ANTITRUST CIVIL PROCESS ACT AMENDMENT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 39

TO AMEND THE ANTITRUST CIVIL PROCESS ACT TO INCREASE THE EFFECTIVENESS OF DISCOVERY IN CIVIL ANTITRUST INVESTIGATIONS, AND FOR OTHER PURPOSES

MAY 8 AND 9; JULY 17 AND 25, 1975

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CONTENTS

ANTITRUST CIVIL PROCESS ACT AMENDMENT

THURSDAY, MAY 8, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:15 a.m., in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. [chairman of the subcommittee] presiding.

Present: Representatives Rodino, Flowers, Sarbanes, Seiberling, Mazzoli, Hughes, Hutchinson, and McClory.

Also present: Earl C. Dudley, Jr., General Counsel; James Falco, counsel; and Franklin G. Polk, associate counsel.

Chairman RODINO. The committee will come to order.

The Subcommittee on Monopolies and Commercial Law is commencing its hearings on H.R. 39, to amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations, and for other purposes.

Thirteen years ago, the Attorney General of the United States, the late Robert F. Kennedy, while testifying before this subcommittee in support of proposed legislation that became the Antitrust Civil Process Act of 1962 said:

> The priniciples of free enterprise which the antitrust laws are designed to protect and to vindicate are economic ideals that underlie the whole structure of a free society * * * the Department of Justice realizes that it has no more important function than enforcing these laws. However, we find ourselves hampered in our enforcement program because we lack certain vital tools of investigation.

The 1962 act gave the Department power to obtain documents from potential defendant corporations by means of the civil investigative demand.

The hearings we commence today will consider proposed amendments to that act which seek to provide tools of investigation in addition to the civil investigative demand. We must decide, among other things, whether there is a need for the pre-complaint use of interrogatories and deposition testimony in civil antitrust investigations, and, if so, whether there are adequate safeguards for targets of these new tools.

We must also give consideration to whether the use of these new tools creates the risk of excessive and premature grants of immunity during investigations as well as in litigation. The extension of the act's coverage to natural persons as well as to corporate entities demands that we inquire into areas of law and individual rights not normally relevant to proposed legislation apparently treating only antitrust investigative procedures.

One issue is sharply defined by the bill: Should a lower Federal court's construction of the act that has reduced the use of CID's in investigating mergers as possibly violative of the Clayton Act, be reversed? Undeniably, widespread public anxiety persists over undue market and aggregate concentrations in certain industries and sectors of the American economy. Restrictions on merger investigations are most unfortunate, especially since the Supreme Court, in a string of landmark cases since the limiting construction of the act in this area was rendered, has repeatedly observed that the antitrust laws preserve an economic way of life. Undue concentration jeopardizes this economic way of life, and causes consumers' alternatives to disappear; it also enhances the likelihood that the free enterprise system will be characterized not by policies of competition, but by parallel policies of mutual advantage benefiting large corporate enterprises only.

The bill is most timely in other respects. Fiscal restraint is no longer solely a topic for legislative discussion. The bill makes clear that there are tools necessary for vigorous enforcement of the antitrust laws that money can't buy. Increased appropriations are not the only means by which the Congress can respond to the increasing public demand and undisputed need for improved and more efficient enforcement of the antitrust laws. Hence, this subcommittee's oversight duties are also touched upon by H.R. 39. Moreover, periods of inflation, recession, and stagflation present temptations to engage in certain types of antitrust violation that, if unchecked, can inflict phenomenal widespread economic injury. The present and foreseeable conditions of the Nation's economy are relevant in assessing the need for the bill.

[A copy of H.R. 39 follows:]

94TH CONGRESS
1ST SESSION

H. R. 39

IN THE HOUSE OF REPRESENTATIVES

JANUARY 14, 1975

Mr. RODINO (for himself and Mr. HUTCHINSON) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Antitrust Civil Process Act (76 Stat. 548; 15 U.S.C. 1311) is hereby amended as follows:

(a) Clause (c) of section 2 is amended to read as follows:

"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has

been engaged in any antitrust violation or in any activities which may lead to any antitrust violation;".

(b) Clause (f) of section 2 is amended by deleting the phrase "not a natural person" and inserting immediately after the word "means" the following: "any natural person or".

(c) Subsection (a) of section 3 is amended to read as follows:

"Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have knowledge of any fact or facts, relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for examination or to answer in writing written interrogatories or to give oral testimony, or any combination of such demands, pertaining to such fact or facts.".

(d) Subsection (b) of section 3 is amended to read as follows:

"Each such demand shall—

"(1) state the nature of the conduct constituting

the alleged antitrust violation which is under investigation and the provision of law applicable thereto; and

"(2) if it is a demand for production of documentary material,

"(A) describe the class or classes of documentary material to be produced thereunder with such definiteness and certainly as to permit such material to be fairly identified;

"(B) prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(C) identify the antitrust investigator who shall be the custodian to whom such material shall be made available; or

"(3) if it is a demand for answers to written interrogatories,

"(A) identify the antitrust investigator to whom such answers shall be made;

"(B) propound with definiteness and certainty the written interrogatories to be answered; and

"(C) prescribe a date at which time answers to written interrogatories shall be made; or

"(4) if it is a demand for the giving of oral testimony,

"(A) prescribe a date, time, and place at which oral testimony shall be taken; and

"(B) identify the antitrust investigator or investigators who shall conduct the examination.".

(e) Subsection (f) of section 3 is redesignated subsection (g) and a new subsection is inserted following subsection (e) to read as follows:

"(f) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

"(1) delivering a duly executed copy thereof to the person to be served; or

"(2) depositing such copy in the United States mails, by registered or certified mail duly addressed to the person to be served at his residence or principal office or place of business.".

(f) Section 3 is further amended by adding the following new subsections after redesignated subsection (g):

"(h) The production of documentary material in response to a demand for production described in subsection (b) (2) of this section shall be made under a sworn certificate to the effect that all of the documentary material described by the demand which is in the possession, custody,

or control of the person to whom the demand is directed has been produced and made available to the custodian.

"(i) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer. The answers and objections are to be signed by the person making them.

"(j) (1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. Upon certification the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the antitrust investigator or investigators conducting the examination. The antitrust investigator or investigators conducting the examination may exclude from the place where the examination is held all persons other than the person begin examined, his counsel, the officer before whom the testimony is to be

taken, and any stenographer taking said testimony. The provisions of the Act of March 3, 1913 (ch. 114, 37 Stat. 731; 15 U.S.C. 30), shall not apply to such examinations.

"(2) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon between the antitrust investigator or investigators conducting the examination and such person.

"(3) Any person examined under a demand for oral testimony pursuant to this section shall, on payment of lawfully prescribed costs, procure a copy of his own testimony as stenographically reported, except that such person may for good cause be limited to inspection of the official transcript of his testimony.

"(4) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied by counsel. For any purposes other than those set forth in this subparagraph, such person shall not refuse to answer any question, nor by himself or through counsel interrupt the examination by making objections or statements on the record. Such person or counsel may object on the record, stating the reason therefor, where it is claimed that such person is entitled to refuse to answer on grounds of privilege, or self-incrimination or other lawful grounds.

Where the refusal to answer is on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accord with the provisions of part V of title 18, United States Code. Upon a refusal to answer, the anti-trust investigator or investigators conducting the examination may petition the district court of the United States for the judicial district within which the examination is conducted for an order requiring such person to answer.

"(5) Upon completion of the examination, the person examined may clarify or completely answers otherwise equivocal or incomplete on the record.".

(g) Subsection (b) of section 4 is amended by inserting in the first sentence immediately after the word "demand", first appearance, the following: "for the production of documents", and by amending the second sentence to read as follows: "Such person may upon written agreement between such person and the custodian substitute copies for originals of all or any part of such material.".

(h) Subsection (c) of section 4 is amended by inserting in the first sentence immediately after the word "material" the phrase "described in subsection (b) (2) of section 3" and by inserting in the fourth sentence immediately before the word "documentary" the word "such".

(i) Subsection (d) of section 4 is amended to read as follows:

"(1) Whenever any attorney of the Antitrust Division of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding or to conduct any antitrust investigation, the antitrust investigator or investigators having custody and control of any documentary material described in subsection (b) (2) of section 3, interrogatories served pursuant to this Act and answers thereto, or transcript of oral testimony taken pursuant to this Act may deliver to such attorney such documentary material, interrogatories, and answers thereto, or transcript of oral testimony for use in connection with any such case, proceeding, or investigation as such attorney determines to be required. Upon the completion of any such case, proceeding, or investigation such attorney shall return to the antitrust investigator or investigators any such materials so delivered and not having passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(2) The Antitrust Division, while participating in any Federal administrative or regulatory agency proceeding, shall not employ the authority granted by this Act to obtain information or evidence for use in such proceeding where an adequate opportunity for discovery is available under

the rules and procedures of the agency conducting the proceeding.".

(j) Subsection (e) of section 4 is amended to read as follows:

"Upon the completion of (1) the antitrust investigation for which any documentary material described in subsection (b) (2) of section 3 of this Act was produced, and (2) any such case or proceeding, the custodian shall return to the person who produced such material all such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or Federal administrative or regulatory agency through the introduction thereof into the record of such case or proceeding.".

(k) Subsection (f) of section 4 is amended to read as follows:

"When any documentary material has been produced by any person under a demand described in subsection (b) (2) of section 3 of this Act, and no case or proceeding as to which the documents are usable had been instituted and is pending or has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation,

such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all such documentary material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.".

(l) Subsection (g) of section 4 is amended to read as follows:

"In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under a demand for production described in subsection (b) (2) of section 3 of this Act or the antitrust investigator having possession of answers in writing to written interrogatories or the transcript of any oral testimony produced under any demand issued under this Act, or the official relief of such custodian or antitrust investigator from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such documentary material or to maintain possession of such answers to interrogatories or such transcript of oral testimony, and (2) transmit in writing to the person who submitted the documentary material produced under a demand for produc-

tion described in subsection (b) (2) of section 3 of this Act, notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.".

(m) The first sentence of subsection (b) of section 5 is amended to read as follows:

"Within twenty days after the service of any such demand upon any person, or at any time before the compliance date specified in the demand, whichever period is shorter, or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator or investigators named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such antitrust investigator or investigators a petition for an order of such court modifying or setting aside such demand.".

56-900 O - 75 - 2

[The opening statement of Chairman Rodino and a section-by-section analysis follow:]

STATEMENT OF HON. PETER W. RODINO, JR.

Thirteen years ago, the Attorney General of the United States, the late Robert F. Kennedy, while testifying before this subcommittee in support of proposed legislation that became the Antitrust Civil Process Act of 1962 said, "The principles of free enterprise which the antitrust laws are designed to protect and to vindicate are economic ideals that underlie the whole structure of a free society. . . . The Department of Justice realizes that it has no more important function than enforcing these laws. However, we find ourselves hampered in our enforcement program because we lack certain vital tools of investigation."

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The hearings we commence today will consider proposed amendments to that act which seek to provide "tools of investigation" in addition to the civil investigative demand. We must decide, among other things, whether there is a need for the precomplaint use of interrogatories and deposition testimony in civil antitrust investigations, and, if so, whether there are adequate safeguards for targets of these new tools.

We must also give consideration to whether the use of these new tools runs the risk of excessive and premature grants of immunity during investigations as well as in litigation. The extension of the act's coverage to natural persons as well as to corporate entities demands that we inquire into areas of law and individual rights not normally relevant to proposed legislation apparently treating only antitrust investigative procedures.

One issue is sharply defined by the bill: Should a lower Federal court's construction of the act that has reduced the use of CID's in investigating mergers as possibly violative of the Clayton Act, be reversed? Undeniably, widespread public anxiety persists over undue concentration in certain industries and sectors of the American economy. Restrictions on merger investigations are most unfortunate, especially since the Supreme Court, in a string of landmark cases decided since the limiting construction of the act in this area was rendered, has repeatedly observed that the antitrust laws preserve an economic way of life. Undue concentration jeopardizes this economic way of life, and causes consumer's alternatives to disappear; it also enhances the likelihood that the free enterprise system will be characterized not by policies of competition but by parallel policies of mutual advantage benefiting large corporate enterprises only.

The bill is most timely in other respects. Fiscal restraint is no longer solely a topic of legislative discussion. The bill makes clear that there are tools necessary for vigorous enforcement of the antitrust laws that money can't buy. Increased appropriations are not the only means by which the Congress can respond to the increasing public demand and undisputed need for improved and more efficient enforcement of the antitrust laws. Hence, this subcommittee's oversight duties are also touched upon by H.R. 39. Moreover, periods of inflation, recession, and stagflation present temptations to engage in certain types of antitrust violation that, if unchecked, can inflict phenomenal widespread economic injury. The present and foreseeable conditions of the Nation's economy are relevant in assessing the need for the bill.

Section by section comparison of H.R. 39 and ACPA of 1962

Citation	Present law [1]	Proposed amendment [2]
15 U.S.C. Sec. 1311 (a)-(b).	For the purposes of this chapter (a) The term "antitrust law" includes: (1) Each provision of law defined as one of the antitrust laws by section 12 of this title; (2) The Federal Trade Commission Act; and (3) Any statute enacted on and after September 19, 1962 by the Congress which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to (A) any restraint upon or monopolization of interstate or foreign trade or commerce, or (B) any unfair trade practice in or affecting such commerce; (b) The term "antitrust order" means 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;	(No change).
(c)	(c) The term "antitrust investigation" means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation;	"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation *or in any activities which may lead to any antitrust violation*;".
(d)-(e)	(d) The term "antitrust violation" means any act or omission in violation of any antitrust law or any antitrust order; (e) The term "antitrust investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any antitrust law;	(No change).
Sec. 1311(f)	(f) The term "person" means any corporation, association, partnership, or other legal entity [not a natural person];	(b) Clause (f) of section 2 is amended by deleting the phrase "not a natural person" and inserting immediately after the word "means" the following: "*any natural person or*".
(g)-(h)	(g) The term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document; and (h) The term "custodian" means the antitrust document custodian or any deputy custodian designated under section 1313(a) of this title.	(No change).
Sec. 1312(a)	(a) Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person [under investigation] may be in possession, custody, or control of any documentary material relevant to a civil antitrust investigation, he may, prior to the institution of a civil or ciminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.	"Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, *or may have knowledge of any fact or facts*, relevant to a civil antitrust investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such *documentary* material for examination *or to answer in writing written interrogatories or to give oral testimony, or any combination of such demands, pertaining to such fact or facts*."
Sec. 1312(b)	(b) Each such demand shall— (1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto;	"Each such demand shall— "(1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto; *and*

See footnotes at end of table.

Citation	Present law [1]	Proposed amendment [2]
(b)(2)	(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;	"(2) *if it is a demand for production of documentary material,* "*(A)* describe the class or classes of documentary material to be produced thereunder with such definiteness and certainly [sic] as to permit such material to be fairly identified;
	[(3)] prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and	"*(B)* prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and
Sec. 1312 (b) (a)	[(4)] identify the custodian to whom such material shall be made available.	"*(C)* identify the antitrust investigator who shall be the custodian to whom such material shall be made available; *or* "*(3) if it is a demand for answers to written interrogatories,* "*(A) identify the antitrust investigator to whom such answers shall be made;* "*(B) propound with definiteness and certainty the written interrogatories to be answered; and* "*(C) prescribe a date at which time answers to written interrogatories shall be made; or* "*(4) if it is a demand for the giving of oral testimony,* "*(A) prescribe a date, time, and place at which oral testimony shall be taken; and* "*(B) identify the antitrust investigator or investigators who shall conduct the examination.*".
Sec. 1312(b)		
(c)	(c) No such demand shall— (1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation; or (2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation.	(No change).
(d)	(d) Any such demand may be served by any antitrust investigator, or by any United States marshal or deputy marshal, at any place within the territorial jurisdiction of any court of the United States.	(No change).
Sec. 1312(e)	(e) Service of any such demand or of any petition filed under section 1314 of this title may be made upon a partnership, corporation, association, or other legal entity by— (1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity; (2) delivering a duly executed copy thereof to the principal office or place of business of the partnership, corporation, association, or entity to be served; or (3) depositing such copy in the United States mails, by registered or certified mail duly addressed to such partnership, corporation, association, or entity at its principal office or place of business.	(No change).
Sec. 1312(f)	[(f)] A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be proof of such service. In case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand. Pub. L. 87-664, § 3, Sept. 19, 1962, 76 Stat. 548.	Subsection (f) of section 3 is redesignated subsection (*g*) and a new subsection is inserted following subsection (e)

"(f) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

"(1) delivering a duly executed copy thereof to the person to be served: or

"(2) depositing such copy in the United States mails, by registered or certified mail duly addressed to the person to be served at his residence or principal office or place of business.".

"(h) The production of documentary material in response to a demand for production described in subsection (b)(2) of this section shall be made under a sworn certificate to the effect that all of the documentary material described by the demand which is in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

"(i) Each interrogatory is a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer. The answers and objections are to be signed by the person makin them.

"(j)(1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. Upon certification the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the antitrust investigator or investigators conducting the examination. The antitrust investigator or investigators conducting the examination may exclude from the place where the examination is held all persons other than the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking said testimony. The provisions of the Act of March 3, 1913 (ch. 114, 37 Stat. 731: 15 U.S.C. 30), shall not apply to such examinations.

"(2) The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon between the antitrust investigator or investigators conducting the examination and such person.

"(3) Any person examined under a demand for oral testimony pursuant to this section shall, on payment of lawfully prescribed costs, procure a copy of his own testimony as stenographically reported, except that such person may for good cause be limited to inspection of the official transcript of his testimony.

"(4) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied by counsel. For any purposes other than those set forth in this subparagraph, such person shall not refuse to answer any question, nor by himself or through counsel interrupt the examination by making objections or statements on the record. Such person or counsel may object on the record, stating the reason therefor, where it is claimed that such person is entitled to refuse to answer on grounds of privilege, or self-incrimination or other lawful grounds. Where the refusal to answer is on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accord with the provisions of part V of title 18, United State Code. Upon a refusal to answer, the antitrust investigator or investigators conducting the examination may petition the district court of the United States for the judicial district within which the examination is conducted for an order requiring such person to answer.

