downward price adjustments which mark the effective working of a competitive system. (Report of the Attorney General's National Committee to Study the Antitrust Laws, Mar. 31, 1955, p. 200.)

* * * * *

"At all events, we recommend repeal of section 3 as dangerous surplusage. Doubts besetting section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law. It does not serve the public interest of antitrust policy" (p. 201).

This committee strongly urges that subparagraph (a) (3) of section 2 of this bill be deleted. Any proposal which might conceivably be construed to make section 3 of the Robinson-Patman Act a part of the antitrust law for purposes of private suits, should be subject to public hearings called for that specific purpose. The inclusion of this provision in this bill is unwarranted, and is completely unrelated to the purpose of the bill.

OBJECTION TO MAKING MATERIAL AVAILABLE TO COMMITTEES OF CONGRESS

At the time hearings were held on the predecessor bill S. 716 (Mar. 3, 1959), it contained no provision for the Attorney General to make available to committees of Congress material produced under authority of the bill. The suggestion was first made during the course of the hearing by counsel for the Senate subcommittee. Assistant Attorney General Victor R. Hansen was quite hesitant in commenting, but expressed concern as to the effect such a provision might have upon the attitude of companies complying with a civil demand. (Hearings, Mar. 3, 1959, pp. 19-21.)

The full Judiciary Committee amended S. 716 by inserting in section 4(c): "provided nothing herein shall prevent the Attorney General from making available the material so produced for examination by the Committee on the Judiciary of each House of the Congress."

The bill passed by the Senate included a new section 5(e) proposed by Senator Dirksen, as follows:

"Within twenty days after any person receives notice pursuant to section 4(c) that material produced by such person shall be made available for examination by any antitrust agency or any committee of the Congress, such person may file, in the district court of the United States for the judicial district within which the office of the custodian is situated, and serve upon such custodian, a petition for an order of such court that secret processes, developments, research or any privileged material not be made available for examination, or be made available for examination on such terms and conditions as the court finds that justice required to protect such person."

Senator Dirksen's amendment, section 5(e) was a compromise which gave a little protection from the broad application of the provision in section 4(c), but it did not overcome the basic objection to this procedure, and is not included in S. 167. No effort has been made to demonstrate why congressional committees need to obtain from the Attorney General documents belonging to corporations. Since congressional committees have subpoena power, which author-

izes production of material direct from the owner, there is no reason to enact a statute to authorize them to obtain the material indirectly.

A congressional committee does not have unlimited investigatory powers. When it uses its subpoena power directly, a company has an opportunity to protect itself, either by a direct appeal to the discretion and judgment of the committee, or to a court. The nature of the material submitted must be related to specific, known purposes, and the companies can determine whether there is any danger to their rights. Furthermore, when material is obtained directly, the company is in direct contact with the committee and is able to request the committee not to make public certain types of information.

If the congressional committees may obtain material from the Attorney General, the companies lose the right to protest. The term "privileged material," as used in the Dirksen amendment to S. 716 is not broad enough to protect the companies. That might be construed to mean only matter coming within established privileged relationships such as attorney-client. At least two types of material would not be protected by such language. One would include sales or cost information, and names of customers. Such information is of greatest importance to the owner, and might properly be required for consideration by the Attorney General, but might not be proper for a particular congressional investigation. A second type of information is that of internal exchange of memoranda not affecting a company's business, nor of interest to a committee, which is derogatory either to some companies or individuals. Public disclosure of such material could cause great embarrassment, while serving no public purpose.

There is an important distinction between the function and method of operation of the Attorney General and congressional committees. The attorneys in the Department of Justice would not make public any material at all except what was actually pertinent for use in evidence in court. As to such evidence, any detriment to a company from disclosure is a necessary consequence of the lawsuit required by the public interest. Even here, the purpose of the Attorney General is limited, and there are sufficient safeguards to protect a company from unnecessary injury.

It must be recognized that there is no well-defined authority for limiting use by a congressional committee of material, once it is obtained. Congressional committees range far and wide in their hearings, and often the disclosures are unrelated to any legislative purpose. Once a letter, memorandum, or statistic is obtained by a congressional committee, there is no power which can prevent a Senator or Representative from making it public, whether at a hearing or not.

