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Richard L. Perry
Member, District of Columbia Bar

William Simon
Member, District of Columbia Bar

THE CIVIL INVESTIGATIVE DEMAND: NEW FACT-FINDING POWERS FOR THE ANTITRUST DIVISION

*Richard L. Perry† and William Simon**

THE complexity, scope and length of modern antitrust litigation bring to prominence the procedures by which evidence — particularly documentary evidence — is discovered and placed before the courts and administrative agencies. Fact-finding mechanisms now available for ferreting out and prosecuting violations make up an imposing array. These include the grand jury subpoena, the discovery provisions of the Federal Rules of Civil and Criminal Procedure and the subpoena and visitorial powers of certain administrative agencies. The "civil investigative demand," a precomplaint compulsory process, is a new weapon proposed to be added to this arsenal.

Few dispute the desirability of new precomplaint investigative authority in civil antitrust cases. Legislation passed by the Senate during the First Session of the 86th Congress, however, is apparently designed to attain objectives in addition to precomplaint investigation. In so doing, it may infringe constitutional safeguards erected for the protection of private papers as well as safeguards designed to achieve an impartial administration of justice.

Background

For several years the Antitrust Division of the Department of Justice has sought power to issue "civil investigative demands" to obtain data needed in deciding whether to file a civil antitrust complaint. Before complaint the department can, and usually does, seek the voluntary cooperation of persons under investigation, and this method has proved satisfactory in many cases.[1] The grand jury, which is available only where there are grounds for believing that a criminal violation has occurred, is not a sat-

† Member, District of Columbia Bar. — Ed.

* Member, District of Columbia Bar. — Ed.

1 REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 344 (1955) (hereinafter cited as "REPORT").

isfactory alternative.[2] Filing complaints on the basis of inadequate information and then employing the discovery procedures of the federal rules to develop the facts is likewise an unsatisfactory procedure.[3]

The only legitimate purpose of a civil investigative demand would be to supply information needed to determine whether a civil complaint should be brought.[4] This need, of course, could be met by authority which would permit government investigators to inspect and copy relevant documents at the owner's place of business. Such authority was embodied in two bills presented to the First Session of the 86th Congress: S. 1003, introduced by Senator Wiley, and H.R. 4792, introduced by Congressman Celler. These bills are identical in all substantial respects. However, the bill reported by the Senate Judiciary Committee and passed by

2 In United States v. Proctor & Gamble Co., 356 U.S. 677 at 683 (1958), the Supreme Court said that use of procedures intended for criminal cases to elicit evidence for civil cases constitutes "flouting the policy of the law." The district court later found that because the grand jury had been continued to procure evidence for a civil case after the department decided not to ask for an indictment there was "a flouting of the policy of the law and a subversion or abuse of the Grand Jury process. . . ." United States v. Proctor & Gamble Co., (D.C. N.J. 1959) 175 F. Supp. 198 at 200.

3 Criticism of the vagueness of complaints has been attributed to the inadequacy of the department's precomplaint investigative powers. Judicial Conference of the United States, "Procedure in Antitrust and Other Protracted Cases," 13 F.R.D. 62 at 67 (1953).

4 The Department of Justice has no compulsory process in connection with certain economic reports made by it, and the proposed civil investigative demand bills, properly construed, would not supply such powers. The Attorney General makes reports under the Defense Production Act of 1950, 64 Stat. 798, 50 U.S.C. App. (1958) §2061; the Interstate Compact to Conserve Oil and Gas under the Joint Resolution of August 7, 1959, 73 Stat. 290 (1959); and the Small Business Act of 1953, 67 Stat. 232, as amended, 15 U.S.C. (1958) §§631-648. The Defense Production Act provides that no act or omission pursuant thereto shall be deemed an antitrust violation or a violation of the Federal Trade Commission Act. 64 Stat. 818 (1950), as amended, 50 U.S.C. App. (1958) §2158. A similar provision is found in the Small Business Act [§640 (b)]. The periodic reports under the Compact likewise are not undertaken for the purpose of uncovering specific antitrust violations. The civil investigative demand bill, S. 716, is limited to the collection of evidence needed for the prosecution of "antitrust violations," and would therefore be unavailable for the collection of data required in the preparation of economic reports under the foregoing statutes or the Compact. See §2 (c), (d) and (e). Furthermore, the Attorney General is authorized by the Defense Production Act to request the Federal Trade Commission to conduct surveys in determining factors which may tend to eliminate competition or create monopolies, and additional investigative powers would appear to be unneeded. It would appear undesirable to give the Attorney General compulsory process in connection with these economic reports unless full consideration were given to the implications for industry and the administrative process. Such consideration would involve the extent of duplication and overlap with the jurisdiction of the regulatory agencies, and the desirability of clothing the Antitrust Division, which is part of the executive branch, with administrative powers which would make it, in effect, an arm of Congress. It is likely that should the Attorney General be granted compulsory process to collect economic data not relevant to specific law violations, the department could in time largely replace the Federal Trade Commission as an expert investigating and fact-finding agency in a number of important areas.