"(5) Upon completion of the examination, the person examined may clarify or completely answers otherwise equivocal or incomplete on the record.".

See footnotes at end of table.

Citation	Present law [1]	Proposed amendment [2]
Sec. 1313(a)	(a) The Assistant Attorney General in charge of the Antitrust Division of the Department of Justice shall designate an antitrust investigator to serve as antitrust document custodian, and such additional antitrust investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.	(No change).
Sec. 1313(b)	(b) Any person upon whom any demand issued under section 1312 of this title has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person (or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to section 1314(d) of this title) on the return date specified in such demand (or on such later date as such custodian may prescribe in writing). Such person may upon written agreement between such person and the custodian substitute [for] copies of all or any part of such material [originals thereof.]	Subsection (b) of section 4 is amended by inserting in the first sentence immediately after the word "demand", first appearance, the following: "*for the production of documents*", and by amending the second sentence to read as follows: "Such person may upon written agreement between such person and the custodian substitute copies *for originals* of all or any part of such material.".
Sec. 1313(c)	(c) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than a duly authorized officer, member, or employee of the Department of Justice. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representative of such person.	Subsection (c) of section 4 is amended by inserting in the first sentence immediately after the word "material" the phrase "*described in subsection (b)(2) of section 3*" and by inserting in the fourth sentence immediately before the word "documentary" the word "*such*".
Sec. 1313(d)	(d) Whenever any attorney has been designated to appear [on behalf of the United States] before any court or grand jury in any case or proceeding [involving any alleged antitrust violation, the custodian] may deliever to such attorney such documentary material [in the possession of the custodian] as such attorney determines to be required [for use in the presentation of such case or proceeding on behalf of the United States.] Upon the [conclusion] of any such case [or] proceeding, such attorney shall return to the [custodian] any [documentary material so withdrawn which has not passed] into the control of such court [or] grand jury through the introduction thereof into the record of such case or proceeding.	"(1) Whenever any attorney *of the Antitrust Division of the Department of Justice* has been designated to appear before any court, grand jury, *or Federal administrative or regulatory agency* in any case or proceeding *or to conduct any antitrust investigation, the antitrust investigator or investigators having custody and control of any documentary material described in subsection (b)(2) of section 3, interrogatories served pursuant to this Act and answers thereto, or transcript of oral testimony taken pursuant to this Act* may deliver to such attorney such documentary material, *interrogatories, and answers thereto, or transcript of oral testimony for use in connection with any such case, proceeding, or investigation* as such attorney determines to be required. Upon the *completion* of any such case, proceeding, *or investigation* such attorney shall return to the *antitrust investigator or investigators* any *such materials so delivered and not having passed* into the control of such court, grand jury, *or agency* through the introduction thereof into the record of such case or proceeding. "(2) *The Antitrust Division, while participating in any Federal administrative or regulatory agency proceeding, shall not employ the authority granted by this Act to obtain information or evidence for use in such proceeding where an adequate opportu-*

Sec. 1313(e)	(e) Upon the completion of (1) the antitrust investigation for which any documentary material was produced [under this chapter], and (2) any case or proceeding [arising from such investigation], the custodian shall return to the person who produced such material all such material (other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court [or] grand jury through the introduction thereof into the record of such case or proceeding.	*nity for discovery is available under the rules and procedures of the agency conducting the proceeding."* "Upon the completion of (1) the antitrust investigation for which any documentary material *described in subsection (b)(2) of section 3 of this Act* was produced, and (2) any *such* case or proceeding, the custodian shall return to the person who produced such material all such material (other than copies thereof *furnished to the custodian pursuant to subsection (b) of this section* or made by the Department of Justice pursuant to subsection (c) of the section) which has not passed into the control of any court, grand jury, *or Federal administrative or regulatory agency* through the introduction thereof into the record of such case or proceeding."
Sec. 1313(f)	(f) When any documentary material has been produced by any person under [this chapter for use in any antitrust investigation] and no [such] case or proceeding [arising therefrom has] been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all documentary material (other than copies thereof made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.	"When any documentary material has been produced by any person under *a demand described in subsection (b)(2) of section 3 of this Act*, and no case or proceeding *as to which the documents are usable had* been instituted *and is pending or has been instituted* within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all *such* documentary material (other than copies thereof *furnished to the custodian pursuant to subsection (b) of this section or* made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.".
Sec. 1313(g)	(g) In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under [any] demand [issued under this chapter] or the official relief of such custodian from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian [thereof], and (2) transmit [notice] in writing to the person who [produced such] material as to the identity and address of the successor so designated. Any successor [so] designated shall have with regard to such materials all duties and responsibilities imposed by this [chapter] upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation [as custodian].	"In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under a demand *for production described in subsection (b)(2) of section 3 of this Act or the antitrust investigator having possession of answers in writing to written interrogatories or the transcript of any oral testimony produced under any demand issued under this Act*, or the official relief of such custodian *or antitrust investigator* from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian *of such documentary material or to maintain possession of such answers to interrogatories or such transcript of oral testimony*, and (2) transmit in writing to the person who submitted the *documentary* material *produced under a demand for production described in subsection (b)(2) of section 3 of this Act, notice* as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such materials all duties and responsibilities imposed by this *Act* upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.".
Sec. 1314(a)	(a) Whenever any person fails to comply with any civil investigative demand duly served upon him under section 1312 of this title or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General, through such officers or attorneys as he may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this chapter, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.	(No change).

See footnotes at end of table.

Section by section comparison of H.R. 39 and ACPA of 1962—Continued

Citation	Present law [1]	Proposed amendment [2]
Sec. 1314(b)	(b) Within twenty days after the service of any such demand upon any person, or at any time before the [return] date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such [custodian] a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this chapter, or upon any constitutional or other legal right or privilege of such perosn.	The first sentence of subsection (b) of section 5 is amended to read as follows, "Within twenty days after the service of any such demand upon any person or at any time before the *compliance* date specified in the demand, whichever period is shorter, *or within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator or investigators named in the demand,* such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such *antitrust investigator or investigators* a petition for an order of such court modifying or setting aside such demand.".
Sec. 1314(c)	(c) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this chapter.	(No change).
Sec. 1314(d)	(d) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this chapter. Any final order so entered shall be subject to appeal pursuant to section 1291 of Title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.	(No change).
Sec. 1314(e)	(e) To the extent that such rules may have application and are not inconsistent with the provisions of this chapter, the Federal Rules of Civil Procedure shall apply to any petition under this chapter.	(No change).

[1] Brackets indicate deletions that would occur.

[2] Italic indicates new language to be added.

Chairman RODINO. I recognize the gentleman from Michigan, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. Chairman, as we open the hearings on H.R. 39, we must not overlook some fundamental truths. The antitrust laws seek to establish a code of conduct just as, generally, our criminal laws are intended to. However, not all antitrust laws carry criminal sanctions, and only last year were any violations deemed felonies. Even though some antitrust violations may result in grave injury to the people, criminal sanctions are often legally inapplicable or factually inappropriate.

It is in the twilight zone between the civil and the criminal that antitrust enforcement walks the beat. Those who enforce these laws are the police who ferret out "white-collar wrongs."

H.R. 39 would significantly increase the investigative resources of those who police the antitrust laws. As with any increase in police authority, we must be ever alert to safeguard the interests on the other side. Of course, the fourth and fifth amendments to the Constitution provide protection over and above any legislation, and the Antitrust Civil Process Act itself provides some protection.

But beyond that there must abide in a free society the belief that every citizen should be left alone to pursue happiness as he sees it, within the confines of the law. It follows as a corollary to that belief that the police cannot tap the citizen on the shoulder and subject him to investigation without a good reason.

The fact that the citizen has available to him judicial remedies to protect against overzealous enforcement is well and good, but it is no substitute for legislative precision in stating what authority enforcers must have to perform their function.

H.R. 39 would expand the Justice Department's authority regarding civil investigative demands in several respects. Whereas the Antitrust Civil Process Act of 1962 authorized CID's against only nonnatural persons under investigation, H.R. 39 would expand that to include any person with relevant information or documents. Whereas the act authorized CID's for documents only, H.R. 39 would also authorize interrogatories and depositions. And whereas the act authorized CID's for current or past antitrust violations, H.R. 39 would also authorize CID's for "activities which may lead to any antitrust violation."

Thus the bill expands upon who may be served, what may be demanded, and why a CID may be issued.

Is this expanded authority necessary? In answering that question it is not enough to state one's faith in the antitrust laws. Rather we must determine whether such expansion is consonant with the proper balance that the legislative branch must strike between the needs of law enforcement and the rights of our citizens.

I trust that these hearings will shed light on that question.

Thank you, Mr. Chairman.

Chairman RODINO. Thank you, Mr. Hutchinson.

Our first witness this morning is Thomas E. Kauper, the distinguished Assistant Attorney General in charge of the Antitrust Division. Mr. Kauper, we are delighted to have you here this morning, and we know that your expertise in this area will be very valuable to the committee in providing it with the information that it needs to come to a good legislative conclusion.

Thank you, and you may proceed.

TESTIMONY OF HON. THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY JOE SIMS, SPECIAL ASSISTANT, AND WILLIAM E. SWOPE, DEPUTY DIRECTOR OF OPERATIONS

Mr. KAUPER. Thank you, Mr. Chairman. I think the record should note that I am accompanied this morning by Joe Sims, my special assistant, and by William Swope, our Deputy Director of Operations. I should explain that I asked Mr. Swope to accompany me this morning even though he will have to depart about 11:20, if that is acceptable to you.

Chairman RODINO. That is perfectly all right.

Mr. KAUPER. I am pleased to respond to this committee's request to present the views of the administration on H.R. 39, legislation which would substantially aid effective antitrust enforcement by giving the Department of Justice necessary precomplaint civil investigatory powers. The administration strongly supports this legislation.

H.R. 39 would amend the Antitrust Civil Process Act to authorize the collection of information in advance of action which might be unlawful, to cover natural persons, and to include oral testimony and written interrogatories. It would also extend the scope of a civil investigation demand—CID—to include all persons believed to have information relevant to an antitrust investigation.

The considerations supporting enactment of the Civil Process Act of 1962 speak today for extension of the statute. No litigation involves facts more complex and records more extensive than are found in the Government's antitrust cases. Collecting the great amount of information needed for successful antitrust enforcement is a task of considerable magnitude. Thus, the Antitrust Civil Process Act, as far as it goes, has proven beneficial to our operations.

In the years since its enactment, 1,626 civil investigative demands have been issued by the Antitrust Division. However, the limited scope of the act substantially impairs our investigative effectiveness by limiting civil investigative demands to current or past alleged violations, to legal entities not natural persons, to documentary material, and to parties under investigation.

We simply cannot depend on the voluntary cooperation of industry in our investigatory functions. Although compulsory grand jury process can be used in the investigation of criminal violations under the Sherman Act, the grand jury cannot be used where our intent is only to bring a civil action. Moreover, the Clayton Act is not a criminal statute; under it we must proceed civilly.

H.R. 39 clarifies our authority to seek information on incipient violations, an area of some judicial confusion.[1] This is a highly desirable change, since investigations of yet to be consummated mergers will always involve incipient conduct.

The bill would also give the Department the opportunity to compel the production of information from individuals in those cases where it is not voluntarily forthcoming. This, too, is a necessary addition if our investigatory authority is to be equal to the task.

[1] See, e.g., *U.S.* v. *Union Oil Co.*, 343 F. 2d 29 (9th Cir 1965)

The availability of written or oral testimony, in addition to document production, will also be a very useful investigatory tool. The provision for oral testimony is nothing new. There is ample precedent for it in the State statutes providing antitrust investigatory powers to their attorneys general before institution of any suit. Numerous Federal laws also authorize various departments and agencies to compel the attendance and testimony of witnesses in the course of investigations under the laws which they administer.

These changes in the existing legislation are desirable and indeed necessary for a truly effective antitrust enforcement program, and thus the administration strongly supports H.R. 39.

Since this legislation was prepared by the administration and introduced, however, we have considered other proposed legislation, as well as comments from outside the administration, and we have become convinced that several changes in the legislation as introduced would be desirable. We stand ready to work with this committee and its staff on the language of particular provisions. I would like to highlight these areas here, and also discuss several provisions which raise important policy issues. I have attached an appendix to this statement with detailed language and technical suggestions.

Section (c) of H.R. 39 amends section 3(a) of the Civil Process Act, which sets out the basis on which a CID can be issued and what may be requested. As amended, answers to written interrogatories and oral testimony could be required, in addition to the production of documents. In addition to this change, which we strongly support, section 3(a) would be amended by adding the language "or may have knowledge of any fact or facts." This is intended to form the basis for a demand for oral testimony or written interrogatories, and was in fact the language suggested in the administration bill.

I have concluded, however, that the limitations to "fact or facts" may prove unworkable, since it is ofttimes difficult to establish what another person knows as a "fact." I would suggest the substitution of the language "or may have any information". This is less likely to create enforcement problems and is in fact what the demand seeks.

Section (d) of H.R. 39 amends section 3(b) of the ACPA, which details what the demand shall contain. We have some technical changes in this section which I have detailed in the appendix to my testimony.

There is, however, one change of some impact which affects several provisions of H.R. 39, including this one. As now drafted, section (i) of H.R. 39 would extend the power to utilize the ACPA to obtain information for use before regulatory agencies only in those cases where "an adequate opportunity for discovery" is not available under agency rules and procedures. After careful thought, I have come to the conclusion that this standard is simply unworkable. Who is to decide, for example, whether the agency's rules are adequate?

Therefore, because I believe this authority would be extremely valuable to the Division's regulatory activities, I would suggest that the qualifying language be dropped. The Division's participation before regulatory agencies has become an extremely important part of its activities. In many cases, agency participation is chosen instead of litigation, where it is felt that litigation would be a piecemeal approach to an industry problem.

Other times, agency participation is taken in tandem with related litigation. The Division's advocacy activities before Federal agencies truly complement its traditional enforcement activities and, in the long term, both seek the same goals. Therefore, any distinction in the gathering of information is an artificial one which I do not feel should be perpetuated. I have included in the appendix language which would eliminate this unnecessary distinction.

Section (f) of H.R. 39 deals with the form of responses to a CID. New subsection (g) deals with the production of documents, and would require a sworn certificate that all documents requested have been produced. Who must provide the certificate is unclear. This could be interpreted as allowing certification, even where the demand was directed at a natural person, by someone other than the person to whom the demand was directed. I have suggested in the appendix language to cure this ambiguity. A similar problem exists with new subsection (i), and is also dealt with in the appendix.

New subsection (j) deals with the procedures for complying with a demand for oral testimony. I have a number of suggestions in this area, most of which are dealt with in the appendix, but I would like to specifically mention two points which I feel raise significant policy issues.

First, new subsection (j)(1), as drafted, would allow oral testimony pursuant to a CID to be open to the public, a condition I can assure you was not intended by the drafters. The treatment of information obtained through a CID has always been, and would remain under H.R. 39 amendments, highly restrictive, with areas of use strictly defined. I think this is both appropriate and desirable, and should continue. Nevertheless, new subsection (j)(1) merely permits an oral examination pursuant to a demand to be held in closed session. I believe that such proceedings should always be confidential, with all persons other than counsel for the person being examined and those necessary to conduct the examination excluded. Any other standard, it seems to me, is inconsistent with both the letter and the spirit of other provisions of both the act as it now stands and H.R. 39.

Second, I find that the provisions providing a procedure by which the person examined may obtain a copy of his testimony is not adequate. In addition, there is no provision for certification of the testimony by the person examined, and some ambiguity in new subsection (k)(5), dealing with the right to clarify or complete equivocal answers.

Because of these deficiencies, and because I view this procedure as somewhat analogous to a civil deposition as contemplated by the Federal Rules of Civil Procedure, we now believe changes to conform to those rules is appropriate.

Rule 30(c) outlines the procedure for review and corrections by the witness, and provides for signing. Similar procedures are appropriate and, with slight modifications in language, should be included in these amendments to the Civil Process Act.

Section (i) of H.R. 39 generally describes the uses to which information obtained by CID can be put. I have already indicated some desirable changes in this provision. In addition to those mentioned, however, I believe the scope of the provision must be somewhat narrowed.

Section (i) would allow any use of CID information before any "court, grand jury, or Federal administrative agency" and in the conduct of any antitrust investigation. While we believe that information properly obtained through the use of a CID should be available to Division attorneys in agency proceedings, the possible disclosure of such information in antitrust investigations would have the ironic effect of allowing disclosures by other attorneys in other investigations not permitted to the investigators who obtained the information.

The confidentiality of the documents would be substantially impaired if disclosure was allowed outside a judicial, grand jury, or agency proceeding. The appendix contains specific language to correct this problem, and to permit documents to be utilized in oral depositions under this act.

In addition, we believe that all information obtained through a CID should be available to the FTC, subject to the same limitations placed on the use of the information by the Division. The appendix contains language to accomplish this purpose.

Finally, the relationship of the Freedom of Information Act and the Civil Process Act, including proposed changes, must be carefully considered. We would favor clear and complete exemption from the FOIA for any information, in whatever form, obtained through a CID.

By definition, such information is investigatory and frequently consists of confidential business data. While it would thus probably be exempt from disclosure in any event, we strongly favor specific language to that effect.

In summary, this is necessary and highly desirable legislation. With the few minor changes suggested in this testimony, it has the administration's strong support. I commend this committee for early hearings on this important bill and strongly urge its early passage.

Thank you, Mr. Chairman.

Chairman RODINO. Thank you very much, Mr. Kauper.

In accordance with the rules of the committee, we will proceed and allow each member 5 minutes to question.

Mr. Kauper, on page 2 of your prepared statement you point out and state that the Antitrust Division "simply cannot depend on the voluntary cooperation of industry" in its investigatory functions. The basis of the original act was, it seems to me in large measure, the withholding of documents upon Antitrust Division requests for voluntary cooperation by corporations, was it not?

Mr. KAUPER. Yes.