When a company is complying with a civil demand, it will be much more critical in its selection of material called for, if there is danger that its files will be opened to the public by a congressional committee. Often, a truckload of files has been delivered to the Department of Justice in response to a grand jury subpoena. Entire files of correspondence and memorandums covering a period of many years are submitted, and the Department of Justice attorneys peruse it for a few documents which may constitute evidence. The safeguards within the Department of Justice are a sufficient assurance to a company that matter which should not be disclosed will not. Often a document will contain both pertinent evidence and nonpertinent matter of a nature which the company does not wish disclosed. For court purposes, there is no difficulty in separating these categories. But before a congressional committee, the nonpertinent damaging information is made public along with the pertinent.

It is no answer to say that section 5(b) enables a company to withhold such material from the Attorney General, by authorizing a company to apply to a court for relief where compliance would violate a "privilege." For one thing, a court might consider certain material pertinent for a civil demand which it would consider not pertinent to a congressional committee. But more important, it would force many companies to object in court to civil demands, which they would otherwise have complied with, relying upon the traditional safeguards the Department of Justice has enforced.

Nor is it any answer to say that the Attorney General is not required to comply with a congressional request. The pressure upon the Attorney General can be very great, and simply to avoid the public criticism and censure which often comes from Members of Congress, an Attorney General may reluctantly comply. He has little incentive to incur congressional wrath when his Department no longer has any interest in the material requested.

This provision for new authority is unwise. The civil demand was proposed to avoid the unnecessary use of a grand jury. The Attorney General is not authorized to make available to Congress material obtained by a grand jury subpoena. There is no justification for Congress using the civil demand procedure as a short cut to obtaining information. If this new authority enables such committees to obtain information not presently authorized, it is unfair; and if it enables such committees to obtain only what they may already obtain by subpoena, it is unnecessary.

There is real danger that this new authority might be used by some Senators or Representatives to engage in "a fishing expedition." The bill permits the Attorney General to retain copies of material even though a court might compel the return of the originals. This would permit such committees to dig through files going back for years, for the purpose of exposure for its own sake. If such "old" material were required by subpoena, a court might rule it need not be produced. But this bill deprives the companies of this court protection.

This committee recommends striking from section 4(c) the phrase "provided nothing herein shall prevent the Attorney General from making available the material so produced for examination by the Committee on the Judiciary of each House of the Congress."

THE RETURN DATE SHOULD BE NOT LESS THAN 20 DAYS

This committee wishes to amplify an objection it made to the Senate subcommittee with respect to S. 716. Section 3(b)(3) provides that the civil demand shall "prescribe a return date which will provide a reasonable period of time" to produce the material. Section 5(b) provides that a petition to modify a demand must be filed within 20 days after service or before the return date, whichever period is shorter. There is rarely any urgency which would require that the Attorney General receive material in less than 20 days. This provision indicates to the courts that Congress considers less than 20 days is reasonable. This committee recommends that section 3(b)(3) be amended by inserting therein after the word "time" the phrase "(but not less than 20 days after service)." Section 5(b) should be amended by striking out the words, commencing in the second line thereof, "or at any time before the return date specified in the demand, whichever period is shorter." Thus, while the Attorney General would have to give a company more than 20 days to compile the material, the company would have to act within 20 days if it wishes to raise any objection.

If these three amendments are made, this committee shall recommend enactment of S. 167.

Respectfully submitted.

Committee on Trade Regulation: Edward F. Johnson, chairman; Edgar E. Barton, Albert C. Bickford, George H. Cain, J. Kenneth Campbell, Joseph V. Heffernan, John Howley, David Ingraham, Maximilian W. Kempner, George N. Lindsay, Jr., John J. Scott, Frank A. F. Severance, John D. Swartz, Nelson F. Taylor, Allan Trumbull.

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

This statement is filed on behalf of the National Association of Manufacturers, a voluntary membership corporation with about 19,000 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.

This association has consistently advocated and strongly endorsed legislation which would aid in an intelligent, fair, and effective administration of the antitrust laws. We are, therefore, interested in the proposals contained in S. 167 because we fear that the defects and the dangers inherent in the proposal outweigh any advantages its enactment might afford the Department of Justice as an aid to the enforcement of the antitrust laws.

