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"We recognize that the Department (of Justice) has been handicapped and accept the Judicial Conference conclusion that present civil investigative machinery is inadequate for effective antitrust enforcement. The problem is, therefore, to devise a pre-complaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation by those under investigation fails."[1]

With these words, the Attorney General's Committee initiated the effort to provide the Antitrust Division with a tool for use in civil investigations. The Committee's recommendation of a "Civil Investigative Demand" climaxed discussion within and without the Antitrust Division as to the need for, and the means of providing, more effective and less cumbersome investigative procedures when the Division contemplates only civil proceedings. The proposed legislation which has resulted would put civil and criminal investigations on a more equal footing.

For many years, attorneys within the Division had discussed the problem of using a grand jury in investigations resulting only in

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[1] Att'y Gen. Nat'l Comm. Antitrust Rep. [hereinafter cited as Att'y Gen. Rep.] 345 (1955). The Prettyman Report, Procedure in Anti-Trust and other Protracted Cases, 13 F.R.D. 62, 67 (1951), observed:

> It is said that vague complaints in civil antitrust cases brought by the Government are unavoidable, because the inquisitorial power of the Department of Justice in civil matters is inadequate and the Department's only recourse is to file complaints containing indefinite allegations and thereafter to utilize the processes of the court to discover the facts. It may well be that the powers of investigation of the Department are not sufficient for these tasks and that Congress should be asked to remedy that deficiency, or that the ample investigative powers of the Federal Trade Commission should be utilized.

The Prettyman Report noted further that the Federal Rules of Civil Procedure "were not intended to make the courts an investigatory adjunct to the Department of Justice," and that the Government or any other plaintiff "cannot pretend to bring charges in order to discover whether actual charges should be brought." *Ibid.*

civil proceedings. While it had long been the policy of the Department of Justice to utilize the grand jury in investigations only when criminal proceedings were contemplated, the decision to use a grand jury was not difficult to justify in view of the Sherman Act criminal penalties, and it was not then considered essential to decide at the outset whether only civil proceedings would be instituted. It was easy to decide that the nature of the prosecution would depend upon the results of the investigation to be conducted and that criminal indictment might be sought. Nevertheless, many attorneys within the Division were bothered by the use of the grand jury in situations in which it was most likely that the Department would not proceed by indictment. However, agreement could not be reached on an alternative procedure, and it was not until the Attorney General's Committee separated the request for documentary material from the requirement of oral testimony that a feasible procedure emerged.[2]

There is a considerable body of opinion that any investigative procedure which does not include the requirement of oral testimony under oath is not a significant investigative tool. The more general view, however, is that the necessary administrative safeguards which are concomitants to the power to require oral testimony would radically alter the Division from its prosecuting functions and thus impair its effectiveness.[3] With this power absent the proposal of a civil investigative demand gained many supporters.

Shortly after the Committee transmitted its report to the

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[2] The need for such authority has been questioned and some side effects have been suggested, not the least of which is that "some less serious offenses, which might otherwise go untouched, may be picked up in a dragnet of civil proceedings." BNA Antitrust Rep. No. 11, p. B-3 (1961). It has also been suggested that the creation of such authority would encourage review of record disposition programs to provide for disposition of all otherwise non-essential documents. *Ibid.*

[3] The Attorney General's Committee said:

> We reject the proposal for legislation authorizing the Department of Justice to issue the type of administrative subpoena typically employed by regulatory agencies. Unlike the Federal Trade Commission, for example, the Department of Justice is entrusted only with law enforcement. The grant of subpoena powers suggests broader regulatory powers, structural reorganization, a system of hearing officers and a panoply of administrative procedural protections which the Committee is not prepared to recommend. We would, in addition, disapprove any subpoena power that would permit prosecuting officers in antitrust investigations to summon sworn oral testimony by placing businessmen under oath in the absence of a hearing officer and like safeguards. Such authority is alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary.

Att'y Gen. Rep., *op. cit. supra* note 2, at 345-46.