Chairman RODINO. Are there new problems that have arisen that form a similar basis for these amendments, Mr. Kauper, or has the original difficulty intensified and multiplied despite the enactment and availability of the CIDs?

Mr. KAUPER. I do not know if I could say the original difficulty has become worse, although there still are situations in which we do not get all of the documents we request. However, that, it seems to me, is basically an enforcement problem; that is, how to enforce failure to comply with the request. I think the problems we see at the present can be put, if I might, in a couple of categories.

First, it is not clear that we are authorized to use CID authority for demand of documents in connection with a proposed transaction; that is, particularly a merger or a proposed joint venture. Those are probably the two major categories. And we have, as I think you know, Mr. Chairman, court rulings which suggest that we cannot use the authority prior to the time that the merger is consummated. That is obviously a severe restriction on our ability to obtain documentary evidence in cases where we have a very major enforcement problem, and where, as a practical matter, we would normally like to challenge an acquisition prior to its consummation, if possible.

The second area are in the areas in which we are now seeking expanded authorities; that is, our ability to obtain information from third parties which may become relevant when, for example, we are asked to determine the competitive effects of a merger, and we need some basic data with respect to sales from various members of the industry in order to construct markets and so on. That is the third party proposition.

Moreover, since the act in no way applies to third persons, we really have not been able to obtain the kind of cooperation which we might otherwise be able to obtain if we had this authority. And I would emphasize that I would suspect that if we had this authority we would probably get much more of that information from third parties on a voluntary basis.

So far as our ability to take depositions, since we have no such authority now, and have authority to obtain testimony under compulsory process only in criminal cases, we are largely at the whim of the individuals and corporations involved as to whether they will talk to us at all in some circumstances. And indeed, it is not uncommon, Mr. Chairman, that we do not get past the first hurdle; that is, we simply are not permitted to talk to corporate employees, corporate officers, and so on.

Now, here again, I would anticipate that if this authority existed, much of that would be voluntarily forthcoming without the invocation of all of the formal procedures in this act. That certainly has been our experience under the CID statute as it now exists. But I think that our basic difficulty has been that much of the information which we need in an antitrust investigation does not come simply from the records of the corporation under investigation. That is the essential problem more than anything else.

Chairman RODINO. Mr. Kauper, on page 2 you stated that H.R. 39 clarified the authority of the Antitrust Division commendably and allows, in your language, "investigations of yet to be consummated mergers." Is not the current problem the judicial construction of the act which has restricted the Antitrust Division's investigation of consummated mergers? Do you not mean the amendments assist you in stopping midnight mergers? Is that not, frankly, what you are getting at?

Mr. KAUPER. Yes; to a degree that would be true. That is, it would provide us with the availability to get information. Now, in the case of the true midnight merger, Mr. Chairman, that is a merger consummated perhaps even for the deliberate purpose of making sure that we could not seek to enjoin it. Obviously, if a company has that in mind, the fact that we can get information once we know of it

may not be the ultimate answer to that problem. But certainly, it does mean that we would be able under the amendments to obtain information prior to consummation when we would know consummation is down the road. The *Union Oil* decision suggests we cannot do that.

Now, we did, of course, contend to the contrary. That is why this is put in terms of clarifying. But, it has been a major difficulty for us on merger investigations, and I think, at least in the situation where a proposed transaction has been announced, we pretty clearly ought to have that kind of authority.

Chairman RODINO. Could you define a to-be consummated merger and explain how you find out about them, and how frequently you investigate these?

Mr. KAUPER. Well, at the present time, Mr. Chairman, we are largely dependent upon public information, or notification by counsel. Now, there are a good many mergers in which the companies involved instruct their counsel to inform us well in advance. Obviously, there are some companies who would prefer to be sued before they get into consummation, rather than having to unwind later.

But generally, we are dependent upon public sources of information, and I suspect, Mr. Chairman, in a number of cases we learn about mergers at about the same time you do, assuming we read the same sources.

Chairman RODINO. Mr. Kauper, on page 8 you state that H.R. 39 should be amended to give "a complete exemption" from the Freedom of Information Act "for any information in whatever form obtained through a CID." Yet you also go on to say "by definition such information is investigatory." Could you be more specific in justifying your proposal seeking a blanket exemption from the Freedom of Information Act?

Mr. KAUPER. Well, we feel that most of this material would be exempt under the act as it exists, and I think that is the hypothesis of the question. And I agree with you, I think that that probably is true.

However, I think in securing compliance with this sort of request and, indeed, even in considering passage of this bill, which I know has raised some questions concerning the use to which material is put and procedures which are to be used, that we would be in a better position if we could assure a company that its compliance is not going to be turned over to some third party. There is considerable concern, I think, over the meaning of the recent amendments, passed in this last December, to the Freedom of Information Act, and particularly as they relate to the seventh exemption, which is the investigatory exemption. Our feeling simply is that we ought to be able to assure a company or an individual who appears and testifies that his particular information will not be made public. I think there would be some difficulty in some applications of the Freedom of Information Act, for example, to oral testimony where questions may cover a whole variety of things, some of which could conceivably be questions concerning public information, asking for a reaction to that. And I think that we would like to be able to assure the witness that this information, indeed, perhaps the very fact that he has appeared, is not a matter of public record, and will not be made available to the public.

Chairman RODINO. Well, if the material does, as you suggest, consist of confidential data that should not be made public, does not the supplier of this information, such as trade secrets, have the right under the provisions of the present Antitrust Civil Process Act to apply to a Federal court for an order under the rules of discovery limiting the use and disclosure of such information?

Mr. KAUPER. Yes; I think they do, Mr. Chairman, and that is perhaps one way to proceed.

I am frankly concerned in my own mind as we try to develop this legislation about what the understanding of the business community is in advance of its passage in terms of securing their reaction. And I think we feel we would like to be able to assure that they do not need to go to court to get that kind of protection, that the agency itself is bound not to make such disclosure and that that assurance ought to be sufficient.

Now, I recognize that one could say that a major part of this could not be made available in any event. But, I think we have seen Mr. Chairman, on information that is voluntarily received today, that companies have frequently indicated that this is, in their judgment, confidential business data. We cannot always assure them that a court, under the Freedom of Information Act, would agree with their judgment, and thus uncertainty does operate as something of a deterrent to obtaining information. It really is a matter of certainty, more than anything else.

Chairman RODINO. Thank you.

Mr. Hutchinson.

Mr. HUTCHINSON. Mr. Kauper, as I understand from your testimony, the real reason for wanting to extend the reach of this law to cover any activity which may lead to any antitrust violation is really because you want to try to find out about proposed mergers. My concern is that the language in this bill, as it is drafted—activities which may lead to any antitrust violation—is very broad language. It reaches a lot more than mergers. It is the language of a fishing expedition.

Do you think it is essential or necessary that this bill carry such broad language, or would you be willing to have it restricted?

Mr. KAUPER. I think, Congressman, the language probably could be read as broadly as you suggest. We discussed at some length whether or not this should be confined specifically to mergers alone. It was our feeling that there were certain other kinds of proposed transactions, such as conduct which the parties announce they are going to engage in, that we might want to look at. And this would include joint ventures, which I suppose we might view as a form of a merger activity, and conceivably distribution arrangements.

But I think, Congressman, in direct response to your question, the major emphasis is on mergers and joint ventures. If there is concern about the breadth of that language, I don't think we would be terribly concerned if it were so confined to eliminate any notion that what we are trying to find out is whether somebody is thinking about violating the antitrust laws. That is not what we have in mind.

The circumstances in which this is used would be where the parties propose a transaction which they are going to implement, and have announced they are going to implement at a later date. That is our major concern, and that would be largely mergers and joint ventures, conduct subject to the coverage of section 7 of the Clayton Act.

Mr. HUTCHINSON. Now, under present law perhaps you do not get sufficient advance notice of an impending merger to enjoin them, and so they go ahead and they merge. But now that does not prevent you from going ahead and suing them, and forcing them to disengage. And as you say, a lot of corporations, recognizing the difficulties of being separated once they are joined, prefer to come to you and get a pre-clearance.

Now, what is so wrong with leaving it up to the individuals, businessmen, lawyers, or whoever they are, who are contemplating a merger? What is so wrong in putting them to the burden of having to unwind if they choose not to come to you first? Why do you need to go out and simply tell them, without their solicitation, what they should or should not do? They know if they violate the law that they will be subject to penalties.

Mr. KAUPER. I think, Congressman, what we really are talking about in that question is the question of adequacy of relief. It certainly is true that if a merger is consummated and the parties do not hold up the merger until we have completed an investigation, we can force them to unwind at a later time. Indeed, I would suppose that in that circumstance we could clearly use a CID after consummation.

But, I do not think, even under the existing statute, there would be any problem with that. The difficulty I preceive with that kind of an approach is that in my view divestiture simply is not, as a general proposition, an adequate remedy. Unwinding a corporate transaction is a very complicated matter; thus, in the normal situation, if we are convinced that a proposed transaction will be a violation, we would prefer to seek to enjoin that transaction rather than trying to unwind it, which may take many years after a judgment that the acquisition from its outset was unlawful. I think you only have to look at our experience with divestiture in the past 4 or 5 years to wonder whether it is an adequate remedy at all. Divestiture is hard to obtain, among other problems, and once you decide something should be divested, it has to be structured to be divested and then you have to assume at that given moment you can find a buyer. It is often an extremely difficult thing to do.

We simply do not believe divestiture really works as an effective remedy. Now, I think that is really the issue that your question raises, and I have rather strong feelings about that, I am afraid.

Mr. HUTCHINSON. Mr. Chairman, I have only one further question of Mr. Kauper.

Now, as I understand it, the Supreme Court reminds us that we should not use the grand jury process except with respect to criminal offenses. But, my question to you, sir, is this: At the time that you start investigating, looking around, searching around against a corporation either on a merger matter or any other violation of the antitrust laws, how do you know at that point whether what you are going to come up with is a criminal offense or simply a civil case?

In other words, can you still not properly use a grand jury in the beginning, even now, since you do not know at that point whether you are going to end up with criminal charges or a civil case?

Mr. KAUPER. Well, that is undoubtedly true in some cases, Congressman. I think we normally do not begin an investigation by simply saying we are going to investigate all of the conduct of company *X*.

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We begin an investigation usually of a particular form of conduct by that company which we usually have learned of before we would go to a grand jury. That is, we usually have some reason to believe that there is a specific violation before we go to the grand jury.

Now, there are certain categories where one truly may not know, even with that focus, whether the conduct will ultimately be criminal conduct or not. And you are quite right, we can use a grand jury there.

But there are certain other categories where it really is quite clear we would not use criminal process. There are even, of course, some antitrust statutes which carry no criminal sanction at all. None of the provisions of the Clayton Act, with the exception of one Robinson-Patman amendment, carry any criminal penalties whatsoever, and thus it is quite clear we cannot use a grand jury in that sort of investigation.

What we usually confront is a circumstance in which we have to make an initial judgment whether there really is a reasonable possibility that the conduct we are investigating may involve criminal conduct. The answer to that is frequently no, and that is the primary area in which much of this would be relevant to us. If it is a mixed bag, if, for example, your judgment with respect to criminal prosecution might turn to intent or some particular set of facts which you do not know, then yes, you probably may go to a grand jury even though in the absence of finding those particular facts you would then go ahead and proceed civilly.

Mr. HUTCHINSON. I thank you.

Chairman RODINO. Mr. Flowers?

Mr. FLOWERS. Mr. Chairman, if I might yield my time at this point to Mr. Seiberling, and then come back at the conclusion?

Chairman RODINO. Mr. Seiberling is recognized.

Mr. SEIBERLING. Thank you, Mr. Chairman. I am happy to see you, Mr. Kauper.

I certainly agree with your general position on this legislation. I think it is necessary that the department have the means of investigating incipient violations before they become full blown. I am concerned about making sure the legislation provides proper protections against abuse, and while I have not fully thought through what that might be, I have in mind some of the abuses that have taken place in the past with respect to already existing powers of investigation, in particular the use by President Kennedy of the FBI to coerce the coal companies into dropping their price increases back in the early 1960's and some of the abuses that were discovered during the course of the impeachment investigations and the Watergate hearings, which certainly reveal an intent on the part of some individuals to abuse the powers that the Government already has.

Do you have any specific suggestions, or are there built into this bill any specific provisions to prevent that type of abuse?

Mr. KAUPER. Let me say initially, Congressman, that I hope I am as concerned about that prospect of abuse as you are. I testified yesterday in the Senate on some other provisions which have been introduced, and I found myself in a position of saying that certain powers ought not be given to us because I did not think any Government agency ought to have that kind of authority. And I have a bit of the same concern here.

However, I think we do have built into this bill adequate protections, in terms of judicial protection of firms that are involved, in terms of allowing counsel in interrogatory procedures, in the signing of particular statements by witnesses, and so on.

Now, we all have to recognize that virtually any power that is given to the Government can be abused in one way or another, and that about the best you can do is to assure adequate judicial protection against that sort of abuse and adequate protection to the individual in terms of being able to have counsel present, of being able to review what he has said, and so on. I hope we have built into this bill sufficient protection of that kind that those concerns can be allayed.

I assume we will probably work further with committee staff in the language in the appendix, but I would point out that some of the suggested technical amendments are designed to respond to comments we have had from outside the administration, from the antitrust bar, and from others that have expressed some concerns about whether there is adequate protection in terms of examination of copies and so on.

Mr. SEIBERLING. Well, you made the point which I thought was a good one that the language ought to be changed where you are describing who might be subject to process to include a person who may have any information. Now, of course, there are already in the law protective provisions that preserve the right of a person to contest a demand, aren't there?

Mr. KAUPER. Yes.

Mr. SEIBERLING. But you broaden out the language to "may have any information." Are there any provisions in the suggested law which requires sufficient specificity on the part of the Justice Department so that there is some basis for making a contest in court if the individual feels that the request is too vague, for example? Do you feel case law takes care of it, or will this override the existing case law?

Mr. KAUPER. I think on that particular issue the law is really not substantially changed. That is, the department is required in issuing a demand under the statute now, and would continue to be, to specify the violation which is being investigated.

Mr. SEIBERLING. But here we are talking about things that are not investigations necessarily.

Mr. KAUPER. Well, I think you are talking about the language that I think I was discussing with Mr. Hutchinson. I recognize the problem. Perhaps the answer is to make clear that that deals with specific transactions which are announced but not consummated and thus avoid some of this difficulty. That is where we would intend to use it, and maybe the statute ought to make that clear.

But, I think there is a requirement that we must be specific when we issue a CID and that does provide a measure against which courts have to determine whether or not the demand to a particular company is appropriate. And that same standard presumably would continue to be applied to judicial challenges. It seems to me that provides at least a measure of whether or not the individual has something that is relevant to what we are examining into. I think there ought to be a basis for that kind of review.

Mr. SEIBERLING. Well, then you agree with us, with me, then, that we have got to make sure in drafting this legislation that we do not broaden this out so that there would not be that kind of protection for the people under investigation?

Mr. KAUPER. Yes; I do.

Mr. SEIBERLING. Now, to get to another subject slightly different, but bearing on this. We have had some correspondence lately regarding the possible study or investigation of the price increases in the coal industry. And in your last reply to me you suggested that convening a grand jury to investigate the price situation in the coal industry might be counterproductive. I wonder if that does not have a bearing on this bill, and if you could explain in what way it would be counterproductive?

Mr. KAUPER. Well, I think our concern was that convening of a grand jury prior to some further judgment on our part that there really was a reasonable basis for belief that there had been a violation tends both to get us into heavy use of resources and to absorb the companies in that kind of process, and could, in addition, have some restraining influence on conduct in the industry in the interim. Now, that may be competitive conduct, it may not be. That is a difficult judgment, but I do not view our purpose in using a grand jury to itself adversely affect conduct.

Now, if your question is with respect to use of possible civil investigative demand, or perhaps either interrogatory or testimonial authority, yes, that might be useful to us in that sort of a circumstance. I think one of the things running through here is that the grand jury is not a device which we ought to use just on a kind of "Well, we think we might have a problem, let's call all of these people before the grand jury" sort of basis.

Mr. SEIBERLING. Or it might even be questioned whether you could legally do that.

Mr. KAUPER. I think there is a question whether we legally can do it, but even in circumstances where we might legally do it, the grand jury process is cumbersome and individuals are not represented in a grand jury room. There are reasons of fairness why one is reluctant, absent some reasonable basis at the outset, to use the grand jury at all. So, I think while it is true we can say we can run a grand jury investigation to determine whether there is a criminal violation, I think it ought to be clear we do not do that unless we have some reason to think that there is a violation involved. The use of the grand jury is a pretty controversial subject, and we have tried awfully hard to make sure we are not in the position of using it without warrant.

Mr. SEIBERLING. In the correspondence I was referring to, you mentioned that you have an economic staff under a Mr. Hay, and the implication that I got was that they were studying this whole situation. I wonder if you can tell us whether you now have an economic staff that is taking over some of the functions formerly performed by lawyers in your Division and if so, how would that fit into this whole investigative process?

Mr. KAUPER. Well, the economic staff performs a number of functions. I do not view the economic staff as conducting law enforcement investigations as such.

In the particular case you are talking about, we are using the economic staff to analyze economic data, really for the purpose of

helping to arrive at a judgment as to whether a grand jury or other formal investigation is appropriate. Now, it is true that at various periods in the Division's history that very kind of preliminary study was to a degree also done by the legal staff. I think our judgment has been that in analyzing economic data we are better using economists than lawyers.

But, if the question is are we planning to use this CID process in order to produce economic studies, I think the answer to that is no. We would contemplate this comes in at the next step. We work largely from public sources and so on.

Mr. SEIBERLING. Well, who makes the decision whether to conduct an investigation? The economic staff or somebody in the antitrust law department?

Mr. KAUPER. No, that judgment is made by the Director of Operations, which is on the legal side of the Division. Mr. Swope, sitting to my left, makes most of those judgments.

Mr. SEIBERLING. I know in the past economists have criticized antitrust lawyers because they say antitrust law does not bear any relationship to economic sense. But, by the same token, I would be concerned if economists were making a decision as to whether or not to proceed either to investigate or to prosecute or not prosecute a possible situation. I am just wondering to what extent lawyers are going to make to final decision in these cases, or are we going to have economists making them?