Briefly, S. 167 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 civil violations of antitrust laws, and in proceedings arising from such investigations. Additionally, the Attorney General could turn over such docu-

ments to the Judiciary Committee of either House of Congress, presumably for whatever use the committee might choose to make of them.

The reasons advanced in support of this legislation are that when the Department of Justice investigates possible violations of the antitrust laws it must either impanel a grand jury, file a civil complaint and make use of discovery processes under the Federal Rules of Civil Procedure, or rely upon the voluntary cooperation of concerns under investigation. The Department contends, and rightly so, that resort to the grand jury is not appropriate when only a civil action is contemplated. The Department further contends that it should not be forced to file a "skeleton" complaint and hope that the Federal Rules' discovery procedure will unearth facts essential to a valid complaint. It is argued that in the absence of a grand jury proceeding or the filing of a skeleton civil complaint, the Justice Department is left in a position of sole dependency upon voluntary cooperation.

Even if we assumed the validity of these arguments, they do not justify the enactment of legislation as drastic as S. 167. But validity of the contention that the Justice Department is severely handicapped by lack of cooperation by companies under investigation, which in the final analysis is the gravamen of the Department's case, cannot be conceded. Undoubtedly the Department of Justice is sometimes confronted with concerns that refuse to accede to Government requests for the voluntary production of books and records. It was stated, however, by one of the members 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."

The reasons behind the refusal of this 10 percent voluntarily to produce company records must be widely varied and surely many of such reasons are valid. It hardly seems necessary, therefore, in view of the other remedies available to the Government, to arm antitrust investigators with the broad powers proposed here, even if the entire 10 percent who do not cooperate do so for no reason at all except recalcitrance.

The Justice Department has also made a point of the fact that the Federal Trade Commission and other agencies charged with enforcement of the antitrust laws already possess subpoena powers at the investigative stage similar to that proposed in S. 167 for the Department of Justice. In this connection, however, the dissimilar functions performed by these two agencies is of importance.

The Federal Trade Commission is a regulatory agency. Its investigative proceedings are administrative and not a part of the judicial process. The Department of Justice is a law enforcement agency and is not entrusted with any regulatory powers. Thus to place in the hands of an executive officer of the Government discovery powers more sweeping than those possessed by a grand jury, yet lacking the judicial restraints and the protection of secrecy, is to disregard the basic distinction between the executive power on the one hand and the judicial power on the other.

It may be that the availability of such an instrument would make easier the work of the Department of Justice, but certainly this is not sufficient reason to adopt a device foreign to our legal traditions and violative of our sense of justice. The fact remains that there has been demonstrated no need for granting to the Attorney General the extensive authority proposed here.

S. 167 appears to us to be fundamentally defective in a number of respects. As noted above, the necessity for authority to issue civil investigative demands is urged upon this committee as an aid in the investigation of suspected violations of the antitrust laws in connection with which civil proceedings are, from the outset, contemplated. It is acknowledged by the proponents of S. 167 that the Justice Department is now empowered to employ compulsory process to obtain both documentary and testimonial evidence at every stage of criminal and civil antitrust proceedings except for its investigative stage of civil violations, a gap which this bill supposedly was designed to bridge. But this bill is not so limited.

The term "antitrust investigation" is defined as an inquiry for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation. "Antitrust violation" is defined as any act or omission in violation of any antitrust law or any antitrust order. "Antitrust law" is defined to include, in addition to the traditional definition of the term, the Federal Trade Commission Act, section 3 of the Robinson-Patman Act and "any statute hereafter enacted" which makes available to the United States any civil remedy with respect to restraints of trade or unfair trade practices affecting commerce.

It seems apparent, therefore that the civil investigative demand embraces much more than its name implies. This new procedure, arising from an objection to the use of the grand jury in civil cases, would provide the means for avoiding the use of the grand jury in the investigative stage of criminal cases. Thus, it could be used to compel production of documentary material pertinent to an investigation of any suspected violation of the antitrust laws, including, for example, section 3 of the Robinson-Patman Act, a purely criminal section.