the Senate, S. 716, introduced by Senator Kefauver, contains additional features.[5] The Senate's action was surprising, not only because S. 716 far exceeds the needs of the department, but also because the sweeping powers conferred thereby were not even requested.[6]

At a Senate subcommittee hearing the only witnesses to appear were Victor R. Hansen, former head of the Antitrust Division, and Earl W. Kintner, then General Counsel and now Chairman of the Federal Trade Commission. Frederick H. Mueller, then Undersecretary of Commerce, submitted a letter which emphasized the need for preserving the confidential character of copies of reports submitted to the Department of Commerce. Written statements were submitted on behalf of the Section of Antitrust Law of the American Bar Association, the Association of the Bar of the City of New York, the National Association of Manufacturers, and the American Paper and Pulp Association. None of these groups favored S. 716.

S. 716, as approved by the Senate Judiciary Committee, allowed the Attorney General to submit to the Senate and House Judiciary Committees private documents obtained by means of civil investigative demands and did not limit the use thereof by such committees. During the floor debate, however, an amendment was adopted which would allow the filing of an application in court for a protective order upon notice that such disclosures are contemplated.[7]

"Documents Custodian"

S. 716 would create the office of "Documents Custodian" within the Department of Justice with authority to establish and maintain a permanent library of private documents or copies thereof.[8] Additional copies could be made by other antitrust agencies and other libraries created. Senator Kefauver thus argued in favor

[5] S. 716, 86th Cong., 1st sess. (1959). See S. Hearing Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, 86th Cong., 1st sess., pursuant to S. Res. 57, on S. 716 and S. 1003, March 3, 1959; S. Rep. 451, 86th Cong., 1st sess. (1959); 105 CONG. REC. 13304, 13320, 13323-13333 (July 29, 1959).

[6] No action was taken during the First Session by the House.

[7] 105 CONG. REC. 13328, 13332 (July 29, 1959).

[8] S. 716 requires that business records and other documentary material be turned over to a "Documents Custodian," to be appointed by the Assistant Attorney General in charge of the Antitrust Division. §4(a). S. 1003 and H.R. 4792 require that the owner make documents available to antitrust investigators for inspection and copying but do not create the office of "Documents Custodian." §3(a).

of legislation which would permit the Attorney General and Congress to obtain information "even though it might have no particular importance except for historical reasons."[9]

The custodian's office would be staffed by a number of deputy custodians and antitrust investigators, all of whom would be charged with the responsibility of maintaining voluminous files of documents or copies thereof. The budgetary and administrative problems raised by the proposal, which presumably would be substantial, were not discussed at the hearing except by Judge Hansen, who opposed establishment of the office. He pointed out that although the Attorney General's National Committee To Study the Antitrust Laws had recommended establishment of a documents custodian,[10] the department's views were different. He said:

> "The current proposal in S. 1003 provides, as I mentioned, for the organization served with a demand to produce the material at its principal office or place of business, unless otherwise agreed upon by the organization and the Department representative. This change [from the Attorney General's National Committee's recommendation] it seems clear, is a considerable improvement. It obviates the burden on the Department of becoming a recordkeeping office and enables the organization to pursue its normal business activities without being deprived of its records."[11]

More important than the cost of the new office is the question of the propriety of any federal department's undertaking to become a repository for current, private documents in nonregulated industries. Even evidence obtained by grand jury subpoena does not become the property of the Department of Justice.[12] Unless held under an impounding order issued by the

[9] 105 CONG. REC. 13329 (July 29, 1959).

[10] The committee's recommendation was apparently intended to assure that responsibility for the documents should be definitely fixed within the department so as to avoid the possibility of unauthorized disclosures. This objective, of course, could easily be achieved by providing that each civil investigative demand specify the attorney responsible for safeguarding the documents or copies which are removed. There was no suggestion in the Report that the custodian's function should be to build a permanent library. See REPORT 346.

[11] Hearings, note 5 supra, at 13. Later in the hearings, Judge Hansen stated that his "number one" objection to the custodian was "that it places an added burden on the Department to maintain a series of records. . . . " Id. at 16.