Mr. KAUPER. I hope the answer to that is the lawyers. This is a delicate problem when you are using economists, but we are structured so those decisions are made by the legal staff.

Mr. SEIBERLING. It does seem to me this is a legal question primarily in the end and not an economic question as to whether a violation has taken place.

Mr. KAUPER. I agree with you, Mr. Seiberling.

Chairman RODINO. The time of the gentleman has expired.

Mr. SEIBERLING. Mr. Chairman, could I have unanimous consent for 2 more minutes just to pursue this?

Chairman RODINO. Without objection.

Mr. SEIBERLING. Now, I also wrote you about a situation that was reported in the papers where Union Oil was under contract with Pacific Gas and Electric Co. to provide geothermal steam. Pacific had the steam deposits, but Union Oil was contracted to operate it, and the price of the steam was escalated in accordance with the price of oil, which struck me as being almost a prima facie antitrust violation right then and there, since the cost of the steam had nothing to do with the price of oil. I have not received a response as yet, and I wondered if you are at all concerned about the apparent coincidences, at the very least, in the coal industry and other energy fields of apparently a movement to index all energy sources to the price of oil on a comparable British thermal units basis?

Mr. KAUPER. This is not something, Congressman, that I am all that familiar with yet.

I should say that I believe your letter has been answered; at least I think I signed it. I do not want to get into specific investigations we have pending. Yes, this matter of indexing is a matter of some concern to us, both in connection with the kind of thing you suggest, geother-

mal, and in some other areas as well. But, I do not want to start down a path of specific investigations which may be pending right now.

Mr. SEIBERLING. Well, I am all for your getting the additional authority needed to conduct adequate investigations. But, I am also a little concerned as to whether the authority is being used that you already have, that is, being used as aggressively—in the energy field particularly—as the facts might seem to warrant.

Mr. KAUPER. Well, we hope it is.

Mr. SEIBERLING. Thank you.

Chairman RODINO. Mr. McClory.

Mr. MCCLORY. Thank you, Mr. Chairman.

Mr. Kauper, at the present time we do have available, do we not, in the Department of Justice, information which is secured by the FBI and from the Federal Trade Commission and detailed statistical information which more recently has been made available by legislation through the Department of Labor? In how many or what percentage of the cases do you have information from each of those three sources?

Mr. KAUPER. Well, I do not know that I could give you a specific breadkown. It certainly is true that we use information made available to us from a number of Government agencies, some of it statistical, and we do occasionally use labor statistics. We do use reports prepared by the Federal Trade Commission as well as a number of other Government agencies.

So far as the use of the FBI is concerned, we do use the FBI from time to time for investigatory purposes, for taking of interviews, and so on. However, I think we have found that the use of the FBI in very complex investigations is really quite difficult, largely because unless someone is trained in antitrust enforcement it is rather difficult to come up with the follow-up question. We have, in most complex matters, used our own staff and not the FBI.

Now, I do not want to suggest that we find it impossible to use the FBI. We do not. There are circumstances in which they are very helpful to us.

Mr. MCCLORY. Could you give me a percentage of cases? Is it a majority or a small minority?

Mr. KAUPER. It would be a minority of cases. I do not know that I could give you a specific percentage. I would not think it would be more than 10 or 15 percent.

Mr. MCCLORY. Of course, one of the great purposes in our interest in further legislation to strengthen the arm of the Antitrust Division is our feeling that this is going to improve the economy, it is going to improve competition, to provide more jobs and better products. Could you tell me to what extent, in your opinion, are we failing to enforce the existing antitrust laws because of an inadequacy of investigative authority?

Mr. KAUPER. Well, it would probably be easier to answer that after we had the authority and see what we can do with it.

Mr. MCCLORY. Well, you know, you hear it all the time, that we should have stricter enforcement of the antitrust laws. I agree. I want to encourage competition. I think it is good. It provides jobs and better bargains for the consumer and so on.

But, do you think that we are failing in that role now, and if we are, is it because we do not have this kind of legislation?

Mr. KAUPER. No, I do not think we are failing in the role. I think obviously there are a good many major antitrust matters going on now based on information that we are able to put together.

Our feeling is, however, we are not as effective at it as we could be. Sometimes judgments may be made and have to be made on the basis of what information is available to us, when we have not been able to obtain all that perhaps we should have been able to.

Second, we may not be as efficient at doing some of these things as we should be.

So, while I do not want to be in a position of saying to you, Congressman, that this is going to result in x number more cases, it certainly ought to make us much better at what we do, and make our judgments a good deal more informed than they sometimes are.

Mr. MCCLORY. Are you satisfied that you are fully employing the informational sources and the facilities available through the FBI, through the FTC, through the Department of Labor, and as Mr. Hutchinson in his inquiry asked, through the grand jury process?

Mr. KAUPER. I think we are. I think we are reasonably good at using public sources. I think we use the grand jury effectively. But I think there are large areas in which we cannot today get information which does not fall in those categories.

Now, public information is always obtainable, and I think our people are very well trained in the use of that.

Mr. MCCLORY. You made specific reference to two types of cases in which this legislation might be employed; namely, mergers and joint ventures. A current concern of Americans is the absorption of American industry by foreign financiers and other foreigners; and, they make reference now to the Arab Shieks and so on. And of course, the CIA is an intelligence gathering agency which gathers information from abroad. So I would like to ask first of all, do you get any information from it? Second, would you contemplate utilizing this statute, this new authority, to investigate such attempted foreign absorption of American companies? Third, would you also review to what extent our laws would not permit what they are doing and foreign statutes would?

Mr. KAUPER. I think in response to your first question, I do not know of any situation where we have utilized the CIA. We do obtain occasionally from some foreign sources information, and it is usually obtained through the various cartel offices of either the EEC or some other foreign antitrust authorities who occasionally do provide us, at our request, with information.

There is no reason why the authority we are presently seeking could not be used in connection with investigations, for example, of foreign acquisitions to the extent that those acquisitions are within the jurisdiction of the American antitrust laws at the present time.

Now, I would put a caveat on that. Obviously if you serve a civil investigative demand upon a company headquartered in London, you may have some problems as to how you enforce that demand. But, they are subject to the reach of the American antitrust laws for conduct which infringes upon American trade and commerce. And in the situation of a merger where they are actually proposing to enter this country and make an acquisition, we normally would be able, I think, to get the necessary information through the use of this kind of authority.

Mr. McCLORY. Well, one of the problems that I have is that I feel that American companies work at a disadvantage vis-a-vis the foreign cartel and foreign companies. Would not this legislation put the American companies at a further disadvantage vis-a-vis the foreign-based company?

Mr. KAUPER. Well, it would not put them at any disavdantage within the United States. If your question is does it put them at a disadvantage in terms of their operations abroad, I do not think the investigatory authority does. If you are asking the broader question: Do the American antitrust laws themselves inhibit them in terms of their operations abroad? That is at least a different question over which there is a considerable debate.

My answer to that is generally no. One also has to recognize that increasingly our companies doing business abroad and subject to the antitrust laws of the authorities under which they operate abroad are undoubtedly subject to virtually these same investigative authorities by any number of foreign government agencies.

Mr. McCLORY. May I ask one more question? There is an on-going investigation, I believe, with respect to the so-called food processing companies and allegations that there is price fixing and also some alleged violations of the antitrust laws in the dry cereal industry. Would you expect to use this law to help in that investigation?

Mr. KAUPER. Well, the specific investigation I think you were referring to is a pending complaint that has been issued by the Federal Trade Commission against the cereal manufacturers. That is within their investigatory authority, and I would not contemplate we would be involved in that particular proceeding. That is a matter already in litigation before them.

So far as the food industry in general, or indeed any other industry, we would contemplate this authority would be available to us.

Now, in addition to that, of course, we have been particularly concerned with price fixing in various segments of the food industry. We have returned a number of indictments involving sugar, bread, milk, and so on. Those are situations where I would suppose we would continue to use the grand jury. That is, we are specifically looking for criminal conduct and the grand jury is certainly appropriate there.

Mr. McCLORY. I thank you.

Mr. FLOWERS [presiding]. Thank you, Mr. McClory. I will call upon the distinguished gentleman from Kentucky, Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman.

I appreciate being recognized and, Mr. Kauper, I have perhaps an observation and maybe a couple of fairly short questions. I read your testimony before you delivered it today, and also listened to it and find it well presented. The questions that I have are perhaps philosophical. Extending the principle of just collecting information that may or may not lead to a prosecution, the potential dangers, inherent problems connected with that do cause me some concern, and so that is perhaps a philosophical statement.

More to the point, perhaps, because a great deal of our time in the committee from now on will be to try to refine the language and make further tightening changes is: Is there anything in this bill, H.R. 39, that would enable you to proceed where there have been existing mergers or where a merger has been concluded? Is there a tool in here for you and your colleagues to proceed in perhaps righting

what could be considered an improper concentration by reason of a merger?

Mr. KAUPER. Well, let me answer that two ways. First, there is nothing in this proposed bill which extends the substance of the antitrust laws. It is quite clear today under section 7 of the Clayton Act that we have authority to investigate and to sue for any kind of acquisition consummated or not consummated.

The immediate question, then, is anything in here usable in connection with the investigation of a consummated merger, and the answer to that clearly is yes, both in terms of our ability to put interrogatories or our ability to deal with third parties and to obtain market information and so on. All of the various things which we are seeking here, it seems to me, are clearly usable in that sort of circumstance and would undoubtedly facilitate precisely that kind of investigation. That is clearly a civil investigation, so that it is the kind of an area where we would not use a grand jury now, and thus I think is probably the kind of circumstance which is one of the major thrusts of this whole piece of legislation.

Mr. MAZZOLI. Even though we seem to have proceeded beyond the period of extensive mergers in the 1960's and perhaps the early 1970's, do you feel that H.R. 39 would be an advantageous piece of machinery for your people to have for mergers that might occur in the future, and also for those already on the books?

Mr. KAUPER. Yes, I would think so. Surely.

Mr. MAZZOLI. Can the section of the bill that you have recommended for a change, to go beyond those who may have knowledge of any fact or facts to talk about persons who have an awareness generally of anything that might have taken place, Mr. Kauper, be properly controlled and not put the seeds of a fishing expedition in here?

Mr. KAUPER. I do not think so. That is not what it is designed to do. The reason we have suggested that change is simply that we can envision some circumstances in which we might get litigation over what really constitutes a fact; that is, somebody may say, "Yes, I do know something, but I don't really know it to be categorically a fact." Hence, we have to put it in terms of information instead of using that specific word "fact." That is really all that was intended by it. I do not think it extends the language particularly.

Mr. MAZZOLI. Is there any precedent for that in any other title of the law?

Mr. KAUPER. First let me say, if you desire, we will try to run a check and provide you with specifics, but I think you will find in a number of circumstances where administrative agencies have subpena authority or other civil investigatory authority that "information" is frequently the word that is used.

Mr. MAZZOLI. One last question, and perhaps you could supply it to the committee at some point. I am curious to know if you can put down on paper instances of where you have been thwarted in pursuing a case or in coming up with perhaps information that would have protected the public interest by reason of the lack of this kind of a law on the statute books, and it would help me if we had some documentation of the reasons why this is needed in specific cases, if this is not divulging confidential information or similar nature of information. I believe Mr. McClory sort of asked some questions in that

connection, and I would just like to have a little more assurance that this is absolutely needed, and that had it been on the books in times past it would have been of assistance.

Mr. KAUPER. We will see what we can provide you.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. FLOWERS. Thank you, Mr. Mazzoli. And I recognize now the distinguished gentleman from New Jersey, Mr. Hughes.

Mr. HUGHES. Thank you, Mr. Chairman, for recognizing me.

Mr. Kauper, I want to congratulate you on your testimony. You have been helpful to me. I also want to congratulate our chairman for moving this legislation as rapidly as he has, because I think it is important.

Even though we perhaps at one point got off on some generalities, I think they are important, and I am going to, if I may, just express what I think my views are and what the views of my district are insofar as antitrust laws and their enforcement are concerned. I think you can perhaps sense today that we are a little concerned, perhaps, that we do not have the tools; and we, perhaps, do not have the staff and are not addressing the antitrust problems like we, in America, I think, feel we must in the years ahead. I want to applaud the efforts of the Justice Department in trying to furnish themselves with additional tools.

I am concerned also, as Mr. Seiberling has indicated, about the energy conglomerates and some of the market practices that I see. I am extremely concerned, and I would like at some time in the future to sit down with the Justice Department and talk a little bit about some of the natural gas problems that I am encountering, and some of the problems of market practices that my staff is into right now.

With specific regard to this legislation, I do have a question. That is, when you talk about substituting the word "information" for "knowledge of any fact or facts," are you making that, however, relevant to a civil antitrust investigation?

Mr. KAUPER. That is correct.

Mr. HUGHES. Now, let me ask you this: I found in practice, and I had a fairly busy private practice, that getting into this area of discovery you often found facts or information that may not have themselves been relevant, but lead to information that was relevant. Would it not be helpful if, in fact, there would be further modifying language that would indicate information relevant or leading to information that was relevant in a civil antitrust investigation?

Mr. KAUPER. Well, I suppose that is possible. I think my own feeling would be, and I cannot say at this point I have really thought about it in quite those terms, that normally in the matters where CID's today have been challenged, the courts have tended to view the situation as one where they could perceive that this was likely to lead to something of more relevance at least being within the scope of the coverage of the act. I think I might be a little concerned about how many steps back you take in terms of the kind of concern that Congressman Hutchinson and some others have expressed. I do not think, Congressman, we found that a major problem.

Mr. HUGHES. Well, I found it a major problem in litigation that we always got into arguments as to whether or not that information

was, in fact, relevant to the particular matter at hand. Because we have so much litigation in this whole area, I wonder whether it would not be better to make it clear in the statutory language that we are talking not only about facts or information that are relevant to the investigation, but perhaps that would lead to information that would be relevant. Would that be avoiding one Federal district court saying one thing and another one saying something else, and would we not avoid perhaps that division that we often see in the discovery process?

Mr. KAUPER. Well, I think that basically is the existing standard. But, let me give it some further thought, Congressman. I am a little chary about putting language quite that broad in here just in view of some of the kinds of concerns that have been expressed. But let me think about it.

Mr. HUGHES. Well, I share Congressman Hutchinson's concern, because I think we have to achieve balance. We have got to protect the rights both of the American citizens and industry. We do not want to try and make it a complete fishing expedition, but as long as we are trying to secure this data, and we have a right to have this information, I believe under present circumstances it is a very, very complicated area requiring a great deal of study, and I just wonder whether we would not perhaps avoid additional litigation on just that issue.

One additional question. I notice that in the legislation it refers to documentary material produced for examination, or to answers in written interrogatories or oral testimony or a combination of such demands. Does that contemplate the demand for admissions that you see in discovery process? In other words, is an interrogatory generally a question?

Mr. KAUPER. Yes. I do not think we contemplate that this is in the form of a request for admissions of a post-complaint discovery type, and that is not something we would contemplate within this language.

Mr. HUGHES. I see.

Mr. KAUPER. Now, we do use requests for admissions following issuance of a complaint in many circumstances.

Mr. HUGHES. That is either a post-complaint discovery——

Mr. KAUPER. Generally my feeling is that requests for admissions tend to be particularly helpful when you are headed toward trial. In other words, to try to pin somebody to specific admissions in an investigation is something I do not think we would contemplate.

Mr. HUGHES. I am not so sure I would want to see it in the legislation. I just wondered whether or not that was contemplated.

Mr. KAUPER. No, no. It is not.

Mr. HUGHES. In your accommodation of both?

Mr. KAUPER. No, I would say it was not.

Mr. HUGHES. I see. OK. Thank you very much, Mr. Chairman.

Chairman RODINO. Mr. Flowers?

Mr. FLOWERS. I have no questions, Mr. Chairman. Thank you.

Chairman RODINO. Mr. Seiberling.

Mr. SEIBERLING. Yes, I have some questions.

I would like to go back to this first question that I asked you, Mr. Kauper, about preventing abuses of the powers this bill would grant. Now, the proposed change in section (c) would define antitrust investigation to mean any inquiry conducted by an antitrust investi-

gator for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation, and then you would add, "or in any activities which may lead to antitrust violation."

Now, that is so broad that an investigator could almost have discretion to investigate anything that he wanted, since almost anything might lead to an antitrust violation. I am wondering if somehow or other we should not, in this bill, make it clear that the use of the process for any purpose other than investigating an incipient antitrust investigation would be a violation of this law and subject to possible penal restraint? I wonder if you can comment on that?

Mr. KAUPER. Well, I suppose that is one way to assure against abuse. I am not sure, as a practical matter, how one would measure that. The language which is troubling you, I think, is the same language that I discussed with Congressman Hutchinson, and I think if there is a concern about the breadth of that language that we are prepared to talk with the committee staff about modifying that to what is the major area of our concern, which is proposed mergers and joint ventures.

Mr. SEIBERLING. Well, I do not know that I would insist on limiting it to mergers and joint ventures, but I think it ought to be limited so that it cannot be used for some purpose which has nothing to do with antitrust.

Mr. KAUPER. I would agree. And I hope that we could work with the committee staff to work out whatever that standard is, if there is a concern about that. It certainly is not our intention to carry it as broadly as you suggest, and I think we can find the appropriate language which will so confine it.

Mr. SEIBERLING. Well, there is an interesting by-product of this and that is that the proposed changes would permit the use of this in connection with proceedings before other agencies. Now, as long as that use was limited to proceedings that had a bearing on antitrust violations, then I would not object to the broadening language that you suggest; that is, not having the question of whether the agency procedures were adequate but just forget about whether they are adequate and let the Antitrust Division make its investigation. And I also would not object if the agency later on uses the information in some other proceeding before it. I mean, once they have got the information, I do not see why they should not make use of it. But I am concerned about the purpose with which the original request for information is made, and particularly when you are before another agency. It would be awfully easy for that other agency to say, "Well, look, we are interested in this other subject, too, and as long as we have got this guy before us, let's just ask him about that." And I think we definitely need to write into the law something that says where you are using it before another agency it cannot be used for any purpose other than investigation of incipient or actual antitrust violations. How do you react to that?