We recognize, of course, that criminal proceedings may well result from an investigation which, from the outset, seeks only evidence on which to base a civil action. But it seems incongruous, indeed, to make use of a civil investigative demand to investigate an alleged violation of a statute under which only a criminal action could result, such as section 3 of the Robinson-Patman Act.

This and many other deficiencies and discrepancies in the drafting of the bill points up the fact that it goes far beyond the alleged need cited in support of its enactment.

It should be noted in this regard that the Attorney General's Committee To Study the Antitrust Laws, in recommending a civil investigative demand, clearly contemplated its use only in a civil antitrust investigation.

Even if S. 167 could be amended to insure that it would not become a substitute for the presently available discovery proceedings under the Federal rules, or curtail the use of the grand jury in criminal cases, the vague and indefinite requirements of the demand itself would permit excursion into virtually any book, record, or paper in the hands of any company in the land. The material required to be produced pursuant to a demand need only, in the opinion of the Attorney General, be pertinent to the investigation. The term "pertinent" has no accepted legal meaning under the Federal rules, whereas the courts have had opportunities to determine, and thus litigants and recipients of a demand could have some idea what might be relevant.

The demand would state the nature of the conduct constituting the alleged antitrust violation. Both the Attorney General's Committee and the American Bar Association recommend that the subject matter of the investigation be stated, including the particular offense which the Attorney General has reason to believe has been committed. These standards would seem to be eminently closer to our traditional safeguards and restraints on the subpoena power than the vague standards set out in S. 167.

It would be an unimaginative antitrust investigator who could not describe the nature of the conduct constituting an alleged unspecified violation with sufficient breadth to assure the production of a multitude of pertinent documents.

In addition to the broad scope of authority which would be granted by this bill, the persons to whom a civil investigative demand could be directed is almost without limit. Demand could be made upon persons neither being investigated nor suspected of an antitrust violation. In fact, the persons receiving the demand might not know whether he or one of his suppliers or customers or a total stranger was the subject of the investigation. There appears no justification whatever for permitting the wholesale demand for documentary material from companies not under investigation through the use of this type of executive subpoena.

The defects discussed above, as serious as they are, are compounded by the provision that the subpoenaed documentary material must be delivered to an antitrust document custodian at the place specified in the demand. Any place within the territorial jurisdiction of the United States could be specified so long as the Government tendered the cost of transportation. Thus distributors in Dallas, San Francisco, and Seattle might be required to deliver subpoenaed material to Washington, D.C., in connection with the investigation of a supplier located in Richmond or Baltimore.

S. 167 apparently contemplates the production of original books and records. As it is worded, there is no indication whether copies, authenticated or otherwise, would be acceptable in lieu of original records. This, coupled with the fact that there is virtually no limit upon the time such material can be retained, imposes a wholly unwarranted hardship on concerns served with a demand.

In this connection, it is noted that the American Bar Association's proposal would require that the subpoenaed documents be made available for inspection and copying at the recipient's principal place of business. This is similar to postcomplaint discovery procedure under the Federal rules, and similar also to the access to records provision normally incorporated in antitrust consent decrees for enforcement purposes. It would seem that access to books and records at the

place of business of the person under investigation would amply serve the purposes of the Attorney General without the hardship which would inevitably result from a company's being deprived of its original records for long periods of time.

In addition to the possibility of depriving companies of original books and records for long periods of time, the bill would authorize the Justice Department to make such material available to other antitrust agencies, and authorizes such agencies, as well as the Department, to make and retain copies of such material. Such a provision is obviously unnecessary if the bill is intended only to aid the Department of Justice in civil investigations. The Federal Trade Commission and all other agencies charged by law with the administration and enforcement of the antitrust laws already possess plenary investigative powers. Furthermore, the scattering of such material will inevitably result in loose handling, abuse and unauthorized disclosure of the contents. This would be particularly true of copies made of such material. These could, by the terms of the bill, be retained permanently by the Department of Justice and the agencies involved. This would lead to the accumulation of library copies, even in cases where the investigation revealed no antitrust violation.

This provision for making wide distribution of subpoenaed material for examination and copying is in sharp contrast to the secrecy afforded material subpoenaed by a grand jury.