Attorney General on March 31, 1955, Congressman Celler introduced House Bill 7309[4] to provide legislative authority for a civil investigative demand. In 1956, the House of Delegates of the American Bar Association endorsed the principle of the civil investigative demand and authorized its Antitrust Section to support legislation establishing such a procedure with appropriate safeguards.[5] The Antitrust Section has consistently supported the principle of the civil investigative demand. It has been a strong voice in the effort to obtain legislation which would give the Antitrust Division an appropriate tool but which would, at the same time, protect the rights of recipients of such a Demand.[6]

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. However, the determination of whether an antitrust violation exists often depends upon a careful analysis of economic facts which must be developed from the examination of voluminous documents and from consideration of much detailed information. Grand jurors are seldom versed in business affairs and this presents difficulties in focusing their attention on those facts which are significant in determining the existence or non-existence of a violation. It is not unfair or critical of Antitrust Division attorneys to say that if the government attorneys desire to obtain an indictment the grand jury will return one. Consequently, and apparently through the fault of no one in particular, the time-honored function of the grand jury as an independent inquisitorial body is not possible in antitrust matters.

The only other alternative available to the Department of Justice in criminal proceedings is the filing of an information. This would have to be done without the benefit of compulsory investigative powers and is, therefore, not a practical alternative. As a result,

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[4] 84th Cong., 1st Sess. (1955) (referred to Committee on the Judiciary of the House of Representatives on July 13, 1955).

[5] 81 A.B.A. Rep. 410-18 (1956).

[6] Statements were submitted to the appropriate Congressional Committees by the ABA Antitrust Section: In March, 1956, on H.R. 7309, 84th Cong., 1st Sess. (1955) (Congressman Celler); March, 1959, on S. 716, 86th Cong., 1st Sess. (1959) (Senator Kefauver), and on S. 1003, 86th Cong., 1st Sess. (1959) (Senator Wiley); June, 1961, on S. 167, 87th Cong., 1st Sess. (1961) (Senator Kefauver); and August, 1961, on H.R. 6689, 87th Cong., 1st Sess. (1961) (Congressman Celler). Oral testimony was presented on behalf of the ABA Antitrust Section, by William Simon in June, 1961, before the Senate Committee and in August, 1961, before the House Committee.

when the Department determines criminal action is necessary, the grand jury will still be utilized.

When the Department of Justice has decided it will act only on the civil side it has had to depend upon the voluntary cooperation of those it chose to contact during its investigation. In the absence of such voluntary cooperation, the Department either had to abandon the investigation or determine upon the use of the grand jury despite its preference to proceed by civil complaint.

It is probably true that in the great majority of instances, there has been cooperation from parties from whom the Government has sought information. In recent years, however, it is also true that many companies have adopted a policy of something less than full voluntary cooperation. Others have determined upon a course of refusing any voluntary cooperation. It has grown to be a practice among many companies to insist upon some rather detailed specification of the information sought by the Department of Justice before cooperation is forthcoming. This practice is premised not only on the protection of the rights of the company being investigated but also on the avoidance of subsequent dispute as to whether a company has cooperated.

There would appear to be no hardship on the Government to prepare a descriptive statement of the desired information. Since much of its investigatory work is done by FBI agents, something of this kind is already being prepared. It would appear, therefore, that the Department is not impeded in its investigations by an insistence that it specify the information it is seeking. The company or its attorney can then use this statement as a guide in having company records checked to produce information relevant to that investigation. Actually, the procedure which has been gaining acceptance closely resembles the procedure embodied in the proposed legislation providing for the civil investigative demand.