[12] Justice Whittaker, concurring in United States v. Proctor & Gamble Co., 356 U.S. 677 at 684-685 (1958) said: "The grand jury minutes and transcripts are not the property of the Government's attorneys, agents or investigators, nor are they entitled to possession of them in such a case. Instead those documents are records of the court. And it seems

court, documents and copies thereof must be returned to their owner once the grand jury's use of them has ended.[13]

The constitutionality of a statute creating a Documents Custodian with power to establish a permanent file of private documents is dubious. The distinction between papers kept in the ordinary course of business and public papers owned by a government agency or required to be kept by private persons in aid of governmental functions is well recognized.[14] Business concerns are not required to furnish data to government agencies as to their operations unless such data are required in the performance of governmental functions.[15] Even though an investigative demand were a lawful method of gathering data relevant to a specific statutory violation, it does not follow that permanent retention of the documents or copies thereof would be legal. If indefinite retention were allowed, the documents could be consulted years later with respect to alleged violations other than the one which prompted the original inquiry, thus depriving a party of notice that his activities are under investigation and nullifying the notice requirements of the bill itself.[16] The indefinite retention of private papers raises a question under the Fourth Amendment, which states: "The right of the people to be secure in their persons,

clear that where, as here, a 'no true bill' has been voted, their secrecy, which the law wisely provides, may be as fully violated by disclosure to and use by the Government counsel, agents and investigators as by the defendants' counsel in such a civil suit."

The government has sometimes conceded that ownership of documents submitted pursuant to a grand jury subpoena continues in the person subject to the subpoena. United States v. Standard Oil Co., (Crim. No. 2199, N.D. Ind.), transcript Sept. 4, 1959, p. 24; application for return of impounded documents denied sub nom. In re Grand Jury Proceedings, (7th Cir. 1960) 275 F. (2d) 227.

[13] Traub v. United States, (D.C. Cir. 1955) 226 F. (2d) 781; Application of Bendix Aviation Corp., (S.D. N.Y. 1945) 58 F. Supp. 953. As to copies made by the government, see United States v. Wallace & Tiernan Co., 336 U.S. 793 at 801 (1949) (return of photostatic copies necessarily follows if the indictment is dismissed); United States v. Proctor & Gamble Co., 356 U.S. 677 (1958), concurring opinion of Justice Whittaker. But cf. In re Petroleum Industry Investigation, (E.D. Va. 1957) 152 F. Supp. 646. After termination of the grand jury and any resulting criminal proceedings, copies of documents which could have been obtained by means of civil discovery processes may be retained for use in a subsequent civil case pursuant to order of the court. Maryland & Virginia Milk Producers Assn. v. United States, (D.C. Cir. 1957) 250 F. (2d) 425.

[14] E.g., Shapiro v. United States, 335 U.S. 1 (1948); Davis v. United States, 328 U.S. 582 (1946); Wilson v. United States, 221 U.S. 361 (1911).

[15] Cf. Champlin Refining Co. v. United States, 329 U.S. 29 (1946); Valvoline Oil Co. v. United States, 308 U.S. 141 (1939); Isbrandtsen-Moller Co. v. United States, 300 U.S. 139 at 146 (1937).

[16] S. 716 requires that notice be given of the nature of the conduct under investigation, the applicable provision of law, the class or classes of documentary material to be submitted, the return date, the identity of the custodian and the place where delivery is to be made. §3(b).

houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

A question not considered by the subcommittee is who should bear the substantial costs involved in making copies of documentary materials. S. 716 would require that such expenses be borne by the owner unless he wishes to do without his records altogether.[17] Under S. 1003 and H.R. 4792, however, the cost of making copies must be borne by the government. These bills might help to discourage wholesale demands for documents, or "fishing expeditions," because government investigators would have to account to their superiors for the costs involved.

In view of the length of time which the department requires to study investigative files before determining whether to file a complaint, it would seem only a matter of basic fairness that the company under investigation should retain its original business records. In the investigative stage of a case, before a complaint is filed, the Department of Justice does not need original business records. At this stage the right to inspect and copy given by S. 1003 and H.R. 4792 should be sufficient.[18]

If the civil investigative demand were limited to inspection and copying, other problems raised by S. 716 would be reduced. For example, business records would not be removed to cities distant from the owner's place of business. In addition, the antitrust agencies and congressional committees would not be hindered in the exercise of their own subpoena powers by the fact that the documents they want had been turned over to the Attorney General.

Congressional Committees

S. 716 delegates power to the Attorney General to supply congressional committees with documentary evidence obtained by means of compulsory process whether or not such evidence is related to legislative functions.[19] For almost eighty years, how-

17 Under S. 716 the government would be required to bear the cost of transporting documents to distant cities. §4 (b) (2).

18 Original business records are possibly not needed even after a grand jury has been impaneled or after complaint has been filed. Judge Hansen stated during the hearings that photostatic copies are acceptable under the rules of evidence if originals are unavailable. Hearings, note 5 supra, at 19.