Assuming the Justice Department does, as it contends, need the investigatory power sought in S. 167, documents produced pursuant to a demand, as well as the contents thereof, should not be disclosed to any person other than an authorized employee of the Department. Moreover, within a fixed and reasonable period of time after production of the material (a maximum of 18 months is suggested by the American Bar Association), all subpoenaed material, including all copies not introduced in the record of an antitrust proceeding, should be returned to the person who produced it.

In addition to making subpoenaed material available to other antitrust agencies, S. 167 provides that "nothing herein shall prevent the Attorney General from making available the material so produced for examination by the Committee on the Judiciary of each House of Congress." There appears to be even less justification for making such material available to the Judiciary Committees than there would be for making it available to other agencies.

The committees of Congress already possess broad investigative powers, including the power to compel the production of documentary material, as well as testimonial evidence, which may be relevant to any legislative inquiry.

The material which would be sought by a civil investigative demand under this bill would, presumably, be selected on the basis of its suitability as an aid in the investigation of a suspected violation of the antitrust laws. It is highly unlikely that material selected on such a basis would be suitable for the broader legislative purposes of congressional committees.

Furthermore, while subpoenaed material in the hands of the Justice Department could be used only in connection with the investigation of a suspected violation or in a proceeding arising from the investigation, there appears to be no limitation or restriction upon the use of such material by the committees. It is not clear from the wording of the bill whether the Judiciary Committees would be authorized to copy material made available to them. Certainly there is no specific prohibition against such copying. Assuming the committees could make copies, there is no requirement with reference to the return of such copies upon completion of the Justice Department's investigation.

Congressional use of such material during the pendency of an investigation by the Department of Justice, or during any proceeding resulting from the investigation could be extremely prejudicial to the Attorney General or the person producing the material, or both. Similarly, even if no violation is found, the committees could still use the documents, without limit as to time, in such a manner as to be more damaging to the person who produced them than a proceeding by the Attorney General might be.

There is also the possibility that documents relating to the investigation or enforcement of specific antitrust cases would encourage the Congress to legislate antitrust enforcement on a case-by-case basis rather than investigating and legislating with respect to the broad policy and philosophy of the antitrust laws.

As noted earlier, S. 167, as now written, disregards the fundamental distinction between the executive and the judicial power. If documentary material produced pursuant to an executive subpoena as an aid to law enforcement is made available to the committees of Congress, the question should at least be raised

whether the result would not be a complete disregard of the concept of separation of powers.

Considering the sweeping power which would be granted by S. 167, and the absence of the traditional safeguards surrounding the grand jury subpoena power, or the judicial protection afforded in connection with civil discovery under the Federal Rules of Civil Procedure, we believe there is a very real possibility of abuse inherent in this bill. All that is necessary to bring a civil investigative demand into play is an antitrust investigator who can convince the Attorney General or the Assistant Attorney General in charge of the Antitrust Division that there is reason to believe that a company has possession of documents pertinent to an investigation. There is no requirement that anyone even be suspected of violating the law. An investigation may be undertaken merely for the purpose of ascertaining whether any person has violated the law. There could hardly be a clearer invitation to investigators to engage in "fishing expeditions." The civil investigative demand could also be turned into a powerful weapon of harassment under the guise of antitrust investigation. This is not to say that the Justice Department should not be free to investigate possible violations of the antitrust laws. It is quite another thing, however, to grant it an aid to investigation which goes far beyond its needs, and so susceptible of abuse as this one is.

In our view, there has been an insufficient showing of need for this drastic measure. Apparently bills to authorize the issuance of a civil investigative demand are an outgrowth of the recommendations made by the Attorney General's Committee To Study the Antitrust Laws in 1955, and subsequently endorsed by the American Bar Association. This bill, however, goes far beyond the powers recommended by the Attorney General's committee. Even if need for some form of aid in civil investigations of the antitrust laws is conceded, we submit that the proposals of the Attorney General's committee would adequately fill that need and represent the maximum that should be considered.

We, therefore, respectfully urge that S. 167 not be favorably reported by the subcommittee.

STATEMENT OF JULIAN D. CONOVER, EXECUTIVE VICE PRESIDENT, AMERICAN MINING CONGRESS

The American Mining Congress is opposed to the principle of S. 167, which would compel corporations to turn over documents demanded by the Justice Department in the course of civil antitrust investigations.