The proponents of the civil investigative demand, however, do not urge it as a substitute either for the grand jury or the request for voluntary cooperation. The Attorney General's Report stated:

> The Attorney General should resort to this Demand where requests for voluntary production would probably prove not fully effective. If, as seems likely, the Demand in practice becomes an effective tool to compel production of

> data adequate for precomplaint investigation, its successful use should end the necessity for utilizing the grand jury process in civil antitrust investigations. Thus, it would complement, not supersede, the grand jury, which retains its proper role in criminal investigations.[7]

The report was speaking well before the Supreme Court decided that it was an abuse of process to use a grand jury in an antitrust investigation where there is no intention to bring a criminal case.[8] This decision should also dispose, for the most part, of the dissents expressed in the Attorney General's Report. There is no answer —other than disagreement—to the argument that a civil investigative demand limited to the production of documents cannot give the Government the information it needs to draft an intelligent complaint or to decide whether to proceed civilly or criminally

The proposed "Antitrust Civil Process Act"[9] authorizes the Department of Justice to issue a Civil Investigative Demand in civil antitrust investigations. Such a Demand may be issued by the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, whenever he has reason to believe that any person,[10] not a natural person, may be in possession, custody or control of any documentary material relevant to an antitrust investigation.[11] Such a Demand must be in writing and it cannot be issued after the institution of a civil or a criminal proceeding based upon the same suspected violation.[12] The person upon whom such a demand is served is required to produce such documentary material for examination, inspection and copying or reproduction[13] by a custodian identified in the Demand.[14]

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[7] Att'y Gen. Rep., *op. cit. supra* note 2, at 347.

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

[9] S. 167, 87th Cong., 1st Sess. (1961), was passed by the Senate on September 20, 1961. The House abandoned the companion House bill, H.R. 6689, 87th Cong., 1st Sess. (1961), and, after certain amendments, passed S. 167 on February 26, 1962. S. 167 was sent to a Committee on Conference to resolve the differences in the two bills. On July 18, 1962, the House failed to accept the Conference Committee Report. A motion to recommit the bill to the Committee on Conference passed by a vote of 202 to 200. The Committee on Conference was instructed to insist on certain House amendments which would limit the issuance of a Demand only to those "under investigation" and would restrict use of demanded documents to the Department of Justice. References herein are to S. 167 as amended and agreed upon by the Conference Committee.

[10] If the House view prevails, such a person must be "under investigation." See note 7 *supra*.

[11] Antitrust Civil Process Act [hereinafter referred to as "Act"] §3(a).

[12] Act, §3(a).

[13] Act, §3(a).

[14] Act, §3(b)(4).

The act prescribes certain standards for and some limitations on the Demand. The Demand shall state the nature of the conduct constituting the alleged antitrust violation which is under investigation as well as the applicable provision of the law or laws covering the alleged violation.[15] The Demand shall describe the class or classes of documentary material to be produced and such description shall be with such definiteness and certainty as to permit such material to be fairly identified.[16] The Demand shall also prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for such inspection and copying or reproduction.[17] The Demand shall not contain any requirement which would be held to be unreasonable if contained in a grand jury subpoena duces tecum.[18] Nor shall such a Demand require the production of any documentary evidence which would be privileged from disclosure if demanded by a grand jury subpoena duces tecum.

The specified materials shall be made available for inspection and copying or reproduction at the principal place of business of the person whose materials are sought unless otherwise agreed to in writing with the custodian.[19] The return date may also be varied by such a written agreement.[20]

The custodian shall take possession of the copies of the documents he has made pursuant to the inspection and thereafter he is responsible for the use made of the documents and for the return of them.[21] While a custodian may have additional copies made as may be required for official use he may not permit examination of the material by anyone other than a duly authorized member or employee of the Department of Justice or of the Federal Trade Commission[22] without the consent of the person who produced the material.[23] The Senate version of S.167 would have used the term "any antitrust agency" instead of the Federal Trade Commission. The Senate language would have included

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15 Act, §3(b)(1).
16 Act, §3(b)(2).
17 Act, §3(b)(3).
18 Act, §3(c)(1).
19 Act, §3(c)(2). See Act, §5(a), which suggests that under certain circumstances originals of demanded documents must be relinquished.
20 Act, §4(b).
21 Act, §4(b).
22 If the House prevails, the FTC will not be able to examine demanded documents. See note 7 *supra*.
23 Act, §4(c).