19 S. 716 provides: ". . . 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." §4 (c).

S. 1003 and H.R. 4792 provide: "No documentary material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a district court for good

ever, the law has been clear that congressional investigations must be restricted to legislative purposes.[20] The principle was reaffirmed as recently as 1957, with the court holding that investigations unrelated to any legislative purpose are "beyond the powers conferred upon the Congress in the Constitution."[21] Since the only purpose of the civil investigative demand is to help the Attorney General obtain documentary evidence for possible litigation, not legislation, it appears doubtful that such evidence would very frequently, if ever, possess a significant relationship to legislative problems. S. 716 would thus permit the Senate and House Judiciary Committees to obtain data indirectly, with the cooperation of the Attorney General, which the Constitution does not permit them to obtain by means of their own subpoena powers.

S. 1003 and H.R. 4792 are not subject to the foregoing objection. Since they are limited to inspection and copying of documents, congressional committees would remain free to obtain documents from the owner by means of subpoena if a legitimate legislative purpose is shown.

Restriction on Discovery Rights

In civil cases the courts are authorized, upon a showing of good cause, to order any party to produce and permit inspection and copying of any designated documents, not privileged, in his possession, custody or control, if relevant to the issues.[22] In criminal cases the court may authorize the defendant to inspect and copy documents needed for the preparation of his defense, including those "obtained from others by seizure or by process."[23]

S. 716 restricts the discovery rights of defendants, but not of the government, under the federal rules by prohibiting disclosure to persons other than government personnel.[24] S. 716 completely forecloses discovery of evidence relevant to the issues of a pending case which the custodian has obtained from third parties.

cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the Department of Justice, without the consent of the organization who produced such material . . . ." §4(a).

20 Kilborn v. Thompson, 103 U.S. 168 (1881).

21 Watkins v. United States, 354 U.S. 178 at 198 (1957).

22 Fed. Rules Civ. Proc. 34.

23 Fed. Rules Crim. Proc. 16.

24 S. 716, in creating a "Documents Custodian," provides: "While in the possession of the custodian, no materials so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice or any antitrust agency. . . ." §4(c).

This is particularly unfair because the custodian can get the original documents. S. 1003 and H.R. 4792, on the other hand, attempt to preserve the power of the courts to grant discovery under the federal rules of documents obtained by means of civil investigative demands upon a showing of "good cause."[25]

The problem here involves evidence obtained by the government from third parties. Yet full discovery of *all* relevant evidence is of the greatest importance. Much of the evidence in antitrust cases relates to industry questions and involves data obtained from persons other than the defendant. Where the issue involves an actual or potential injury to competitors, suppliers or customers of the defendant, data obtained from them can be an essential feature of the government's or the defendant's case.

The restriction imposed by the Kefauver bill goes against the basic policy of the federal rules, stated by the Supreme Court in *Hickman v. Taylor*:

> "The pretrial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pretrial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. . . . Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[26]

Because of the complexity of factual problems commonly encountered in antitrust litigation, it is clear that denial of pretrial

[25] S. 1003 and H.R. 4792 provide: "No documentary material produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a district court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to [any person], other than an authorized employee of the Department of Justice, without the consent of the organization who produced such material . . . . The Attorney General or any authorized employee of the Department of Justice may use such copies of documentary material as he determines necessary in the performance of his official duties, including presentation of any case or proceeding before any court or grand jury." §4 (a).

[26] 329 U.S. 495 at 500-501 (1947).

examination and inspection of potential evidence in the government's files would cause needless delay and confusion at trial. The bill thus reverts to the dark ages of court procedure so far as one party, but not the other, in concerned.

Under S. 716 documents in the possession of the custodian would be shrouded in greater secrecy, insofar as pretrial discovery is concerned, than even grand jury proceedings. Under the federal rules a defendant can obtain discovery of portions of the grand jury transcript needed for preparation of the defense upon a showing of good cause.[27]

The constitutionality of any statute which would require the parties to contend on unequal ground is dubious. The federal rules are intended to aid both sides. The broad investigation permitted by the rules can be justified only on the theory that the powers granted are mutual.[28]

Scope

S. 716 would be unique in the history of the antitrust laws in that it confers investigative power upon the Department of Justice extending substantially beyond the department's enforcement jurisdiction.[29] S. 1003 and H.R. 4792 are based on the principle that the department should not be given a civil investigative power in any area where it is not authorized to bring a civil action.

[27] United States v. Proctor & Gamble Co., 356 U.S. 677 (1958).

[28] The Supreme Court said in Hickman v. Taylor, 329 U.S. 495 at 507 (1947): "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

[29] S. 716 authorizes investigations of violations of the "antitrust laws" as defined by §1 of the Clayton Act and also violations of the Federal Trade Commission Act, §3 of the Robinson-Patman Act, and "any statute hereafter enacted by the Congress" providing a civil remedy for restraint or monopolization of commerce or any unfair trade practice. §2 (a).