Mr. KAUPER. Well, so far as the other agency proceedings are concerned, the statute now confines its use to specific matters pending before the agency in which it is contemplated we would be a party. I think if you were to confine it specifically to antitrust violations as such, then there would be an issue raised as to whether or not, for

example, this was within the exclusive jurisdiction of the agency, and thus not an antitrust violation.

What we are seeking here is authority to obtain information to take part in that proceeding on competitive issues. Maybe that is not clear enough. We would not be there otherwise.

Mr. SEIBERLING. Well, I can see if the FTC has a broad economic jurisdiction, which again has a bearing on antitrust, then what you are saying is we have to be very careful that we would not get into problems because of the fact that you are trying to help the FTC come up with some economic guidelines in an industry that would promote competition, and at the same time not involve incipient antitrust violations?

Mr. KAUPER. That is correct.

Mr. SEIBERLING. I can see that problem. Well, I do think that is something we ought to focus on.

Mr. KAUPER. Yes. I agree. And we will work further with the committee staff as we go along on this issue.

Mr. SEIBERLING. On a related matter, I think the question was whether this should be limited only to information relating to possible Clayton Act vlolations, and I think we have covered that. I personally do not think it should, but that would probably make it easier to get a bill through.

But, I wonder if you really want to do that, particularly in the light of our discussion about the FTC's jurisdiction?

Mr. KAUPER. Well, so far as its use in a specific antitrust investigation as such, the major concern is with Clayton Act type matters; that is, joint ventures and mergers. So far as regulatory proceedings it is somewhat broader than that, and it may require some additional language change. But so far as it is being used by us in connection with our existing statutory antitrust enforcement authority, at least the major emphasis, and the reason for that language is primarily with mergers and joint ventures.

Mr. SEIBERLING. By broadening the scope of this so that any individual as well as corporations could be made subject to this process, and by broadening out the definition of antitrust investigations, are we going to be bringing in third persons who will not have the protection that such persons have in litigation under the Federal Rules of Civil Procedure?

Mr. KAUPER. Indeed, the purpose of some of the amendments we have suggested in the appendix is to make certain provisions of the rules are more clearly applicable, so we would contemplate generally that those protections would be available.

Mr. SEIBERLING. Well, we ought to make sure that that intent is clear in the bill.

I just have one more question, which again relates to this problem of the FTC jurisdiction. I understand that there is a working arrangement between the Justice Department and the FTC that gives FTC primary jurisdiction over civil antitrust matters relating to the oil and gas industry. Is that correct?

Mr. KAUPER. That is stated somewhat broadly, Congressman. The FTC is conducting two major matters in the petroleum industry. One is their broad energy study, and the other is the pending complaint against the eight major oil companies.

Insofar as specific investigations might impinge upon those proceedings and particularly the latter, we have in large part deferred to the Commission. That does not mean that criminal matters, domestically, are outside of our jurisdiction. We do have criminal investigations. Nor does it mean that all specific civil transactions are necessarily in their area. We are looking at some such matters. We are also heavily involved at the moment in looking at a number of foreign operations which are not covered directly by the FTC complaint. Does that spell it out any more clearly?

Mr. SEIBERLING. Yes, it does. Well, who would have primary jurisdiction to investigate the structure of the oil industry?

Mr. KAUPER. Well, I think the domestic structure issue as such we tend to think of as being within that major complaint which they have filed. That is exactly what that complaint is aimed at. They are proceeding with that matter.

Thus, we do not presently have a major investigation of the total structure of the industry. However, particular transactions between companies are being handled on a one-by-one basis with the Commission through our normal clearance procedures. We have some such matters.

Mr. SEIBERLING. How about the relationship of the oil industry to other energy industries?

Mr. KAUPER. There again, that is an area that is being handled one-by-one in terms of specific transactions, such as those that may arise in connection with a given merger or something of that sort. We may handle such an investigation or they may, depending on who has resources available and who may know something about those particular companies. Their broader energy study is looking at questions of the total structure and by that I mean energy industrywide, if we use that as a single term, and hence a number of those questions are matters they are looking at right now.

But again, if it is a particular transaction, we have some such matters. We will continue to have.

Mr. SEIBERLING. Thank you, Mr. Chairman. I have no further questions.

Chairman RODINO. Mr. Dudley.

Mr. DUDLEY. Mr. Kauper, I just have one question. One possible concern that strikes me with this legislation from an enforcement point of view is that the danger that it might insert another layer of extensive litigation over the enforcement of it in the antitrust enforcement process, and I was wondering whether you might address yourself to that concern, and in the process distinguish, if you see any distinction, between the need for and the likely problems with depositions and interrogratories in this area?

Mr. KAUPER. As opposed, you mean, to document requests?

Mr. DUDLEY. Well, yes, whether really your need for depositions differs from your need for interrogatories, and whether you foresee greater problems in litigating the procedures of this act with respect to those two?

Mr. KAUPER. Let me say, first of all, that I do not think we have had major problems in litigating under the existing CID authority. Now, it is true there have been occasional challenges, but generally speaking we have not had that authority challenged where the conduct

under investigation is described and the requests are limited, as they are, within the definitions of the bill. I do not see any particular reason why we would see any more by way of litigation in the additional areas.

Now, it is true that if, for example, a witness is called, and refuses to answer a question, it might then be up to us to determine would we try to compel him to answer. I do not think that it is likely to happen very often. I do not think it is likely to happen much more often than it does with grand jury proceedings, where it is not a major problem. And keep in mind, too, that the judgment would then be up to us as to whether that is a matter that is of such importance to this investigation that we think we ought to go to court to compel him to answer. In many cases that is just not likely to be the case.

So, I would not perceive any reason why we would be much more tied up in litigation on these issues than we are now. I do not really see any particular difference between these various categories.

Now, as to priorities among them, I am not really sure I can state the categorical priorities, because it depends in large part on what kind of investigation you are running. There are certain kinds of investigations where what you really need more than anything else is authority to talk to people. That is, you want to pursue communications, you want to pursue why they did certain things, and they may not be in documents at all. There are other investigations where documents may really be the key element. The answer to your question on priorities really depends a good deal on what kind of investigation you are talking about. Within the Division, we think of certain kinds of matters as document cases and others as testimonial kinds of cases, and they are pretty hard to characterize in advance.

Mr. DUDLEY. Do you anticipate—I notice you mentioned earlier you thought this legislation would give you an opportunity to obtain information from corporate employees and officers where you may be investigating that corporation. Do you anticipate there the possible interposition of serious claims of privilege, particularly the fifth amendment privilege where you are outside of the Clayton Act area?

Mr. KAUPER. I think there will be circumstances where privilege will be claimed, yes, and then we have to make some judgment as to whether that is appropriate. After all, in many cases where it is claimed, it may be perfectly appropriate, and we are not going to do anything further about it. If the man claims the privilege and he seems to have a basis for doing that, we would normally not pursue that any further. In the context of your question, which was litigation and so on, I do not see why that would add immeasurably to our litigation problem.

Chairman RODINO. Mr. Polk.

Mr. POLK. Thank you, Mr. Chairman.

Mr. Kauper, under section 4(f) of the act as it now stands, the Department of Justice may retain copies of documents even after the investigation has been completed, and even though no violations of the antitrust laws are found. What is the practice of the Department with regard to maintaining and retaining such copies?

Mr. KAUPER. Well, we do retain copies in a number of circumstances, typically of general corporate information. A lot of material,

of course, is returned to the companies. They are entitled to request its return

What tends to be retained is largely general corporate data.

Mr. POLK. Is there any reason, other than Congress having permitted it, for the Department to retain such copies?

Mr. KAUPER. Well, I think if one hopes to build up in the Department certain areas of expertise with respect to certain industries, yes, there is a reason to retain it. Now, I suppose what you can do is not actually retain the documents, but assign somebody to make some summaries of them.

Mr. POLK. Well, there is some concern in other areas of law enforcement where enforcement agencies simply retain information because at some future date the information may be relevant at that time. In other words, are you simply keeping files on prospective defendants?

Mr. KAUPER. Well, I do not think we have had a major problem that way and, indeed, frequently the companies do not seem to have any problem with our retaining documents or copies of documents virtually forever, so far as I know, and I just do not perceive that as a major difficulty. Now, maybe we have got some kind of complaints that I do not know about, but at least it is not a problem that I am aware of.

Mr. POLK. On another point, would section 5(e) of the act incorporate the Federal Rules of Civil Procedure with regard to petitions so that rule 26 might serve to define what is relevant with regard to the civil investigative demands?

Mr. KAUPER. I think the answer to that is yes. I am trying to find the specific language you are talking about.

But, in terms of objections and that sort of thing, I think the answer would be yes to that.

Mr. POLK. Well, then, is that not the answer to Mr. Hughes' question as to what relevance means?

Mr. KAUPER. I think you would measure it off the Federal rules, yes. That would by my conception of it. Now, I do not know how directly that answers Mr. Hughes, but I think the concept of relevance, as it is defined in the Federal rules, is basically what we are talking about.

Mr. POLK. Well, I was not entirely certain in view of the fact that section 5(e) refers incorporation to petitions, and it does not necessarily refer it to, say, to the CID's in question.

Mr. KAUPER. I think we would contemplate that you would apply that sort of standard if there is any ambiguity about it. The language of the Senate version of the bill that we dealt with yesterday has somewhat different language dealing with this, but I think our basic concept is that the Federal Rules standard would be applicable and that would be true whether what you are talking about is documents or some other form of demand.

Mr. POLK. On a related point, rule 26(c), I believe, of the Federal rules allows the target of the discovery procedure to petition to modify or set aside the discovery if it would impose an undue burden. I assume that section 5(e) of the act would incorporate rule 26 in that regard?

Mr. KAUPER. Well, if you look at paragraph 7 of the appendix, we have indicated I think what that standard ought to be. In connection

with demands for documentary material the appendix talks about an unreasonableness requirement, in terms of interrogatores oppressive burden and so on. We have tried to spell that out in those amendments. That is the purpose of those being there.

I know some concern has been expressed about precisely that; hence, the reason for that suggestion.

Mr. POLK. So that that amendment that you suggest would operate in lieu of rule 26(c)?

Mr. KAUPER. That is right.

Mr. POLK. With regard to that question?

Mr. KAUPER. Right.

Mr. POLK. Finally, the chamber of commerce has presented us a copy of its statement which it is going to give tomorrow, and in that statement they make the argument that the excess of investigatory tools may be one of the problems which the FTC has. On page 10 of their statement, referring to a study, it says:

> It was estimated that as much as 70 percent of the Commission's investigatory time was wasted in fruitless pursuit of non-existent antitrust violations. Several factors contributed to the Commission's misplaced efforts. It is fair to suggest that one of the contributing factors was the case with which the vast investigative powers of the Commission could be invoked in its prosecutorial role.

I was wondering if you had any comments with regard to that?

Mr. KAUPER. I think, first of all, one has to recognize that if what you are asking is, how much of their time is spent using various of their powers, and not resulting in litigation, in judging that I think I would make two general observations.

First of all, the Commission is charged by the Congress with making economic studies. Now, if the chamber is using the amount of time which they are spending doing that as a measure of their effectiveness in bringing cases, I think that is inappropriate because they are charged with seeking reports, making studies. That is not an authority we have, but it is an authority that the Commission has.

Second, I think it is a little erroneous to measure how successful they are by whether a given investigation results in a case. I would like to think that a complete antitrust investigation which leads to the conclusion, after viewing all of the facts, that there is no violation, is a perfectly legitimate and sound sort of a procedure, and that we ought not be measured necessarily by: Did it result in a case? The question is: Did you run a good investigation? And I have tried to communicate to my staff if they run a good investigation, and conclude that this company is engaged in no violation, fine; they have done what their job is. So, to try to measure it against prosecution, it seems to me, is completely inappropriate.

Mr. POLK. Thank you, Mr. Kauper.

Chairman RODINO. Mr. Falco.

Mr. FALCO. Just a few quick questions, Mr. Kauper. Very early in the questioning, you were asked if there had been an additional need for the bill since enactment in 1962, and relating to that line of questioning, is it not true that since 1962, in addition to withholding documents or the nonvoluntary compliance, the Division has run into a situation of destruction of documents?

Mr. KAUPER. Yes, there have been.

Mr. FALCO. And in that case, depositions and interrogatories are about the only way you could get at the investigation?

Mr. KAUPER. Yes, that is true. If a company is engaged in a file cleaning-out or burning, then I suppose that the only facts that you can try to obtain are nondocumentary facts. Now, I am sure, Mr. Falco, if you are asking a second question, which is: How do you investigate an actual destruction of documents? Then it seems to me, assuming they are under proper process, that is a matter that we would normally investigate criminally.

Mr. FALCO. No; I can see why you would think there was the second question. I just meant since 1962 have there not been some investigations or litigated cases in which you have had allegations of destruction of documents occurring?

Mr. KAUPER. Yes.

Mr. FALCO. Has there been any judicial construction of the statute that might limit your ability to subpena information that has been stored under modern technological storage and retrieval devices?

Mr. KAUPER. Well, I do not know that I would say that there has been any categorical holding. It obviously is an issue which is not really resolved and could continue to be more of a problem, obviously, as we go along.

Mr. FALCO. Well, if you would give it some thought maybe some language could be added if there is a problem in subpenaing information that is stored under modern technological devices.

Mr. KAUPER. Let us think about that.

Mr. FALCO. And the final question, Mr. Chairman. We have had a number of concerns expressed that the present act incorporates standards under a grand jury subpena duces tecum in addition to the Federal Rules of Discovery, so that to expand the act by compulsory testimony, a statutory distinction must be drawn because compulsory testimony of a grand jury occurs through exercise of judicial power. The question is: Would you then perhaps be encroaching on judicial power by vesting in the Antitrust Division compulsory power that is available to a grand jury only through judicial power?

Mr. KAUPER. I must say I have a little trouble understanding that argument.

Mr. FALCO. Perhaps that is two of us.

Mr. KAUPER. The thought that somehow we would have the ability by way of deposition to seek testimony, and that somehow this encroaches on either the grand jury's function or the function of the court in connection with the grand jury, I guess I just find a little mystifying. I am just not sure what the basis for that argument could be.

Now, it is true that if we were to call an individual in before us, and he were to refuse to answer a question, and we felt compelled to make him answer, we would presumably have to invoke that same judicial authority. But I find it a little hard to believe that a judge at that point would say "Well, this is a question of my judicial authority in connection with the grand jury."

I just really do not understand that argument.

Mr. SEIBERLING. Would the gentlemen yield on that point?

Mr. FALCO. Sure.

Mr. SEIBERLING. I guess the chamber of commerce testimony, which is going to be given tomorrow and is incorporated in a statement which we already have, one of the things they say in that is that a subpenaed witness, although he could bring his own lawyer, his lawyer would be muzzled by express terms of the proposed amendment, and he could neither interrupt nor object.

Now, as I read the proposed amendment, it says that his lawyer or his counsel, that person or counsel may object, stating the reasons therefor, where it is claimed that such person is entitled to refuse to answer on grounds of privilege or self-incrimination or other lawful grounds. Now, would other lawful grounds include relevance?

Mr. KAUPER. Yes.

Mr. SEIBERLING. So that statement by the chamber of commerce would not be supported by the facts?

Mr. KAUPER. It does not seem that way to me, Congressman.

Mr. SEIBERLING. All right. That was one of the things that was concerning me, and I am glad that you agree that that is not the case.

If I could ask one other question: Are you going to submit a proposed new bill with all of the additional changes that you referred to in your testimony?

Mr. KAUPER. Well, I think we can work with the committee staff as to how they want to proceed.

Mr. SEIBERLING. It would be helpful, because I am a little confused at this moment as to how they all fit together.

Mr. KAUPER. All right. We will see what we can do on that, Congressman. [See p. 54.]

Mr. FALCO. I have one further question, Mr. Chairman. It is true, is it not, that under the present law if you subpenaed documents and then they destroyed them, you could use Title 18, Obstruction of Justice or Contempt, and there would be no problem?

Mr. KAUPER. I think that is correct.

Mr. FALCO. That is all I have, Mr. Chairman.

Thank you, Mr. Kauper.

Chairman RODINO. Well, thank you very much, Mr. Kauper. We appreciate your appearance here and your testimony. We do look forward to your division working closely with our staff in order that some of these matters that are at issue and which have raised some further questions regarding H.R. 39, may be resolved. We hope to proceed with this bill as expeditiously as possible.

Thank you very much, and the hearing is recessed until tomorrow morning at 10 o'clock, when we will hear from a representative of the U.S. Chamber of Commerce.

Mr. KAUPER. Thank you, Mr. Chairman.

[The prepared statement with appendix of Mr. Kauper follows:]

STATEMENT OF THOMAS E. KAUPER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION

I am pleased to respond to this Committee's request to present the views of the Administration on H.R. 39, legislation which would substantially aid effective antitrust enforcement by giving the Department of Justice necessary pre-complaint civil investigatory powers. The Administration strongly supports this legislation.

H.R. 39 would amend the Antitrust Civil Process Act to authorize the collection of information in advance of action which might be unlawful, to cover natural persons, and to include oral testimony and written interrogatories. It would also extend the scope of a civil investigative demand ("CID") to include all persons believed to have information relevant to an antitrust investigation.

The considerations supporting enactment of the Civil Process Act of 1962 speak today for extension of the statute. No litigation involves facts more complex and records more extensive than are found in the government's antitrust cases. Collecting the great amount of information needed for successful antitrust enforcement is a task of considerable magnitude. Thus, the Antitrust Civil Process Act, as far as it goes, has proven beneficial to our operations. In the years since its enactment, 1626 Civil Investigative Demands have been issued by the Antitrust Division. However, the limited scope of the Act substantially impairs our investigative effectiveness by limiting civil investigative demands to current or past alleged violations, to legal entities not natural persons, to documentary material, and to parties under investigation.