any board, commission or agency of the United States charged by law with the administration or enforcement of any antitrust law or the adjudication of proceedings arising under any such law.[24] Undoubtedly this would include the Federal Trade Commission, but in addition, with respect to the enforcement of compliance with Sections 2, 3, 7 and 8 of the Clayton Act, it would presumably include the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board and the Federal Reserve Board.[25]

The purpose sought to be achieved by this legislation has not encountered any appreciable opposition during the seven years it has been before Congressional Committees.[26] There is, however, much difference of opinion as to how that purpose should be achieved. It would serve no useful function here to attempt to review these differences in detail—even if I felt competent to do so.

Throughout the consideration of the legislation it has been recognized that adequate investigatory processes are essential for effective antitrust enforcement and that such enforcement should not be left dependent upon the voluntary cooperation of those under investigation. At the same time vesting power in the Attorney General to issue and seek judicial enforcement of a civil investigative demand would lodge in the Executive Department considerable power in the nature of a subpoena. It is felt, therefore, that the exercise of such power should be surrounded with adequate safeguards. The recommendations of the Antitrust Section of the American Bar Association have been made with these principles in mind.

The Demand is, of course, restricted in its application to "documentary material" which is defined in very broad terms to include "the original or any copy of any book, record, paper, communication, tabulation, chart, or other document."[27] This definition would not appear to omit any writing found in a company's files but the documentary material which may be demanded must be "relevant to an antitrust investigation."[28] Much was said in the hearings about the use of the word "relevant" in preference to the

[24] S. 167, 87th Cong., 1st Sess., §2(b) (1961) (original Senate version).
[25] 49 Stat. 1527 (1936), 15 U.S.C. §21(a) (1958).
[26] See note 2 *supra;* Perry and Simon, *The Civil Investigative Demand: New Fact-Finding Powers for the Antitrust Division,* 58 Mich. L. Rev. 855 (1960).
[27] Act, §2(h).
[28] Act, §3(a).

word "pertinent" which was in earlier versions of the bill. It was contended that relevancy is a concept which is well-known in the law[29] and that the courts would therefore have less difficulty in interpreting this language than if a new concept of pertinency were to be introduced.

It is comforting to have a familiar concept nearby when one looks at the subject matter it defines. This is especially true here when one considers the rather startling ramifications which flow from the definition of "antitrust investigation." The scope of a particular investigation is controlled to some extent by the fact that the act requires that each Demand shall "state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto."[30] What constitutes an "antitrust investigation" is a real question which is illustrated by considering the defined terms beginning with "antitrust investigation."

An "antitrust investigation" is defined to mean "any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation."[31] An "antitrust violation" is a defined term and means "any act or omission in violation of any antitrust law or any antitrust order."[32] Now "antitrust order" is a defined term,[33] and means "any final order of the Federal Trade Commission[34] or any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under any antitrust law" "Antitrust law" is a defined term[35] and briefly stated includes the Sherman, Wilson Tariff, Clayton, and Federal Trade Commission acts, together with any subsequently enacted statute which prohibits, or makes available to the United States any civil remedy with respect to, any restraint upon or monopolization of interstate

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[29] Act. §5(e) reads: "To the extent that such rules may have application and are not inconsistent with the provisions of this Act, the Federal Rules of Civil Procedure shall apply to any petition under this Act." Fed. R. Civ. P. 34, for example, covering motions to produce has resulted in a host of cases contributing to a determination of the meaning of relevancy in any specific situation.

[30] Act, §3(b)(1).

[31] Act, §2(d).

[32] Act, §2(e).

[33] Act, §2(c).

[34] If the House version prevails the language "any final order of the Federal Trade Commission" will be dropped from this definition. See motion to recommit, 108 Cong. Rec. 13042 (daily ed. July 18, 1962).