S. 1003 and H.R. 4792 merely authorize investigations of violations of the "antitrust laws" as defined by §1 of the Clayton Act. §2 (a).

Sections 11 and 15 of the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. (1958) §§21, 25, confer joint responsibility on the Attorney General and the Federal Trade Commission for the enforcement of §§2, 3, 7 and 8 of the Clayton Act. In addition, the Attorney General has enforcement responsibilities under the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. (1958) §4, and he is authorized to enforce the Webb-Pomerene Act, 40 Stat. 516 (1918), as amended, 15 U.S.C. (1958) §§61-65, "before the Commission has made its investigation." United States Alkali Export Assn. v. United States, 325 U.S. 196 at 211 (1945). But the Attorney General has no authority to prosecute unfair methods of competition in violation of §5 of the Federal Trade Commission Act, 15 U.S.C. (1958) §45.

The danger of unrestricted investigative powers was pointed out by the Supreme Court in *Oklahoma Press Publishing Co. v. Walling*:

> "Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason."[30]

Officious examination is a definite possibility where any official is given authority to inquire into matters which have been committed to another agency for enforcement purposes. No statute has heretofore vested a general inquisitorial power in any agency. In the past, Congress has always restricted the power of inquiry to the extent reasonably necessary for the performance of an agency's assigned responsibilities.[31] In *United States v. Morton Salt Co.*, the Supreme Court noted:

> "Of course, a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power . . . . But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."[32]

The investigation of violations of the Federal Trade Commission Act opens up a new area for the department. Moreover, it is an area which until now has been considered to be the special responsibility of the Federal Trade Commission. "The Federal Trade Commission Act provides a fully-equipped arsenal of weapons for compelling the reluctant to furnish . . . information."[33]

30 327 U.S. 186 at 213 (1946).

31 With respect to the Interstate Commerce Commission, the Supreme Court held in ICC v. Brimson, 154 U.S. 447 at 478 (1894): "Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen." Even the investigative powers of grand juries are limited to the production of evidence needed to fulfill their assigned responsibilities. Thus the Supreme Court held in Hale v. Henkel, 201 U.S. 43 at 77 (1906): ". . . some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the production of such a mass of papers." The Federal Trade Commission's investigative powers are restricted to the collection of evidence needed for adjudicated cases or authorized economic reports. FTC v. American Tobacco Co., 264 U.S. 298 (1924).

32 338 U.S. 632 at 652 (1950).

33 Seidman, "The Commission's Powers To Conduct Field Investigations," A.B.A., SECTION OF ANTITRUST LAW, PROC. 12 (April 9-10, 1959).

Nothing in the subcommittee's report, the hearings or the floor debates suggests that the Federal Trade Commission's powers are deficient or that the commission has been less than diligent in exercising the powers it now has. If any deficiency did exist, however, it seems logical that additional investigative authority should be conferred upon the commission, not the Attorney General.

In the absence of any demonstrated need for dual investigative powers over offenses created by the Federal Trade Commission Act, S. 716 is at best superfluous. More important, the bill would create the potentiality of duplicative and overlapping investigations. The bill provides no machinery for coordinating investigations by the department with prosecutions by the commission. Since the department could not bring a complaint under the Federal Trade Commission Act, it would almost seem that the purpose of S. 716 is to provide a method for surveillance of the manner in which the commission discharges its responsibilities under the act.

S. 716 also extends the civil investigative demand to "any statute hereafter enacted by the Congress which prohibits, or makes available to the United States in any court or antitrust agency of the United States any civil remedy with respect to (A) any restraint upon or monopolization of interstate or foreign trade or commerce, or (B) any unfair trade practice in or affecting such commerce."[34] The power to investigate under "any statute hereafter enacted" ignores the fact that the investigative powers of the Department of Justice, the Federal Trade Commission and other agencies have been developed over the years on the basis of experience. It appears unwise and potentially productive of confused, duplicative and overlapping activities to provide in advance the manner by which statutes not yet enacted shall be enforced. The objectives of sound legislation should require that authority to investigate be given only in the light of the problems existing which justify new legislation, the nature of the remedies adopted, and the respective capabilities of the various enforcement agencies. The attempt to provide the manner for enforcing legislation which may be enacted many years hence to meet problems then existing seems premature and beyond any need now existing.

[34] Section 2 (a) (4).