We simply cannot depend on the voluntary cooperation of industry in our investigatory functions. Although compulsory grand jury process can be used in the investigation of criminal violations under the Sherman Act, the grand jury cannot be used where our intent is only to bring a civil action. Moreover, the Clayton Act is not a criminal statute; under it we must proceed civilly.

H.R. 39 clarifies our authority to seek information on incipient violations, an area of some judicial confusion.[1] This is a highly desirable change, since investigations of yet to be consummated mergers will always involve incipient conduct.

The bill would also give the Department the opportunity to compel the production of information from individuals in those cases where it is not voluntarily forthcoming. This, too, is a necessary addition if our investigatory authority is to be equal to the task.

The availability of written or oral testimony, in addition to document production, will also be a very useful investigatory tool. The provision for oral testimony is nothing new. There is ample precedent for it in the state statutes providing antitrust investigatory powers to their attorneys general before institution of any suit. Numerous Federal laws also authorize various departments and agencies to compel the attendance and testimony of witnesses in the course of investigations under the laws which they administer.

These changes in the existing legislation are desirable and indeed necessary for a truly effective antitrust enforcement program, and thus the Administration strongly supports H.R. 39. Since this legislation was prepared by the Administration and introduced, however, we have considered other proposed legislation, as well as comments from outside the Administration, and we have become convinced that several changes in the legislation as introduced would be desirable. We stand ready to work with this Committee and its staff on the language of particular provisions. I would like to highlight these areas here, and also discuss several provisions which raise important policy issues. I have attached an Appendix to this statement with detailed language and technical suggestions.

Section (c) of H.R. 39 amends section 3(a) of the Civil Process Act, which sets out the basis on which a CID can be issued and what may be requested. As amended, answers to written interrogatories and oral testimony could be required, in addition to the production of documents. In addition to this change, which we strongly support, 3(a) would be amended by adding the language "or may have knowledge of any fact or facts." This is intended to form the basis for a demand for oral testimony or written interrogatories, and was in fact the language suggested in the Administration bill. I have concluded, however, that the limitation to "fact or facts" may prove unworkable, since it is ofttimes difficult to establish what another person knows as a "fact." I would suggest the substitution of the language "or may have any information." This is less likely to create enforcement problems and is in fact what the demand seeks.

Section (d) of H.R. 39 amends Section 3(b) of the ACPA, which details what the demand shall contain. We have some technical changes in this section which I have detailed in the Appendix to my testimony. There is, however, one change of some impact which affects several provisions of H.R. 39, including this one. As now drafted, Section (i) of H.R. 39 would extend the power to utilize the ACPA to obtain information for use before regulatory agencies only in those cases where "an adequate opportunity for discovery" is not available under agency rules and procedures. After very careful thought, I have come to the conclusion that this standard is simply unworkable. Who is to decide, for example, whether the agency's rules are adequate?

Therefore, because I believe this authority would be extremely valuable to the Division's regulatory activities, I would suggest that the qualifying language be dropped. The Division's participation before regulatory agencies has become an

[1] See, eg., *U.S.* v. *Union Oil Co.*, 343 F. 2d 29 (9th Cir. 1965)

extremely important part of its activities. In many cases, agency participation is chosen *instead of* litigation, where it is felt that litigation would be a piecemeal approach to an industry problem. Other times, agency participation is taken in tandem with related litigation. The Division's advocacy activities before Federal agencies truly complement its traditional enforcement activities and, in the long term, both seek the same goals. Therefore, any distinction in the gathering of information is an artificial one which I do not feel should be perpetuated. I have included in the Appendix language which would eliminate this unnecessary distinction.

Section (f) of H.R. 39 deals with the form of responses to a CID. New subsection (h) deals with the production of documents, and would require a sworn certificate that all documents requested had been produced. Who must provide the certificate is unclear. This could be interpreted as allowing certification, even where the demand was directed at a natural person, by someone other than the person to whom the demand was directed. I have suggested in the Appendix language to cure this ambiguity. A similar problem exists with new subsection (i), and is also dealt with in the Appendix.

New subsection (j) deals with the procedures for complying with a demand for oral testimony. I have a number of suggestions in this area, most of which are dealt with in the Appendix, but I would like to specifically mention two points which I feel raise significant policy issues.

First, new subsection (j)(1), as drafted, would allow oral testimony pursuant to a CID to be open to the public, a condition I can assure you was not intended by the drafters. The treatment of information obtained through a CID has always been, and would remain under the H.R. 39 amendments, highly restrictive, with areas of use strictly defined. I think this is both appropriate and desirable, and should continue. Nevertheless, new subsection (j)(1) merely *permits* an oral examination pursuant to a demand to be held in closed session. I believe that such proceedings should always be confidential, with all persons other than counsel for the person being examined and those necessary to conduct the examination excluded. Any other standard, it seems to me, is inconsistent with both the letter and the spirit of other provisions of both the Act as it now stands and H.R. 39.

Second, I find that the provision providing a procedure by which the person examined may obtain a copy of his testimony is not adequate. In addition, there is no provision for certification of the testimony by the person examined, and some ambiguity in new subsection (k)(5), dealing with the right to clarify or complete equivocal answers.

Because of these deficiencies, and because I view this procedure as somewhat analogous to a civil deposition as contemplated by the Federal Rules of Civil Procedure, I now believe changes to conform to those Rules is appropriate. Rule 30(c) outlines the procedure for review and corrections by the witness, and provides for signing. Rule 30(f)(2) provides for copies to be furnished to the witness. Similar procedures are appropriate and, with slight modifications in language, should be included in these amendments to the Civil Process Act.

Section (i) of H.R. 39 generally describes the uses to which information obtained by CID can be put. I have already indicated some desirable changes in this provision. In addition to those mentioned, however, I believe the scope of the provision must be somewhat narrowed. Section (i) would allow *any* use of CID information before any "court, grand jury, or Federal administrative agency" and in the conduct of *any* antitrust investigation. While we believe that information properly obtained through the use of a CID should be available to Division attorneys in agency proceedings, the possible disclosure of such information in antitrust investigations would have the ironic effect of allowing disclosure by other attorneys in other investigations not permitted to the investigators who obtained the information. The confidentiality of the documents would be substantially impaired if disclosure was allowed outside a judicial, grand jury or agency proceeding. The Appendix contains specific language to correct this problem, and to permit documents to be utilized in oral depositions under this Act.

In addition, we believe that all information obtained through a CID should be available to the FTC, subject to the same limitations placed on the use of the information by the Division. The Appendix contains language to accomplish this purpose.

Finally, the relationship of the Freedom of Information Act and the Civil Process Act, including proposed changes, must be carefully considered. We would favor clear and complete exemption from FOIA for any information, in whatever

form, obtained through a CID. By definition, such information is investigatory and frequently consists of confidential business data. While it would thus probably be exempt from disclosure in any event, we strongly favor specific statutory language to that effect.

In summary, this is necessary and highly desirable legislation. With the few minor changes suggested in this testimony, it has the Administration's strong support. I commend this Committee for early hearings on this important bill, and I strongly urge its early passage.

APPENDIX

1. Section (c)

The words "knowledge of any fact or facts" (on line 13 of page 2) should be deleted and replaced with the words "any information." The word "examination" (on line 18 of page 2) should be deleted and replaced with the words "inspection and copying or reproduction" to conform to Section 3(b)(2)(ii) of the Civil Process Act. The language (on lines 19–21 of page 2) following the word "testimony" (on line 19 of page 2) should be deleted and replaced with the words "concerning it, or to furnish any combination thereof."

2. Section (d)

The language "conduct constituting the alleged antitrust violation which is under" (on lines 25 of page 2 and line 1 of page 3) should be deleted to conform to the scope of Section (a) of H.R. 39. The words "or the Federal administrative or agency proceeding involved" should be inserted following the word "thereto" (on line 2 of page 3) in order to conform to the authority in Section (i) of H.R. 39, as amended in this Appendix. The words "or dates" should be inserted following the word "date" (on line 9 of page 3), and following the word "date" (on line 23 of page 3). Subsection 3(b)(3)(A) should be moved to follow 3(b)(3)(C) for purposes of symmetry. The word "taken" (on line 4 of page 4) should be deleted and replaced by the word "commenced."

3. Section (f)

The language governing certification of the responses to demands for production of documents and answers to written interrogatories must be clarified to insure that responses are made and certified by the appropriate person (if a natural person, the person to whom the demand is directed). Thus, new subsection (h) should be amended by adding, following the word "certificate" (on line 24 of page 4) the words "in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production." Similarly, new subsection (i) should be amended by adding after the word "answer" (at line 7 on page 5) the words", and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory, to the effect that all information required by the demand which is in the possession, custody, or control of the person to whom the demand is directed has been furnished." The words "The answer and objections are to be signed by the person making them." (on lines 7 and 8 of page 5) should be deleted.

New subsection (j)(1) should be amended by deleting the word "may" (on line 23 of page 5) and inserting in its place the word "shall."

New subsections (j)(3) and (5) should be deleted and replaced with the following:

"When the testimony is fully transcribed, the transcript shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcript by the officer with a statement of the reasons given by the witness for making them. The transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the transcript is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor.

"The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness and promptly send it by registered or certified mail to the investigator. Upon

payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that such witness may for good cause be limited to inspection of the official transcript of his testimony."

All language on lines 1 through 8 of page 7 should be deleted, and replaced with the following:

"If such person refuses to answer any question on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18, United States Code. If such person refuses to answer any question, the antitrust investigator or investigators conducting the examination may request the district court of the United States for the judicial district within which the examination is conducted to order such person to answer, in the same manner as if such person had refused to answer such question after having been subpenaed to testify thereto before a grand jury, and upon disobedience to any such order of such court, such court may punish such person for contempt thereof."

4. Section (h)

In order to insure that documents or interrogatories obtained pursuant to the Civil Process Act may be used in oral testimony proceedings under the Act, the following language should be added to subsection (c) of Section 4:

"Any documentary material described in subsection (b)(2) of Section 3 or interrogatories served pursuant to this Act may be used in connection with any oral testimony taken pursuant to this Act."

In addition, in order to clarify that CID materials may be used internally within the Antitrust Division during the course of any investigation, the following language should be added following the phrase "Department of Justice":

"for such use as such officer, member, or employee determines to be required. No such material shall be disclosed, except as provided under subsection (d) of this Section."

5. Section (i)

The words "of the Antitrust Division" (on line 1 of page 8) should be deleted as overly restrictive and unnecessary and to make clear that United States Attorneys are included. The words "or to conduct any antitrust investigations" (on lines 5 and 6 of page 8) should be deleted. The words "grand jury, or" should be inserted after the word "case" (on line 12 of page 8). The words "or investigation" (on lines 12–13 of page 8) should be deleted. These changes to subsection (d)(1) would limit the use of CID information to formal proceedings, and would not permit its external use in other antitrust investigations, except to the extent permitted in Section (h) of H.R. 39 as suggested to be amended in No. 4 of this Appendix.

In paragraph (2) of subsection (d), the words "Antitrust Division" (on line 20 of page 8) should be deleted, and replaced with the words "Attorney General, or the Assistant Attorney General in charge of the Antitrust Division." This would conform to the language of other provisions of the Civil Process Act. The words "while participating in any Federal administrative or regulatory agency proceeding, shall not employ" (on lines 20–22 of page 8) should be deleted and replaced with the words "may employ." All language following the word "in" (on lines 23 and 24 of page 8 and lines 1 and 2 of page 9) should be deleted and replaced with the words "any Federal administrative or regulatory agency proceeding." This will make clear our authority to seek information before we formally become a party in any such proceeding, and would conform to the general concept of the CID as a precomplaint investigatory tool.

Paragraph (2) of subsection (d), as amended in conformance with the suggestions contained in this Appendix, should be renumbered (3), and a new paragraph (2) should be inserted, as follows:

"The antitrust investigator or investigators having custody and control of any documentary material described in subsection (b)(2) of Section 3, interrogatories served pursuant to this Act and answers thereto, or transcripts of oral testimony taken purusant to this Act may deliver to the Federal Trade Commission, in response to a written request, copies of such documentary material, interrogatories and answers thereto, or transcripts of oral testimony for use in connection with an investigation or proceeding under its jurisdiction. Upon the completion of any such investigation or proceeding, the Commission shall return to the antitrust investigator or investigators any such materials so delivered and not having been introduced into the record of such a case or proceeding before the Commission. While such materials are in the possession of the Commission, it shall be

subject to any and all restrictions and obligations which this Act places upon the custodian of such documents while in the possession of the Antitrust Division of the Department of Justice."

6. Section (k)

The word "had" (on line 22 of page 9) should be "has."

7. Subsection (c) of section 3 of the ACPA should be amended to read as follows:

"(c) Such demand shall—

"(1) not require the production of any information that would be privileged from disclosure if demanded by, or pursuant to, a subpena issued by a court of the United States in aid of a grand jury investigation; and

"(2)(A) if it is a demand for production of documentary material, not contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation; or

"(B) if it is a demand for answers to written interrogatories, not impose an undue or oppressive burden on the person required to furnish answers.".

DEPARTMENT OF JUSTICE,
Washington, D.C., June 3, 1975.

Hon. PETER W. RODINO, Jr.,
Chairman, Subcommittee on Monopolies and Commercial Law, House of Representatives, Washington, D.C.

DEAR CHAIRMAN RODINO: During my testimony before the Subcommittee on Monopolies and Commercial Law on H.R. 39, I was asked to provide certain additional information. This letter responds to those requests.

Paragraph (c) of H.R. 39 would amend the Antitrust Civil Process Act to allow, *inter alia*, issuance of a Civil Investigative Demand whenever the appropriate official "has reason to believe that any person . . . may have knowledge of any fact or facts" relevant to a civil antitrust investigation. In my testimony, I suggested that the words "knowledge of any fact or facts" be deleted and replaced with the words "any information." I was asked whether other statutes providing investigatory authority contained language similar to that suggested by the Administration.

We have surveyed a large number of statutory provisions granting investigatory authority to a variety of federal agencies. Most do not utilize either the words "fact or facts" or the word "information." These statutes typically simply allow the agency to "investigate" or "to gather evidence" with no limitation as to the type of material or knowledge which may be sought or compelled. A good example of these statutes is found in 15 U.S.C. 49, giving very broad authority to the Federal Trade Commission to, among other things, "require by subpoena the attendance and testimony of witnesses. . . ."

There are, however, a number of statutory provisions explicitly authorizing the gathering of "information." For example, 15 U.S.C. 46(a) authorizes the Federal Trade Commission "to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in Commerce. . . ." 15 U.S.C. 49(b) authorizes the Commission to require corporations engaged in commerce to furnish "such information as [the FTC] may require . . ." under oath and in writing. 7 U.S.C. 222 provides that the Secretary of Agriculture may utilize the powers granted the FTC in sections 46 and 48–50 of Title 15 to carry out his responsibilities.

18 U.S.C. 835(b) authorizes the Interstate Commerce Commission to, *inter alia*, "conduct such investigations, obtain such information, and hold such hearings as it may deem necessary or proper" to assist it in carrying out its responsibilities. That section goes on to authorize the Commission "to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents or both, at any designated place." 42 U.S.C. 2201(c) provides similar authority, in almost identical language, to the Nuclear Regulatory Commission.

Finally, 15 U.S.C. 79r(b) authorizes the Securities and Exchange Commission to "investigate, or obtain any information regarding the business, financial condition, or practices" of various organizations subject to its jurisdiction. 15 U.S.C. 79r(c) provides for the taking of oral testimony and the production of documents.

I continue to feel that the use of the term "information" will not substantially alter the scope of the proposed amendments, and could well avoid delays or obstructions based on narrow definitions of what constitutes a "fact." It is clear that the term has been commonly used in similar investigatory power statutory

provisions, and thus its use in these amendments would not introduce a new term into the federal law. Therefore, I urge the Subcommittee's acceptance of the suggested change.

I would like to take this opportunity to offer an additional suggestion which was inadvertently omitted from my testimony. Paragraph (c) of H.R. 39 should be further amended to reflect the broader scope of CID authority contemplated by H.R. 39 and our suggested amendments. Thus, on line 14 of page, 2, the words "or a Federal administrative or agency proceeding" should be added following the word "investigation." This would conform this provision of the Act to other provisions authorizing the use of CID authority and information in connection with such proceedings.

You also ask in what types of situations the additional investigatory powers which would be granted by H.R. 39 would be most useful. Obviously, there are a variety of investigations where the ability to interview persons with relevant information, either through deposition or interrogatories, would be very useful. Particular need for this authority in specific investigations will depend largely on the circumstances of that investigation, and most importantly the degree of cooperation with the Division. There are, however, two types of matters where our experience has convinced us that additional investigatory power is almost essential to an adequate investigation.

The first is those instances where the actual victim of the anticompetitive practice could technically be considered a co-conspirator. This is frequently the case in reciprocity investigation , but it arises in other contexts as well. Without the ability to compel information in such situations, we have frequently been unable to conduct a satisfactory investigation within a reasonable period of time.

The second, and even more common, problem area is merger investigations. Companies, and their employees, not involved in the transaction under investigation are frequently reluctant to cooperate in furnishing market statistics and other information necessary to a complete analysis of the transaction. Without voluntary production of information, especially market and sales statistics, and the ability to discuss that information with individuals knowledgeable in the area, it is frequently very difficult to make a fully informed judgment as to the competitive effects of a transaction. The merger area is one in which the ability to obtain documents and other information from third parties is extremely desirable for effective enforcement.

The reluctance of companies and individuals to voluntarily produce information has become significantly greater since the passage of the recent amendments to the Freedom of Information Act. It is now common for us to be asked to either serve compulsory process, or to give assurances of confidentiality concerning the information sought. Since we are frequently unable to provide the latter, and in any event cannot promise anything more than the protection granted by FOIA, compulsory process is becoming necessary in more and more situations. The amendments contained in H.R. 39, with the minor changes suggested in my testimony, will enable us to meet this problem effectively.