[35] Act, §2(a). All of the definitions are subject to the prefatory language in §2, *i.e.*, "For the purposes of this Act."

or foreign commerce or any unfair trade practice in or affecting such commerce.

Taking this all together then, the civil investigative demand may require the production for inspection and copying or reproduction of any documentary material relevant to any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any act or omission in violation of the Sherman, Wilson Tariff, Clayton, or Federal Trade Commission acts, or any final order of the Federal Trade Commission,[36] or any final order, decree, or judgment of any court of the United States, duly entered in any case or proceeding arising under the Sherman, Clayton, or Federal Trade Commission acts.

Does this mean that, although the Department of Justice is not authorized to bring actions to enforce the Federal Trade Commission Act, the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, may conduct an investigation to determine whether anyone has performed any act or omission in violation of such law?[37]

The Act defines "person"[38] to mean any corporation, association, partnership, or other legal entity not a natural person. Obviously this would exclude the natural person from the category of those who may be required to produce documentary material. But does the definition also preclude the Department of Justice from bringing an action against a natural person as a result of an investigation using the Demand? The definition of "antitrust investigation" refers to inquiries to ascertain whether any "person" has violated the law Should "person" here be read to exclude the natural person so as to prohibit investigations of him by use of the Demand?

Will the Department of Justice be able to use the Demand to ascertain whether Federal Trade Commission orders are being violated, or whether orders by the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, or the Federal Reserve Board under sections 2, 3, 7,

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[36] See note 32 *supra.*

[37] Congressman Celler suggests the possibility of use of the Demand by the Department of Justice in its "enforcement functions" under the Federal Trade Commission Act "such as, for example, 38 Stat. 719 (1914), 15 U.S.C. §45(1) (1958), authorizing a suit to recover penalties for violations of final cease and desist orders." 17 Record of N.Y.C.B.A. 225 (May, 1962).

[38] Act, §2(g).

and 8 of the Clayton Act are being violated? If the House of Representatives stands by the position taken on July 18, 1962, when it approved a motion to recommit the conference report, the scope of antitrust investigations in which the Demand can be used will not extend to alleged violations of Federal Trade Commission orders or orders of any antitrust agency.[39]

These problems are only illustrative and with respect to some of them, it is possible the definition of "antitrust investigator" may provide some answers. An "antitrust investigation" is an inquiry conducted by any "antitrust investigator."[40] The Act defines "antitrust investigator" as "any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law."[41] Until the advent of the proposed Antitrust Civil Process Act, the Federal Trade Commission Act has not been included within the generally accepted definition of "antitrust laws." Consequently, a Department of Justice attorney or investigator would not be charged with the duty of enforcing that Act unless the Antitrust Civil Process Act changes the situation.

The Act does define "antitrust law"[42] to include the Federal Trade Commission Act but with the prefatory language: "For the purposes of this Act."[43] Does this definition of "antitrust law" have the effect of changing the duty and authority of Department of Justice attorneys or investigators? My answer is that it does not, but will the courts agree?

The Act requires a person served with such a Demand to assemble such documentary material and make it available for examination or inspection and for copying or reproduction[44] at the principal place of business of such person or at such other place as the Custodian and such person may agree in writing.[45] Earlier bills would have required the production and surrender of original documents. In all likelihood, these documents would have been removed to Washington or to one of the regional offices of the Antitrust Division for examination and analysis. Lack of avail-

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[39] 108 Cong. Rec. 13042 (daily ed. July 18, 1962).
[40] Act, §2(d).
[41] Act, §2(f).
[42] Act, §2(a).
[43] Act, §2.
[44] Act, §§3(a), 3(b)(4).
[45] Act, §4(b).

ability of these records might have seriously inconvenienced the company and it was ultimately concluded that a procedure similar to the post-complaint discovery procedure,[46] and similar also to the access to records provision incorporated in antitrust decrees for enforcement purposes, would serve the purposes of the Antitrust Division without working a hardship on the investigation. Moreever, such a procedure of production for inspection and copying has the additional beneficial effect of encouraging antitrust investigators to take a selective, rather than a wholesale approach in drafting the Demand.