S. 716 also appears unsound in that it would create a "civil" investigative demand to uncover evidence of violation of section 3 of the Robinson-Patman Act, a criminal statute.[35] It is surprising that an investigative procedure which arose from objections to the use of the grand jury in civil cases should become a means for avoiding the grand jury in criminal cases. The Attorney General's Committee said of the Civil Investigative Demand: "It would complement, *not supersede,* the grand jury, which retains its proper role in criminal investigations."[36]

S. 1003 and H.R. 4792 are somewhat unclear as to whether the civil investigative demand could be employed in a criminal investigation. It is clear, of course, that no civil investigation could be conducted into alleged violations of section 3 of the Robinson-Patman Act. But these bills state that the Attorney General may execute and issue a civil investigative demand, "prior to the institution of a civil or criminal proceeding" upon an "antitrust violation,"[37] and the term "antitrust violation" is not defined. It is thus conceivable that these bills might be construed as permitting employment of the "civil" demand where only criminal prosecution is contemplated. There will undoubtedly be cases in which evidence of criminality is discovered during the course of a civil investigation. In such cases the Attorney General should be authorized to turn over such information to a grand jury. Nevertheless, the civil investigative demand should not be available under circumstances where, from the outset, only criminal prosecution is contemplated.

Notice

All three bills are deficient in failing to require sufficient specificity in the demands with respect to the conduct constituting the alleged violation under investigation.[38] S. 716 uses the phrase "nature of the conduct constituting the alleged antitrust violation" whereas the other two bills require a statement of "the general subject matter of the investigations." Since the purpose of

35 Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958).

36 REPORT 347. Emphasis added.

37 Section 3 (a).

38 S. 716 provides that the demand shall "(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto; (2) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified. . . ." §3 (b).

S. 1003 and H.R. 4792 provide that the demand shall: "(1) state the statute and section or sections thereof alleged violation of which is under investigation, and the gen-

the civil demand is investigatory some latitude in the specification of acts, practices and omissions must necessarily be allowed. Nevertheless, because of the possibility that vaguely-worded demands may be issued under the quoted language, a more definite standard should be adopted.

S. 716 requires a statement of "the provision of law applicable" to the alleged violation, whereas S. 1003 and H.R. 4792 require a statement of "the statute and section or sections thereof alleged violation of which is under investigation." It is difficult to understand why the Senate adopted the vaguer terminology of S. 716. The antitrust laws comprehend a multitude of conceivable offenses, and persons under investigation should be entitled to the greatest reasonable measure of specificity. For example, if the relationships between two corporations were under investigation it might be sufficient under S. 716 to specify that the alleged violation involved "the Clayton Act." Certainly the parties should be entitled to know whether the investigation involves a stock or asset acquisition, covered by section 7; an interlocking directorate, covered by section 8; or an exclusive dealing arrangement, covered by section 3.

All three bills are also deficient in that none requires an identification of the corporation, association, partnership or individual whose conduct is under investigation. It would seem merely a matter of basic fairness that the person receiving a civil investigative demand should be informed whether his own conduct or someone else's is under investigation.

The documents to be furnished in response to a demand should be specified with reasonable particularity. For this reason the terminology "class or classes" of documents which appears in all three bills should be omitted. For example, the following might be considered to constitute a "class" of documents: (a) "all correspondence of the Marketing Research Department of your company for the period 1949-1959," or (b) "all contracts, agreements and understandings between your company and companies A., B. and C." Such vague descriptions could easily result in the production of documents exceeding the legitimate needs of the investigation.

eral subject matter of the investigations; (2) describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to identify the material demanded. . . ." §3 (b).

Delivery of Documents

S. 716 authorizes the Attorney General to select the place where delivery of the documents is to be made.[39] Although the department requires a measure of flexibility for the efficient performance of its functions, it is difficult to see how any inconvenience would result if government investigators, who are stationed throughout the country, were required to inspect the documents at the owner's place of business, with the right to make copies if needed. S. 716 fails to balance the requirements of efficient administration against the potential burdens upon the business community. For example, the Attorney General could require that business records situated in California be produced in Washington, D.C. or New York City. Moreover, these records could be held for several years during the pendency of the investigation and any resulting litigation. The California company, if it is to continue in business, would have to incur substantial expense in creating duplicate records.

S. 1003 and H.R. 4792 are not subject to this objection because they are limited to the inspection and copying of documentary materials at the owner's place of business. They proceed on the principle that the government should bear the costs entailed in the performance of governmental functions.

Petitions To Modify or Set Aside

Under S. 716, actions to modify or set aside demands must be brought in the judicial district where the custodian designated therein is located, and the Attorney General is free to select the judicial district within which to locate the custodian.[40] If S. 716 were construed as authorizing a separate custodian for each demand, forum shopping could become a serious problem. Thus, a company whose principal office is in Maine might be required to litigate in California, 3000 miles from its headquarters. A company in Florida could become involved in Oregon.[41] S. 1003

[39] Section 3 (b). S. 1003 and H.R. 4792 provide that documentary material shall be produced for inspection and copying during normal business hours at the principal office and place of business of the organizations or at such other times and places as may be agreed upon by the parties. §3 (a), (h).