You also asked whether the language of the Antitrust Civil Process Act, as amended by H.R. 39 would be sufficiently broad to enable the Division to obtain information stored through various modern technological methods, such as computer tapes and the like. 15 U.S.C. 1311(g) defines the type of material now subject to the Act to include "any book, record, report, memorandum, paper, communication, tabulation, chart, or other document." Paragraph (c) of H.R. 39, as we have suggested it be amended, would broaden the scope of the Act to include, in addition to documentary material, "any information."

We believe that this language is broad enough to include information stored on computer tapes or other technological devices. However, in order to avoid any possible confusion, it might be desirable to adopt language similar to that contained in Rule 34 of the Federal Rules of Civil Procedure. Thus, 15 U.S.C. 1311(g) could be amended by adding, immediately after the word "document," the words "or data compilation from which information can be obtained, translated, if necessary, by the person producing same into reasonably usable form."

I trust this information is fully responsive to the questions raised during my testimony. If I may provide any more information, I stand ready to do so at your request.

Sincerely,

THOMAS E. KAUPER,
Assistant Attorney General,
Antitrust Division.

The bill referred to at p. 47 follows:]

H.R. 39, WITH SUGGESTED AMENDMENTS SUBMITTED BY THE DEPARTMENT OF JUSTICE

A BILL

To amend the Antitrust Civil Process to increase the effectiveness of discovery in civil antitrust investigations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Antitrust Civil Process Act (76 Stat. 548; 15 U.S.C. 1311) is hereby amended as follows:

(a) Clause (c) of section 2 is amended to read as follows:

"(c) The term 'antitrust investigation' means any inquiry conducted by any antitrust investigator for the purpose of ascertaining whether any person is or has

been engaged in any antitrust violation or in any activities, *such as mergers, acquisitions, joint ventures, or similar transactions,* which may lead to any antitrust violation;".

(b) Clause (f) of section 2 is amended by deleting the phrase "not a natural person" and inserting immediately after the word "means" the following: "any natural person or".

(c) Subsection (a) of section 3 is amended to read as follows:

"Whenever the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, has reason to believe that any person may be in possession, custody, or control of any documentary material, or may have ~~knowledge of any fact or facts,~~ *any information,* relevant to a civil antitrust investigation *or Federal administrative or agency proceeding,* he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for ~~examination~~ *inspection and copying or reproduction* or to answer in writing written interrogatories or to give oral testimony, ~~or any combination of such demands, pertaining to such fact or facts.~~ *concerning it, or to furnish any combination thereof.*".

(d) Subsection (b) of section 3 is amended to read as follows:

"Each such demand shall—

"(1) state the nature of the ~~conduct constituting the alleged antitrust violation which is under~~ investigation and the provision of law applicable thereto *or the Federal administrative or agency proceeding involved*; and

"(2) if it is a demand for production of documentary material,

"(A) 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;

"(B) prescribe a return date *or dates* which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(C) identify the antitrust investigator who shall be the custodian to whom such material shall be made available; or

"(3) if it is a demand for answers to written interrogatories,

~~"(A) identify the antitrust investigator to whom such answers shall be made;~~

~~"(B)~~ *(A)* propound with definiteness and certainty the written interrogatories to be answered; and

~~"(C)~~ *(B)* prescribe a date *or dates* at which time answers to written interrogatories shall be made; ~~or~~

"(C) identify the antitrust investigator to whom such answers shall be made; or

"(4) if it is a demand for the giving of oral testimony,

"(A) prescribe a date, time, and place at which oral testimony shall be ~~taken~~ *commenced*; and

"(B) identify the antitrust investigator or investigators who shall conduct the examination.".

(e) Subsection (f) of section 3 is redesignated subsection (g) and a new subsection is inserted following subsection (e) to read as follows:

"(f) Service of any such demand or of any petition filed under section 5 of this Act may be made upon any natural person by—

"(1) delivering a duly executed copy thereof to the person to be served; or

"(2) depositing such copy in the United States

mails, by registered or certified mail duly addressed to the person to be served at his residence or principal office or place of business.".

(f) Section 3 is further amended by adding the following new subsections after redesignated subsection (g):

"(h) The production of documentary material in response to a demand for production described in subsection (b) (2) of this section shall be made under a sworn certificate *in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production* to the effect that all of the documentary material described by the demand which is in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

"(i) Each interrogatory in a demand served pursuant to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objections shall be stated in lieu of an answer, *and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons responsible for answering each interrogatory, to the effect that all informa-*

tion required by the demand which is in the possession, custody, or control of the person to whom the demand is directed has been furnished. ~~The answers and objections are to be signed by the person making them.~~

"(j) (1) The examination of any person pursuant to a demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. Upon certification the officer before whom the testimony is taken shall promptly transmit the transcript of the testimony to the possession of the antitrust investigator or investigators conducting the examination. The antitrust investigator or investigators conducting the examination ~~may~~ *shall* exclude from the place where the examination is held all persons other than the person begin examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking said testimony. The provisions of the Act of March 3, 1913 (ch. 114, 37 Stat. 731; 15 U.S.C. 30), shall not apply to such examinations.

"(2) The oral testimony of any person taken pursuant

to a demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon between the antitrust investigator or investigators conducting the examination and such person.

"(3) ~~Any person examined under a demand for oral testimony pursuant to this section shall, on payment of lawfully prescribed costs, procure a copy of his own testimony as stenographically reported, except that such person may for good cause be limited to inspection of the official transcript of his testimony.~~ *When the testimony is fully transcribed, the transcript shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcript by the officer with a statement of the reasons given by the witness for making them. The transcript shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the transcript is not signed by the witness within thirty days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with*

the reason, if any, given therefor. The officer shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness and promptly send it by registered or certified mail to the investigator. Upon payment of reasonable charges therefor, the investigator shall furnish a copy of the transcript to the witness only, except that such witness may for good cause be limited to inspection of the official transcript of his testimony.

"(4) Any person compelled to appear under a demand for oral testimony pursuant to this section may be accompanied by counsel. For any purposes other than those set forth in this subparagraph, such person shall not refuse to answer any question, nor by himself or through counsel interrupt the examination by making objections or statements on the record. Such person or counsel may object on the record, stating the reason therefor, where it is claimed that such person is entitled to refuse to answer on grounds of privilege, or self-incrimination or other lawful grounds. ~~Where the refusal to answer is on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accord with the provisions of part V of title 18, United States Code. Upon a refusal to answer, the antitrust investigator or investigators conducting the examination may petition the district court of the United States for~~

~~the judicial district within which the examination is conducted for an order requiring such person to answer.~~ *If such person refuses to answer any question on the grounds of privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18, United States Code. If such person refuses to answer any question, the antitrust investigator or investigators conducting the examination may request the district court of the United States for the judicial district within which the examination is conducted to order such person to answer, in the same manner as if such person had refused to answer such question after having been subpenaed to testify thereto before a grand jury, and upon disobedience to any such order of such court, such court may punish such person for contempt thereof.*"

~~"(5) Upon completion of the examination, the person examined may clarify or completely answers otherwise equivocal or incomplete on the record.".~~

(g) Subsection (b) of section 4 is amended by inserting in the first sentence immediately after the word "demand", first appearance, the following: "for the production of documents", and by amending the second sentence to read as follows: "Such person may upon written agreement between such person and the custodian substitute copies for originals of all or any part of such material.".

(h) *(1)* Subsection (c) of section 4 is amended by inserting in the first sentence immediately after the word "material" the phrase "described in subsection (b) (2) of section 3" and by inserting in the fourth sentence immediately before the word "documentary" the word "such" and by inserting at the end of subsection (c) the following: *Any documentary material described in subsection (b)(2) of section 3 or interrogatories served pursuant to this Act may be used in connection with any oral testimony taken pursuant to this Act.*

(2) Subsection (c) of section 4 is amended by inserting in the third sentence after the word "Justice" the following: *for such use as such officer, member, or employee determines to be required. No such material shall be disclosed, except as provided under subsection (d) of this section.*

(i) Subsection (d) of section 4 is amended to read as follows:

"(1) Whenever any attorney ~~of the Antitrust Division~~ of the Department of Justice has been designated to appear before any court, grand jury, or Federal administrative or regulatory agency in any case or proceeding ~~or to conduct any antitrust investigation~~, the antitrust investigator or investigators having custody and control of any documentary material described in subsection (b) (2) of section 3, interrogatories served pursuant to this Act and answers thereto,

or transcript of oral testimony taken pursuant to this Act may deliver to such attorney such documentary material, interrogatories, and answers thereto, or transcript of oral testimony for use in connection with any such case, *grand jury,* *or* proceeding, ~~or investigation~~ as such attorney determines to be required. Upon the completion of any such case, proceeding, or investigation such attorney shall return to the antitrust investigator or investigators any such materials so delivered and not having passed into the control of such court, grand jury, or agency through the introduction thereof into the record of such case or proceeding.

"(2) The antitrust investigator or investigators having custody and control of any documentary material described in subsection (b)(2) of section 3, interrogatories served pursuant to this Act and answers thereto, or transcripts of oral testimony taken pursuant to this Act may deliver to the Federal Trade Commission, in response to a written request, copies of such documentary material, interrogatories, and answers thereto, or transcripts of oral testimony for use in connection with an investigation or proceeding under its jurisdiction. Upon the completion of any such investigation or proceeding, the Commission shall return to the antitrust investigator or investigators any such materials so delivered and not having been introduced into the record of such a case or proceeding before the Commission. While such materials

are in the possession of the Commission, it shall be subject to any and all restrictions and obligations which this Act places upon the custodian of such documents while in the possession of the Antitrust Division of the Department of Justice.

"~~(2)~~ *(3)* ~~The Antitrust Division, while participating in any Federal administrative or regulatory agency proceeding, shall not employ~~ *Attorney General, or the Assistant Attorney General in charge of the Antitrust Division may employ* the authority granted by this Act to obtain information or evidence for use in ~~such proceeding where an adequate opportunity for discovery is available under the rules and procedures of the agency conducting the proceeding.~~ *Any Federal administrative or regulatory agency proceeding.*".

(j) Subsection (e) of section 4 is amended to read as follows:

"Upon the completion of (1) the antitrust investigation for which any documentary material described in subsection (b) (2) of section 3 of this Act was produced, and (2) any such case or proceeding, the custodian shall return to the person who produced such material all such material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) which has not passed into the control of any court, grand jury, or Federal administrative or regulatory agency through the

introduction thereof into the record of such case or proceeding.".

(k) Subsection (f) of section 4 is amended to read as follows:

"When any documentary material has been produced by any person under a demand described in subsection (b) (2) of section 3 of this Act, and no case or proceeding as to which the documents are usable ~~and~~ *has* been instituted and is pending or has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General or upon the Assistant Attorney General in charge of the Antitrust Division, to the return of all such documentary material (other than copies thereof furnished to the custodian pursuant to subsection (b) of this section or made by the Department of Justice pursuant to subsection (c) of this section) so produced by such person.".

(l) Subsection (g) of section 4 is amended to read as follows:

"In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material produced under a demand for production described in subsection (b) (2) of section 3 of this Act or the antitrust investigator having possession of answers

in writing to written interrogatories or the transcript of any oral testimony produced under any demand issued under this Act, or the official relief of such custodian or antitrust investigator from responsibility for the custody and control of such material, the Assistant Attorney General in charge of the Antitrust Division shall promptly (1) designate another antitrust investigator to serve as custodian of such documentary material or to maintain possession of such answers to interrogatories or such transcript of oral testimony, and (2) transmit in writing to the person who submitted the documentary material produced under a demand for production described in subsection (b) (2) of section 3 of this Act, notice as to the identity and address of the successor so designated. Any successor designated under this subsection shall have with regard to such materials all duties and responsibilities imposed by this Act upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation.".

(m) The first sentence of subsection (b) of section 5 is amended to read as follows:

"Within twenty days after the service of any such demand upon any person, or at any time before the compliance date specified in the demand, whichever period is shorter, or

within such period exceeding twenty days after service or in excess of such compliance date as may be prescribed in writing, subsequent to service, by the antitrust investigator or investigators named in the demand, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such antitrust investigator or investigators a petition for an order of such court modifying or setting aside such demand.".

(n) Subsection (c) of section 3 is amended to read as follows:

"(c) Such demand shall—

"(1) not require the production of any information that would be privileged from disclosure if demanded by, or pursuant to, a subpena issued by a court of the United States in aid of a grand jury investigation; and

"(2)(A) if it is a demand for production of documentary material, not contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation; or

"(B) if it is a demand for answers to written interrogatories, not impose an undue or oppressive burden on the person required to furnish answers.".

[Whereupon, at 12:07 p.m., the hearing was recessed, to reconvene at 10 a.m., on Friday, May 9, 1975.]

ANTITRUST CIVIL PROCESS ACT AMENDMENT

FRIDAY, MAY 9, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:05 a.m., in room 2141, Rayburn House Office Building, the Honorable Romano L. Mazzoli presiding.

Present: Representatives Mazzoli, Hughes, Hutchinson, and McClory.

Also present: Earl C. Dudley, Jr., general counsel; James F. Falco, counsel; and Franklin G. Polk, associate counsel.

Mr. MAZZOLI. The subcommittee will please come to order.

We welcome you, Mr. Rogers, and appreciate your being with us this morning. You really have your choice as to whether you want to read verbatim from your statement which you have previously served on the committee, and which we have read, or if you wish to summarize the salient points and perhaps make changes as things have developed since you prepared the statement, whatever is your pleasure.

Mr. ROGERS. Well, Mr. Chairman, I would prefer to extend my remarks somewhat as against what the statement says.

Mr. MAZZOLI. Very good.

Mr. ROGERS. Particularly with respect to the latter part of the statement which I think is the real guts of the problem that is faced by this committee.

Mr. MAZZOLI. Without objection, your statement, of course, will be made a part of the record in toto.

Mr. ROGERS. I understand.

Mr. MAZZOLI. And if you wish then to speak to the points that you have made in your statement, in order that the record be amplified, and add any other further points, we will be delighted to have them.

Mr. ROGERS. I have prepared some general remarks here, Mr. Chairman, with the thought in mind of really extending my remarks, but not necessarily referencing them into any particular part of my statement.

Mr. MAZZOLI. Well, you may proceed on that basis then, sir.

Mr. ROGERS. Well, thank you.

[The prepared statement of the chamber of commerce follows:]

STATEMENT ON H.R. 39 AMENDMENT TO ANTITRUST CIVIL PROCESS ACT BY WILLIAM F. ROGERS

My name is William F. Rogers. I am Senior Attorney with the Monsanto Company of St. Louis, Missouri. My company is a member of the Chamber of Commerce of the United States, and I serve on the Chamber's Antitrust and Trade Regulation Committee. Earlier in my career I worked for three years as a trial attorney in the Antitrust Division of the Department of Justice.

On behalf of the Chamber, I want to say at the beginning that we truly appreciate the Subcommittee's invitation to offer views on H.R. 39.[1] We appreciate especially the courtesies of the Subcommittee staff in working with the Chamber to arrange for my appearance here today.

Simply put, this bill would amend the Antitrust Civil Process Act of 1962 by greatly expanding investigation powers of the Justice Department. Principally, it would give the Department power to subpoena witnesses for interrogation under oath before the filing of a complaint, with but a minimum of judicial oversight.

Also stated simply, the Chamber opposes this legislation. While we agree that the Department of Justice should have effective tools for antitrust enforcement, it is hard to believe that the agency would request the kind of power proposed here in any other context. Certainly, it would provoke outrage in the minds of civil libertarians. Yet, if the concepts of due process and civil rights are to have real meaning, they must be respected in all contexts.

With less passion than this expression of shock, but with equal vigor, we will address much of our argument to the reasons given by the DOJ in support of its request for this extreme prosecutorial power. First, however, as an aid to understanding of our discussion, we will set out a brief comparison of the existing Act and the proposals in H.R. 39.

Essentially, the Antitrust Civil Process Act provides that if the Justice Department believes that a person under investigation has documents relevant to a civil antitrust investigation, it may issue a civil investigative demand (CID) ordering production of the documents for inspection and copying. More specifically, the principal provisions of the Act and the proposed changes are as follows:

	Existing Statute	*Proposed Amendment*
(1)	Limited to demands for documents for inspection, copying or reproduction.	Extends to include oral testimony and responses in writing to written interrogatories.
(2)	Limited to investigations to ascertain past or present violations.	Extends to "any activities which may lead to any antitrust violation."
(3)	Limited to demands on "any corporation, association, partnership, or other legal entity not a natural person".	Extends to natural persons.
(4)	Limited to demands on persons under investigation.	Extend to "any person" who "may have knowledge of any fact or facts" relevant to civil antitrust investigation.
(5)	Permissible use of subpoenaed documents limited to cases arising from the investigation.	Permissible use extended to any proceeding in which a Department of Justice Attorney appears.
(6)	Contains provision for confidentiality of documents.	No provision for confidentiality of hearing or transcript of testimony.

The main argument in support of Title II is a simplistic one, which can be summarized as follows: The FTC has investigative powers broader than the Department's CID authority and hence it would be entirely proper to give the Department the same powers as the FTC. The Chamber urges that this argument is faulty in three main respects. *First*, it is predicated on a wholly improper comparison of the full panoply of FTC investigative powers, in relation to the Department's CID authority alone. Such comparison ignores the fact that the Department has several powerful investigative tools, such as the Grand Jury process

[1] A similar proposal is pending in the Senate as Title II to S 1284.

and compulsory discovery under the Federal Rules of Civil Procedure, which the FTC does not have. When *all* of the Department's investigative tools are compared with all of the FTC's authority, there is reasonable equivalency for prosecutorial purposes, and the asserted need for expansion of the Department's investigative powers disappears.

The "FTC-has-it-so-we-want-it" argument is also unsound in a *second* respect. It assumes that the needs are the same on the ground that the primary roles of the two agencies in antitrust enforcement are the same. In fact the two roles are different. The Department of Justice is a *prosecutor*, whereas the Federal Trade Commission was created primarily as an *expert agency with a broad quasi-legislative role*. The Commission's function was to be fulfilled by issuance of broad antitrust guidelines, economic studies, and investigations to develop facts for legislative recommendations to Congress, as well as for keeping both business and the public apprised of broad economic trends. Sweeping investigative powers in the hands of a policy-maker may be justified. It does not follow. however, that the same powers should be given to the prosecutors.