A great deal depends upon the way the Antitrust Division decides to utilize the Demand. For example, the standards prescribed for the content of a Demand are subject to different interpretations. The Act requires that the Demand "shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable thereto."[47] This is pretty general language. I would expect to learn more from the Demand if the Act required that each Demand "shall state the subject-matter of the investigation, including the particular offense which the Attorney General has reason to believe may have been committed, and the statute and section or sections thereof alleged violation of which is under investigation." Now, maybe this says the same thing. If so, fine. If it doesn't, I think it would be no more restrictive on the Division to be more specific.

It is important that the Demand give specific information at this point, because this is one of the standards by which a court must measure the scope of the Demand. It is also one of the standards by which a company served with a Demand must determine the return it should make. The company must make some selection of the records it will make available for inspection and copying by the Antitrust Division and 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,[48] or whether it encroached upon any recognized privilege.[49]

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[46] Fed. R. Civ. P. 34.
[47] Act, §3(b)(1).
[48] Act, §3(c)(1).
[49] Act, §3(c)(2).

A similar problem exists with respect to the requirement that the Demand "shall 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."[50] It would have been preferable, in my opinion to have omitted the words "class or classes," and thereby direct that the definiteness and certainty of the description be of the documents themselves rather than of the type of documents. No one expects a description of specific letters or memoranda by date, author, and addressee. The Demand wouldn't be needed if the Division had that much information. On the other hand, one cannot make an intelligent selection of relevant documents if the Demand calls for "all sales correspondence" or "all marketing memoranda." It might be agreed that these are "classes of documents" but it takes more information than that to determine relevance to a particular investigation.

In the event a person upon whom such a Demand is served fails to comply with it, a petition may be filed in the district court for the district in which such person resides, is found, or transacts business for an order of enforcement. If such a person transacts business in more than one such district, the petition shall be filed in the district in which that person maintains his principal place of business—or in such other district as may be agreed upon by the parties.[51] Prior to the return date specified in the Demand, or within twenty days, whichever is shorter, a person upon whom such a Demand is served, many petition the district court in the district within which such person resides, is found, or transacts business for an order modifying or setting aside the Demand. Filing such a petition tolls the running of the time allowed for compliance.[52] This procedure is comparable to that applicable to antitrust grand jury subpoenas and, while not perfect, it has been found to be workable.[53]

When there is failure to comply with the Demand, the Anti-

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[50] Act, §3(b)(2).
[51] Act, §5(a).
[52] Act, §5(b).
[53] Questions of reasonableness, privilege and the like may be litigated whether the petition is filed by the company prior to return date or by the Department seeking to enforce compliance. See Letter from Congressman Celler to Milton Handler, March 8, 1962, reproduced in 17 Record of N.Y.C.B.A. 225 (May, 1962).

trust Division can get a court order enforcing the Demand which, if disobeyed, may be punished under contempt procedures. This coupled with existing statutory provisions[54] for punishment or concealment of material facts or for obstruction of justice, which have been adequate to deal with situations encountered in the past would seem to be sufficient enforcement authority.[55] However, for no reason apparent from the hearings,[56] the Act provides for additional criminal sanctions.[57] It is to be hoped that the intent requirement of the penal provision will be some protection to persons served with a Demand, but the possibility it creates of criminal prosecution for perhaps wrongly appraising a document as privileged or non-responsive, or for carrying out established procedures for the destruction of old records, is an unfair burden upon businessmen and their counsel.

The Act provides for the creation of an office to be known as Antitrust Document Custodian.[58] This Custodian must be identified in the Demand and he shall be responsible for the use of the documents and for their return.[59] We have already noted that the Custodian has authority to make copies of the material with limitations as to whom he may make the material available for examination.[60] The Act permits him to deliver such documentary material to any attorney who has been designated to appear on behalf of the United States before any court, grand jury, or the Federal Trade Commission[61] in any case or proceeding involving any alleged antitrust violation. Upon the conclusion of any such case or proceeding, such attorney shall return to the Custodian any documentary material which has not passed into the control of the court, grand jury, or the Federal Trade Commission[62] through the introduction

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[54] 18 U.S.C. §1001 (1958).