An almost identical bill failed of enactment in the last Congress. The present bill is unnecessary, and compliance with its provisions would be unduly burdensome. While the Justice Department takes a reasonable attitude in requesting documents in its civil investigations under the present voluntary cooperation system, there is no assurance that the responsible and cooperative relationship which exists on both sides of most civil antitrust investigations at the present time would continue if the Justice Department were to receive the sweeping powers which would be delegated to it by this bill.

If the committee should decide that authority to demand documents in civil antitrust investigations is necessary—and we believe that it is not—then it is recommended that S. 167 be amended in conformity with the principles of the civil investigative demand bill introduced by Senator Wiley in the last Congress, S. 1003.

If legislation on this subject is considered, the following changes in S. 167 are especially important:

1. Authorize the Justice Department to inspect and make copies of documents relevant to its investigation, instead of permitting the original documents to be seized and carried off by the Government investigators. S. 167 would permit the Justice Department to take original documents and keep them indefinitely. Under such a system a corporation would not have access to its own files.

Requiring the Department of Justice to inspect or copy documents instead of permitting their wholesale seizure would have the wholesome effect of limiting the tendency on the part of the Government investigators to make sweeping, wholesale demands for documents. The knowledge that they would have to either inspect these documents or have the Government go to the expense of reproducing them would restrain the tendency to clean out a corporation's files on the off chance that something in them might later turn out to be useful.

Furthermore, limiting authority under the bill to the inspection or copying of documents instead of their seizure would render unnecessary the complicated and cumbersome custodian system which S. 167 would create.

Certainly, if corporations are to be required to give up their original documents, a limit should be imposed on the time that the Government investigators would be allowed to keep them—such as the 18-month period contained in S. 1003 and proposed by the American Bar Association and its section of antitrust law.

2. The Justice Department should not be permitted to pass on documents acquired under the civil demand procedure (whether originals or copies) to other Government agencies or to committees of Congress. In cases where other parts of the Government, such as the Federal Trade Commission or the Judiciary Committees of the Senate and the House of Representatives, have a legitimate right to see these documents they have their own procedures for obtaining them.

There can be no justification for shortcutting these procedures by permitting the Justice Department to pass on material it has acquired for its own purposes. To permit such material to be transmitted to another agency or to a congressional committee, whose reasons for examining the documents may be quite different from the reasons which prompted the original demand, would be to make a mockery of the pertinence or relevance test imposed on the Justice Department when the documents are originally required to be produced.

3. Require the return of copies as well as original documents. S. 167 would absolve the custodian of documents from any responsibility for the return of copies made either by the Justice Department, by any other antitrust agency, or by any congressional committee. This would mean that copies of documents which might be highly confidential could be kept long after the completion of the investigation which prompted their acquisition. Furthermore, the custodian would not be responsible for their supervision. Indeed, under the bill none of the restraints designed to restrict to authorized persons the examination of original documents would appear to apply to copies.

4. Limit the scope of the authority to require production of documents to the period of the civil investigation—that is, before legal proceedings, civil or criminal, are actually instituted. No case has been made by the supporters of the bill for need for civil demand procedure once a grand jury investigation of an alleged criminal offense has commenced or once a civil suit has been filed. The law already contains detailed procedures for obtaining relevant documents after legal proceedings have been instituted, and there does not appear to be any reason for an overlap of the civil investigative demand procedures of S. 167 with these established procedures.

NATIONAL COAL ASSOCIATION,
Washington, D.C., June 12, 1961.

Re 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

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

DEAR SENATOR KEFAUVER: This statement is filed on behalf of the National Coal Association, whose members produce and market about two-thirds of the commercially mined bituminous coal in the United States. We are writing to submit in summary form our comments with respect to S. 167, the civil investigative demand bill. This bill would authorize the Attorney General to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws.

It has been noted that the Federal Trade Commission already possesses authority similar to that proposed to be conferred on the Attorney General by these bills. It is probably true that in a few instances the Antitrust Division has found it difficult to obtain full discovery before the institution of civil proceedings. We do not believe that such difficulties have been shown to be sufficiently serious to justify the enactment of the present proposals.