[40] Section 5 (b).

[41] The following statement of factors considered by the courts in ruling upon venue questions is worth considering in connection with the place where actions should be brought. United States v. National City Lines, 7 F.R.D. 393 at 398 (1947): "Courts have held that the indictment of a person away from his domicile which requires him to (1) go to a distant place, (2) employ counsel in a distant city and (3) to bring his wit-

and H.R. 4792 eliminate the possibility of forum shopping and minimize the burden on the company concerned.[42]

Disclosure of Confidential Data

Data obtained by means of a civil investigative demand should not be disclosed to government officials other than Department of Justice personnel except in connection with court or grand jury proceedings. Nevertheless, S. 716 permits disclosures to congressional committees and various federal agencies.[43] S. 1003 and H.R. 4792, on the other hand, do not authorize such disclosures.[44] The problem of protecting confidential information from unauthorized disclosure is a serious one under S. 716 because such information may be furnished to many people outside the department.[45] Moreover, the bill contains no prohibition against disclosures by persons who acquire access to the documents. Agencies like the Federal Trade Commission, on the other hand, are not authorized to divulge confidential information to anyone outside the commission.[46]

In a letter to the Senate Judiciary Committee John W. Gwynne, former Chairman of the Federal Trade Commission,

nesses from afar are hardships to be considered. So is also, in the case of a corporate body, the fact that (4) its business headquarters are in another city, and (5) its records are there.

42 S. 1003 and H.R. 4792 provide that the petition shall be filed "in the United States district court for the district in which the principal office or place of business of the organization upon whom such demand was served is located, or in such other district as the parties may agree." §5 (b).

43 S. 716 permits disclosures to the Senate and House Judiciary committees and to "antitrust agencies." §§2 (b), 4 (c). No demand shall contain any requirement which would be held "unreasonable" or require the production of any documentary material which would be privileged from disclosure if such requirement were contained in a grand jury subpoena. §3 (c). Upon notice that the documents are to be submitted to an antitrust agency or congressional committee, the owner may petition the district court for an order for the protection of "secret processes, developments, research or any privileged material. . . ." §5 (e).

44 S. 1003 and H.R. 4792 prohibit disclosures to other than authorized personnel of the Department of Justice except in connection with any case or proceeding before a court or grand jury. §4 (a).

45 Judge Hansen explained the problem as follows, Hearings, note 5 supra, at 20: ". . . each time that someone else has an opportunity to see the documents, the personal records or private records of a corporation, the more difficult it is to get those records or to see the records, and I am sure there are instances where it would be difficult for someone not a part of the company or not in the particular industry to readily identify whether it constituted confidential matter or trade secrets or not. Just looking at it to me might not mean anything particularly. To somebody in the industry it would. We would have considerable problems."

46 Section 6 of the Federal Trade Commission Act, 38 Stat. 721 (1914), as amended, 15 U.S.C. (1958) §46 (f) prohibits disclosure of "trade secrets and names of customers" to other than commission personnel. Section 10 provides that officers and employees of the commission shall be subject to fine and imprisonment for making public "any information obtained by the commission. . . ."

stated that the commission was opposed to provisions which would prevent disclosures to the commission. "Such a prohibition," he said, "would completely disrupt the current cooperative practices of the Department of Justice and the Federal Trade Commission to exchange information with each other and to allow the other to inspect, copy, and use evidence other than that secured by grand jury subpoena."[47] Mr. Gwynne's view, however, seems to ignore the distinction between documents obtained by the department through voluntary cooperation and documents obtained by means of compulsory process. His letter recognizes that information obtained by grand jury subpoena is not a subject of the cooperative arrangements between the department and the commission.

If the civil investigative demand were limited to the inspection and copying of documents, no interference with the fact-finding processes of the Federal Trade Commission or any other agency would result. Because the original documents would be retained by the owner thereof, the commission would remain free to discover through exercise of its own powers facts needed in the enforcement of the laws entrusted to it.

There could be no objection to a provision allowing the Department of Justice and the Federal Trade Commission to exchange information as to current or planned investigations. The need to avoid duplicative and overlapping activities appears to require this conclusion. This, however, stops short of an interchange of documents obtained by means of the separate and distinct powers of the department and the commission.