[55] The Attorney General's Committee saw no need for further penal sanctions.

[56] Other than a plea therefor by the Assistant Attorney General in charge of the Antitrust Division.

[57] Act, §6(a).

[58] Act, §4(a).

[59] Act, §4(c).

[60] Act, §4(c). Despite such limitations these documents should not be immune from production through the Federal Rules of Civil Procedure once a civil action has been instituted.

[61] The House motion to recommit the conference report instructed its Committee on Conference to insist the "antitrust agency" and the FTC be precluded from access to demanded documents. 108 Cong. Rec. 13042 (daily ed. July 18, 1962).

[62] *Ibid.*

of such documentary material into the record of such case or proceeding.[63]

Upon the completion of the antitrust investigation for which the material was produced or upon the completion of any case or proceeding arising from the investigation, the Custodian shall return all the documentary material produced which has not been introduced in some case or proceeding, other than copies the Custodian has made which were required for official use under regulations which are to be promulgated by the Attorney General.[64] As a result, in many instances, there will be returned to the person producing the documents something less than all the copies of such documents which may be in the government's possession.

This procedure will not only encourage but will require the accumulation of a library of copies of documents, lending natural impetus to the commencement of cases based on ancient history Retention of these copies would be contrary to the holding of the Supreme Court in *United States v Wallace and Tiernan Co.*[65] Moreover, coincident with the completion of any case or proceeding growing out of the investigation is the termination of the Antitrust Division's right to the documentary material. The Antitrust Division's interest in such documentary material and its power to require production is premised on the antitrust investigation specified in the Demand which is authorized by the Act. When the reason for requiring production of the documents no longer exists the right to retain the documents terminates. In comparison with a grand jury, it might be noted that when the term of a grand jury expires, the government's right to documents produced in response to a grand jury subpoena ends and further retention of the documents is dependent upon issuance by the court of an impounding order.[66]

Within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of an investigation, a person upon whom such a Demand has been served, may demand return of all the documentary material he has produced,

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[63] Act, §4(d).
[64] Act, §4(e).
[65] 336 U.S. 793, 801 (1949). See also United States v. Proctor & Gamble Co., 356 U.S. 677, 684-85 (1958).
[66] See United States v. Proctor & Gamble Co., *supra* note 65; Traub v. United States, 226 F.2d 781 (D.C. Cir. 1955); Application of Bendix Aviation Corp., 58 F Supp. 953 (S.D.N.Y. 1945).

other than the copies just referred to.[67] There is nothing said in the Act which would enable one to determine when such a reasonable time has expired and no individual company can know the extent of an investigation so as to be able to compute this "reasonable time." A simple expedient which would have eliminated this problem without any hardship on the Antitrust Division would have been to provide for an automatic expiration date for a Demand after which the documents would have to be returned unless the parties agreed to an extension or unless the Division, upon showing good cause, obtained an extension from a court. Because of the comparability to a grand jury subpoena the period during which a Demand could be in force might have been set at eighteen months.[68]

The whole concept of the office of "custodian" is really unnecessary under a procedure of inspection and copying documents. This procedure is well known under the Federal Rules of Civil Procedure with relation to discovery[69] and as the materials are being sought by the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, that office becomes responsible for the documents as is the case today in government civil antitrust cases.

The Act provides for replacement of a Custodian in the event of his death, disability or separation from service[70] but this is likely to be a situation which will create administrative headaches. Not only must the Assistant Attorney General in charge of the Antitrust Division "promptly" designate another antitrust investigator to serve as Custodian, but he shall also "promptly" transmit notice in writing to the person who produced such material of the identity and address of the successor so designated.[71] It can readily be seen that after a period of time there will be any number of Custodians designated to act and there may be literally hundreds of companies who will be recipients of such Demands to whom notices must go every time a Custodian leaves the Government or otherwise ceases to serve. It would seem to be a very awkward and possibly a completely unmanageable situation.