The Department of Justice is an enforcement agency rather than a regulatory agency. Legislation of this sort appears to disregard the distinction between

executive and judicial powers secured by our form of government. The enactment of this kind of legislation in the antitrust field would, we believe, set a dangerous precedent for the establishment of similar provisions for other departments in the area of business regulation by the executive arm of the Government. For these reasons we are opposed to the enactment of S. 167.

If, however, it is the judgment of your committee that S. 167 be favorably reported over our objections, we respectfully submit that the following changes should be made in the proposed bill:

(1) The provision allowing material obtained by the Attorney General to be made available to congressional committees should be deleted. The Attorney General is not now allowed to send to Congress material obtained by grand jury subpoena and there is no apparent reason why he should be permitted to furnish to congressional committees documents obtained in connection with civil investigations. Furthermore, since congressional committees themselves have subpoena powers which authorize production of material directly from the owners, there is no reason to enact a statute authorizing them to obtain the material indirectly.

If your committee should decide to retain this provision in the bill, it should at least be modified to allow the production of documents and material to a committee of Congress only upon the discretion of the Attorney General, and the latter should be authorized to restrict the use of such subpoenaed material by any committee. A person who is required to produce documents and material should be given his "day in court" by providing that, 20 days after any person receives notice to produce such material, the person who is required to produce such material may file a petition in the U.S. district court to prevent secret processes, developments, research, or any privileged material from being made available except under such terms and conditions as the court would state in order to protect such person. Both of these modifications were contained in the minority views on similar proposed legislation (S. 716) filed by Senators Dirksen and Ervin in 1959 (S. Rept. No. 451, pt. 2), and were contained in the bill as passed by the Senate in 1959.

(2) The provision of the bill that section 3 of the Robinson-Patman Act should be included in the term "antitrust law" should be deleted. In this connection we endorse the comments contained in the report on S. 716 submitted by the Association of the Bar of the City of New York to the Antitrust Subcommittee (Subcommittee No. 5) of the House Committee on the Judiciary on March 23, 1960, and request that such comments be regarded by your committee as being incorporated by reference in this letter.

(3) S. 167 provides a maximum penalty of \$5,000 fine or 5 years' imprisonment, or both, for obstruction of antitrust civil process. These penalty provisions appear to be unnecessary and unduly harsh. If legislation similar to S. 167 should be enacted, there is no reason why contempt proceedings would not be adequate for its enforcement.

We appreciate the opportunity which your committee has afforded to submit our views in writing on S. 167.

Sincerely,

ROBERT E. LEE HALL, *General Counsel.*

MANUFACTURING CHEMISTS' ASSOCIATION, INC.,
Washington, D.C., June 12, 1961.

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

DEAR MR. CHAIRMAN: The Manufacturing Chemists' Association, Inc., an organization with more than 175 U.S. companies representing a large part of this country's chemical production capacity, wishes to express to you and to the members of the subcommittee its concern over the extent of the grant of power in S. 167, 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. It would be appreciated if this letter could be made a part of the record of the hearing on the bill.

The association does not oppose the principle of S. 167. It believes, however, that the authority which would be granted to the Attorney General is too broad. A feature of S. 167 which appears to us to warrant special concern is the requirement that documents shall be delivered to a custodian (sec. 4(b)) at any location specified within the territorial jurisdiction of the United States. In our opinion,

such a provision could mean in practice that a representative of the Antitrust Division who was moved to investigate a complaint, even if the complaint were without foundation, could compel a company to produce a large volume of its files at any location selected by the Antitrust Division. When this type of legislation was before the 86th Congress, S. 1003, introduced by Senator Wiley, as well as a bill sponsored by the American Bar Association, suggested as an alternate procedure that a company under investigation be required to produce documents for inspection and copying at its principal place of business. We believe that such a requirement would be reasonable and effective.

A second feature of S. 167 which seems to us to be unwise and unnecessary, and which is also a departure from the earlier S. 716, in the 86th Congress, is the provision that documents produced as a result of this demand could be made available to the Committee on the Judiciary of each House of Congress (sec. 4(c)). We believe the bill should provide that the information obtained be disclosed only to authorized employees of the Department of Justice.

Respectfully yours,

M. F. CRASS, Jr.