Expiration of Demands

S. 716 provides that the owner of documents produced pursuant to a demand may call for their return "within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation. . . ."[48] In addition, the bill permits copies to be retained indefinitely by the Department of Justice or any "antitrust agency."[49] The bill, in allowing the documents to be retained for the duration of the investigation regardless of whether it is conducted within a reasonable time, is in sharp contrast to grand jury procedures. Thus section 6 of the Federal Rules of Criminal Procedure provides that no grand jury may serve more than eighteen months. Since

47 Hearings, note 5 supra, at 24.
48 Section 4(f).
49 Section 4(c), (e), (f).

one of the purposes of the civil investigative demand was to provide a more efficient and expeditious fact-finding procedure than the grand jury, it is surprising that legislation should make it possible for civil investigations to drag out longer than grand jury proceedings. The maximum duration of any investigation should be no more than eighteen months, and all documents should be returned thereafter.

S. 1003 and H.R. 4792 provide that the owner of the documents shall be relieved of the duty of holding them available in connection with the investigation or any proceeding resulting therefrom or at the end of eighteen months, whichever is the sooner. The district courts, however, are authorized to extend the period of eighteen months.[50] This provision could be improved by making it clear that all copies of documentary materials, as well as the originals, must be returned when the demand expires.

Penal Provisions

The Attorney General's Committee recommended that the civil investigative demand should be enforced by appropriate order of the court and not by penal sanction.[51] All three current proposals, however, contain penal provisions.[52]

These provisions appear unnecessary because the courts have ample power to compel compliance with their orders, and existing legislation provides criminal penalties for furnishing false information to the government.[53] It is entirely possible that the penal provisions could result in uneven and unfair enforcement of the demand. For example, if a party had no intention of complying with the demand unless and until ordered by court, would he be guilty of crime for willfully "withholding" the documents? The penal provisions thus create the possibility that a person having a legitimate objection to the propriety of a demand must run the risk of subjecting himself to a criminal charge merely by standing on his rights and awaiting an appropriate court order before he complies.[54]

50 Section 4 (b).

51 REPORT 347.

52 All three bills provide for a $5,000.00 fine and imprisonment for not more than five years for anyone who "willfully removes from any place, conceals, withholds, destroys, mutilates, alters, or by any other means falsifies any documentary material. . . ."§6.

53 18 U.S.C. (1958) §1001 provides for a fine of $10,000 or imprisonment for not more than five years for persons who willfully falsify, conceal, cover up or make any false, fictitious or fraudulent statement or representation to any department or agency of the United States. Id., §401 authorizes the courts to punish contempts of court by fine or imprisonment.

54 Section 10 of the Federal Trade Commission Act, 38 Stat. 723 (1914), as amended,

Conclusion

The civil investigative demand could be made a useful mechanism for gathering evidence of civil antitrust violations. It would replace the grand jury for precomplaint investigations where there are no grounds for believing a criminal violation has occurred. For this purpose it would be sufficient to permit government investigators, subject to judicial safeguards, to inspect relevant documents at the owner's place of business. The appointment of a "Documents Custodian" in the Antitrust Division to maintain permanent files of private documents is not only unnecessary but also undesirable in several respects. (1) The bill passed by the Senate, S. 716, would permit the custodian to remove records to distant cities, and in some cases would require that litigation with respect to the propriety of a demand be conducted outside the judicial district where the owner of the documents maintains his principal office. (2) The use of documents should be strictly limited to the purposes of the investigation. Their contents should not be disclosed to congressional committees or administrative agencies with no direct interest in the subject of the investigation. (3) Third party documents should be left subject to the discovery provisions of the federal rules after a lawsuit has been started. (4) The Attorney General should not be given authority to investigate violations of statutes he has no power to enforce by means of a civil action. Authority to investigate violations of the Federal Trade Commission Act and section 3 of the Robinson-Patman Act should therefore be eliminated from the bill.

Although the Celler and Wiley bills, H.R. 4792 and S. 1003, could be improved in several respects, they are radically different from S. 716 and therefore provide a better start toward civil investigative demand legislation.

15 U.S.C. (1958) §50 provides criminal penalities for persons who "neglect or refuse to attend and testify . . . or to produce documentary evidence . . ." or who "willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence. . . ." Since it would be unconstitutional to require an investigatee to subject himself to criminal penalties in order to test the lawfulness of a commission subpoena, he may bring an action to enjoin enforcement. FTC v. Millers' National Federation, (D.C. Cir. 1927) 23 F. (2d) 968. What was described as "the first successful criminal prosecution for failure to give testimony at hearings before a Federal regulatory agency in response to a subpoena" was recently concluded, on April 13, 1960, by means of a guilty plea and imposition of the minimum fine. United States v. Freeman, (Crim. No. 59CR213, N.D. Ill. 1960). See FTC Press Release, April 22, 1960. If criminal sanctions have any place in a civil investigative demand bill, it should be made clear that they do not come into operation until procedures for civil enforcement have been carried to a conclusion.