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[67] Act, §4(f).
[68] Fed. R. Crim. P. 6, provides that no grand jury may serve more than eighteen months.
[69] Fed. R. Civ. P. 34.
[70] Act, §4(g).
[71] Act, §4(g).

The Act also includes a saving provision which would permit the Department of Justice to institute a grand jury with respect to any alleged antitrust violation even though the civil investigative demand procedure had been utilized with respect to a violation which might later be presented to the grand jury.[72] This would seem to be a necessary safeguard to protect the Department against committing itself to proceed only civilly in those circumstances where further investigation—which is, after all, the purpose of the Demand—indicates the necessity, as a matter of Department policy, to bring criminal action. Such a provision is not an encouragement to the Department to utilize the Demand as a stepping stone to grand jury proceedings, but without it the Department might be reluctant to use the Demand except in those situations where it was beyond doubt that criminal proceedings would not be desirable, irrespective of the facts which might be developed during the investigation.

The philosophy behind the Antitrust Civil Process Act is that the Demand would supplement and not be a substitute for the grand jury process.[73] There is no reason to believe that the Demand would not be judiciously used, but the Demand would not eliminate the need for or the use of a grand jury in appropriate circumstances. It is expected that the Department would continue to use the voluntary cooperation route. While there is no obligation on the Department to seek voluntary cooperation prior to issuance of a Demand, it may well be that under some circumstances, this seriatem procedure would be followed. It could be that the mere existence of the Demand authority would increase the incidence of voluntary cooperation.

The creation of the Demand may, in some respects, be a further step toward what might be termed mail-order investigation. In view of the recent effective utilization of the section 6 questionnaires by the Federal Trade Commission there is no doubt that the Commission intends to use these to an even greater extent.[74] In St. Louis before the American Bar Association Antitrust Section, Chairman Paul Rand Dixon said:

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[72] Act, §7.

[73] Att'y Gen. Rep., *op. cit. supra* note 2, at 347.

[74] See remarks of Chairman Paul Rand Dixon on January 26, 1962, before the Section of Antitrust Law, N. Y. State Bar Ass'n. BNA Antitrust Rep. No. 29, p. A-3 (1962).

> We expect to save a good deal of professional manpower, money, and time by using the United States mails to help us get the facts. We are going to continue, for example, to require the filing of special reports under the authority granted to us by section 6 of the Federal Trade Commission Act. This method of investigation is not only efficient and inexpensive, but it is also, in certain circumstances, the only practicable way to bring about such fairness as may come from relatively simultaneous industry-wide enforcement.[75]

While the Demand procedure would not lend itself as readily as the section 6 questionnaire to mass mailings, it nevertheless is quite possible that the Demand would be served by mail with an investigator showing up only at the time specified for production. In the less complicated type of situation it is not unlikely that the company might quite willingly reproduce the documents at the expense of the Government and send them in, without the investigator ever visiting the company's premises. It is only in those instances where the documents demanded are voluminous, that the investigator would be under some compunction to make an examination on the spot in order to avoid an expensive job of reproduction. If the documents are relatively few, it might be even less costly for the Government to arrange to have all the documents reproduced and sent in rather than for the investigator to make trips to places of business which might be some distance from his assigned office.

In summary, I think that the Civil Investigative Demand would bea useful tool in civil antitrust investigations and that it would be a step forward in achieving fair and effective antitrust enforcement. As I have indicated, I think the legislation could be improved upon but frequently things look much worse in anticipation than they turn out to be in realization. I hope that this is true as to the Antitrust Civil Process Act if it passes in its present form. I feel confident that Antitrust Division attorneys want a workable tool and that they would interpret the Act in a constructive way

[75] 19 A.B.A. Antitrust Section 254 (1961).