The third reason for the Chamber's opposition rests on policy grounds. Experience shows that the granting of broad investigative powers to a prosecutor creates the possibilities of abuse, and in the absence of a strong showing of need for such powers, Congress should withhold them. Moreover, experience also shows that during periods when the FTC emphasized its prosecutorial role, the Commission's vast investigatory powers may have contributed to its undue preoccupation with trivial antitrust cases. All of this suggests that the proposed amendments would be unwise.

I. THE EXISTING INVESTIGATIVE POWERS OF THE DEPARTMENT OF JUSTICE ARE ENTIRELY ADEQUATE FOR ITS PROSECUTORIAL ROLE

Under existing law, the Department of Justice is armed with the following investigative tools:

—Pre-complaint CID's to compel disclosure of documents of business entities under antitrust investigation.

—Pre-complaint or pre-indictment grand jury subpoenas to compel disclosure of documents and oral testimony from any business entities or natural persons for all information relevant to possible antitrust violations.

—Post-complaint compulsory discovery procedures under the Federal Rules of Civil Procedure, which include oral depositions, written interrogatories, production of documents and requests for admissions.

—FBI investigations to collect evidence of possible antitrust violations.

—Use of FTC investigative powers, upon request of the Attorney General.

The above investigative tools of the Department of Justice are effective and powerful. When all of them are compared with the FTC's investigative power, the asserted discrepancy between the Department and the Commission disappears for prosecutorial purposes.

Supporters of the proposed amendments often compare the wide range of FTC investigative powers to the more limited powers of the Department of Justice under its CID procedure. This comparison is not justified, because it fails to take into account the other powerful investigative tools available to the Department. For example, the sweeping investigative powers of the grand jury may be used to investigate the mere possibility of any hard-core antitrust violation, such as price-fixing. The power of the grand jury process is virtually unlimited. No showing of "probable cause" is required. As put by the Supreme Court:

"(The grand jury's investigative powers are) not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." [2]

Moreover, the grand jury investigation goes far beyond an inquiry into whether an antitrust offense may have been committed. As conceded by one of the top officials of the Antitrust Division, the grand jury "also gathers evidence of the offense and that evidence is available for use by the Government at trial." [3]

Moreover, if an *FTC investigation* turns up the slightest hint of a hardcore antitrust violation subject to criminal sanctions, it is the practice and policy of the

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[2] *Blair* v. *United States*, 250 U.S. 273, 282 (1919).

[3] Mahaffie, Criminal Antitrust Investigations, 41 Antitrust Law Journal 521, 523 (1972).

Commission to refer the matter to the Department of Justice for criminal prosecution, where the full and unlimited investigative powers of the grand jury are available.

Turning next to civil antitrust cases prosecuted by the Department of Justice, the investigative tools consist of a combination of CID's, FBI investigations, use of FTC investigative powers, and discovery procedures under the Federal Rules of Civil Procedure. Despite the Department's request for the proposed amendments, there has been no demonstration that this powerful combination of investigative tools is inadequate.

Authority under the Civil Process Act, allows the Department to issue a CID for documents of any person under investigation. The demand may be issued "prior to the institution of a civil or criminal proceeding".[4] It is true that the scope of the CID authority is limited in some respects, but all of them are in keeping with the limited purpose of the CID: to determine whether to invoke the grand jury process in a criminal investigation or the broad discovery rules in a civil proceeding under the Federal Rules of Civil Procedure. No one seriously contends that the grand jury process is not adequate in criminal investigations, or that the Federal Rules are defective in civil litigation.

Accordingly, the only remaining issue is whether the Department of Justice is unreasonably handicapped under existing procedures in the pre-complaint stage of a civil antitrust matter. In considering this issue, it is significant that CID powers are buttressed *both* by FBI investigations *and* by the availability to the Department of FTC investigative tools. When all of these tools are combined, the Chamber respectfully suggests that there has been no showing that the CID process has failed to achieve its intended purpose. *i.e.*, providing sufficient evidence to determine whether or not to file a civil complaint in the Federal courts.

In its enforcement of the antitrust laws, the Department often uses FBI investigations. As reported by the then Chief of the Antitrust Division's Trial Section:

"An investigation may be conducted by FBI . . . interviews and file searches, and prospective defendants may have no notice of it at all." [5]

Moreover, the Department has available to it, when needed, the *FTC's power of investigation*. For example, under Section 6(e) of the Federal Trade Commission Act, the Commission is directed "upon the application of the Attorney General to investigate . . . the business of any corporation alleged to be violating the antitrust acts . . ." [6] This procedure has been invoked in the past, and affords the Department every tool that could possibly be needed for its prosecutorial role.

If the Department is already entitled to invoke FTC powers by application to the Commission, the question then is—why not permit the Department to do it directly? The answer is simple—*to minimize the possibility of abuse*. When the Department invokes the FTC's investigative powers, the practice has been for the FTC to appoint an impartial Hearing Examiner to preside over the investigative hearings, while permitting the Department of Justice lawyer to conduct the interrogation. Under H.R. 39, on the other hand, the prosecutor at the Department would be subject virtually to no restraints, because no impartial arbiter would be present.

It has also been argued that inasmuch as some state antitrust laws provide for pre-complaint subpoenas *ad testificandum*, the Department of Justice should have the same power. These state laws are, for the most part, in very old statutes and are notorious for their non-use. In the State of Texas where an active antitrust enforcement effort has been made, the statute does not appear to permit interrogation of witnesses; instead, the State Attorney General is limited to asking a court to require only a sworn statement from any person who knows of a violation.

To sum up, the Department's existing enforcement tools are entirely adequate. The argument that other enforcement agencies have certain types of investigative tools not available to the Department of Justice rests largely on the faulty premise that the Department has only the CID process. Instead, the CID was deliberately intended to serve only a limited and supplemental function, preparatory to invoking either the sweeping investigative power of a grand jury or the equally effective discovery rules under the Federal Rules of Civil Procedure. When all of the Department's investigative tools are taken into account, the asserted shortcomings in the Department's powers are non-existent.

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[4] See section 1312(a) of the Antitrust Civil Process Act of 1962.
[5] Mahaffie, supra, at p. 521.
[6] Similarly, Section 6(d) requires the Commission "upon the direction of the President . . . to investigate . . . any alleged violations of the antitrust acts by any corporation."

II. BILL OVERLOOKS FUNCTIONAL DISTINCTIONS BETWEEN FTC AS POLICY-MAKING AGENCY AND JUSTICE DEPARTMENT AS PROSECUTING BODY

The argument that the Department needs broader investigative powers because the FTC has such powers, overlooks the significant differences in the prosecutorial unction of the Department as compared to the legislative-policy-maker function of the FTC. When the Federal Trade Commission Act was being considered by Congress in 1914, Senator Hollis—a supporter of the legislation—emphasized that one of the intended benefits would be that the "Department of Justice . . . will be able to give its main attention to the task of prosecuting suits" for antitrust violations, leaving to the FTC the role of an expert policy-maker.

The Commission was conceived—not as a prosecutor—but as a body of experts concerned with overall antitrust policy and economic developments. In his State of the Union Message to Congress on January 20, 1914, President Wilson urged Congress to create:

"Such a Commission only as an indispensable instrument of information and publicity, as a clearinghouse for the facts for which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts . . . are inadequate." [7]

Originally, the Commission was to have no prosecuting function whatsoever. Later, Congress added the prohibition of "unfair methods of competition", so that the Commission would be able to "cast light on the grey areas of antitrust law (and) . . . permit it to bring test cases helping to eliminate these grey areas . . . ." [8]

The Commission's authority to fill-in the grey areas was to be implemented only through *civil* proceedings resulting in cease and desist orders, because the purpose was *prevention* of undesirable trade practices—*not punishment*. For this reason, it is generally agreed "that the Commission should not concern itself with practices which are illegal *per se*", because the Commission's expertise in making an "elaborate inquiry into competing policies is unnecessary" as to *per se* violations and because "enforcement should be, and usually is, undertaken by the Department rather than the Commission.[9] By concentrating its efforts on antitrust policy-making, the Commission is able to consider "significant questions arising in the grey areas of antitrust where *per se* rules are inappropriate." [10]

The legislative history of the FTC Act makes it clear that Congress conferred broad investigative powers to enable the Commission to carry out its policy-making function. The debate in Congress revolved around the question as to whether the Federal Trade Commission should be cast in the role of a rate-making agency (such as ICC), or a broad antitrust policy-maker. The first approach contemplated "even the regulation of prices", whereas the second approach recognized "that a commission is a necessary adjunct to the preservation of competition and to the practical enforcement of the law." The Senate Committee, in reporting out the bill that ultimately became the FTC Act, concluded "the Commission which is proposed by your committee . . . is founded upon the latter purpose and idea. . . . (T)he Committee has aimed to provide a body which will have sufficient power *ancillary to the Department of Justice* to add materially and practically in enforcement of the Sherman law and . . . to build up a comprehensive body of information on . . . the business world." (Emphasis Supplied)[11] Congress was especially concerned that the Commission have sufficient investigative powers to aid both the courts and the Department of Justice in the formulation of antitrust decrees *after the prosecutorial function* had ended. After noting that "large powers of investigation are given" to the Commission, Congress concluded that such powers would be needed to "bring forth both to the Attorney General and to the court the aid of special expert experience and training in matters regarding which neither the Department of Justice nor the courts can be expected to be efficient." [12]

To sum up, the FTC's broad investigative powers were intended to enable the Commission to carry-out its role as a broad antitrust policy-maker. Accordingly, it does not follow that the Department of Justice in its prosecutorial role needs the same powers.

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[7] S. Rept. No. 597, 63d Cong., 2d sess. 7 (June 13, 1914).
[8] Elman, Administrative Reform, 59 Geo. L.J. 777, 783 (1971).
[9] Elman, supra, at p. 783.
[10] Ibid.
[11] S. Rept. No. 597, supra, at p. 10.
[12] Ibid., at p. 12.

Unfortunately, the FTC has not always adhered to its primary function as an antitrust policy-maker. The deficiencies of the FTC have been noted in numerous reports.[13] The main thrust of all of these reports was the FTC's myopic concentration on trivial litigation, rather than on its primary role of a broad antitrust policy-maker.

For example, a substantial portion of the Commission's budget in 1969 was devoted to a group which "investigates and eventually closes a myriad of trivial Robinson-Patman cases." [14] In 1968 the Director of one of the Commission's major Bureaus, discovered "while convalescing at home from an illness . . . that 56 cases (should) . . . be closed (for) . . . staleness or lack of importance, and two "were closed at least in part because the files had been lost." [15] It was estimated that *as much as 70% of the Commission's investigatory time was wasted in* fruitless pursuit of non-existent antitrust violations.[16]

Several factors contributed to the Commission's misplaced efforts. It is fair to suggest, however, that one of the contributing factors was the ease with which the vast investigative powers of the Commission could be invoked in its prosecutorial role.

The proposals in Title II of S. 1284 pose the same risk for the Department of Justice. If Congress grants the Department vastly increased investigative powers, it is a fair assumption that such powers will be used. The experience of the FTC suggests that there is a real danger that many on the staff of the Antitrust Division could become bogged down in investigations of antitrust trivia.

The role of the antitrust policy-maker should be to evaluate alternatives and to seek the wisest course possible, whatever might be the outer limits of antitrust law. Judge Friendly, in his provocative study of administrative agencies, criticized the "administrative tendency to consider that the power may wisely be exercised whenever . . . courts would think it might lawfully be (exercised)".[17] The sweeping investigative powers of the FTC were created for its policy-making role. They should not be conferred upon the Department of Justice for its prosecutorial role.

Moreover, it would be equally unwise to transfer the FTC's function as an antitrust policy-maker to the Department of Justice. Congress needs no reminder that the executive departments, including the Department of Justice, are subject to Presidential authority. The Federal Trade Commission, however, is an independent regulatory agency. After evaluating a studious proposal to transfer the policy-making function to executive departments, Judge Friendly concluded:

"Quite simply, I find it hard to think of anything worse. Determination of 'basic needs of public policy' within the general command of the statute is what Congress created the Commission to do. Either the Commission can perform the task or it cannot. If it cannot, it should be abolished. . . . What would be intolerable would be . . . the prospect of making 'day to day' decisions in line with the 'policy guides' of White House assistants, whether or not the latter were characterized by a 'passion for anonymity'. (There would be) . . . the extravagance of having two groups share a common responsibility (and) we would be worse off rather than better." [18]

III. PROPOSED POWERS IN PROSECUTOR WOULD BE OPEN TO ABUSE

It is ironic that in the wake of the Watergate scandals, Congress would seriously consider conferring vast new powers on the Attorney General. While the present Attorney General is a man of great integrity and self-restraint, as well as an antitrust expert, it is worth repeating the truism that ours is a government of laws and not of men. Traditionally, our law has imposed careful limitations on prosecutors, because experience has proved—time and time again—that broad powers breed abuse. There is no reason to single out the antitrust field for different treatment.

Power in the Attorney General to order the production of documents before filing a complaint is unique to the Antitrust Civil Process Act. The country's chief legal officer has no parallel power in any other kind of civil action, or in the course of any other kind of civil investigation. Indeed, Congress seems to have granted this power even in the limited area of antitrust with a great sense of caution.

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[13] See, e.g., Report of the ABA Commission to Study the Federal Trade Commission (Sept. 15, 1969); the so-called Nader Report in 1969, as well as the Neale Report in 1968 and the Stigler Report of 1969.
[14] Elman, supra at p. 795.
[15] Elman, supra at p. 801.
[16] Ibid, at p. 798.
[17] Friendly, The Federal Administrative Agencies, p. 118 (1962).
[18] Friendly, supra, at p. 153.

When the Civil Process Act was passed in 1962, Congress recognized the potential for abuse of Constitutional rights inherent in the power being conferred, and it made every effort to incorporate in the Act safeguards that would prevent the arbitrary exercise of that power. The important safeguards of liberty written into the Act were listed by Representative McCulloch in the course of the House debates in pertinent part as follows (108 Congressional Record 3999):

"First, a civil demand must clearly state the nature of the conduct alleged to constitute the violation and concisely describe [What is] . . . demanded.

"Second, the use of a civil demand is restricted to situations where a concern 'is or has been engaged' in an antitrust violation—not in some activity which may develop into a violation in the future.

"Third, a civil demand is limited to the receipt of documentary evidence—not to the taking of oral testimony.

"Fourth, a demand may only be made upon a corporation, association, partnership, or other legal entity. It cannot be used to obtain personal documents of a natural person.

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"Seventh, the bill excludes the receipt of any document which would be held unreasonable under a grand jury subpena duces tecum, or upon any constitutional or other legal right or privilege.

"Eighth, the Attorney General is prohibited from turning over to any other department or agency of Government documents received under a civil demand.

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"And tenth, the bill provides a dual method for a business concern under investigation to seek judicial review. It may elect to withhold compliance with the civil demand and object to its issuance when and if the Attorney General decides to petition a court for an order of compliance. Or, the concern may directly go into court for a court order modifying or setting aside the demand."

In addition, the final version of the Act limited recipients of pre-complaint subpoenas duces tecum to those "under investigation" in order (to) safeguard the innocent third-party witness from bureaucratic harassment . . ." (108 Congressional Record 18408).

All of these safeguards would be scrapped partially or wholly if the proposed amendment becomes law. At the discretion of the Attorney General, individuals, prospective witnesses as well as investigatees, could be subpoenaed, sworn, and forced to submit to interrogation by the Attorney General's designate.

The subpoenaed witness could bring his own lawyer, but his lawyer would be muzzled: by express terms of the proposed amendment he could neither interrupt nor object. Refusals to answer would be treated as if before a grand jury. Neither persons under investigation nor their counsel would be entitled to be present at the interrogation of a third party witness. Attendance at interrogations would be within the discretion of the Attorney General.

It is to be hoped, of course, that the Attorney General can always be characterized as having integrity, wisdom and self-restraint. But our law and the principles on which our government is based have never rested on such a hope. Ours is a government of laws and not of men. Our system of law has developed careful limitations on prosecutorial power in order to protect the rights vouchsafed individuals in the Bill of Rights. This careful balance is to be toppled in the antitrust field by the proposed amendment which would allow the Attorney General to "fish," harass, and intimidate: in effect, to run a star chamber and be his own grand jury. Indeed, the very origin of the grand jury stemmed from the need to protect the public from the abuse of authority by the Crown.

This proposal is made in the wake of recent events demonstrating that the possibility of abuse does with some frequency result in the fact of abuse. A congress in the midst of curbing real abuses on the part of the executive branch should not at the same time empower a political arm of the executive, the Attorney General, to substitute new abuses for those now being brought under control. The warning of Representative MacGregor, speaking in commendation of the constitutional safeguards in the Antitrust Civil Process Act, should be heeded now; he said (108 Cong. Rec. 18408):

"I do not suggest that this Attorney General, or perhaps, any Attorney General or his assistants would abuse this tremendous grant of authority, but I think we should concern ourselves with the possibilities of its abuse rather than with the prospects and probabilities of its proper exercise."

IV. CONCLUSION

The broad investigative tools currently available to the Department of Justice are entirely adequate for effective antitrust enforcement. While the Department's CID authority may be more limited than the Commission's full range of investigatory tools, the Department has available the grand jury process, compulsory discovery under the Federal Rules, FBI investigations, and even access to the FTC's powers. There is no need for conferring more power.

Moreover, it would be unwise to confer upon a prosecuting agency the broad investigative powers of a policy-maker agency. The Federal Trade Commission, unlike the Department of Justice, is an independent agency, and has recently made significant strides in exposing its internal procedures to public scrutiny. The Attorney General, on the other hand, is a Cabinet officer subject to Presidential control, where the possibility of abuse of broad power is always present.

During periods that the FTC has emphasized its prosecutorial role, the result was undue preoccupation with trivial antitrust cases, and almost complete failure to carry out the primary function of policy-making. A policy-making role for the Justice Department would, by the same token, dilute its prosecutorial function.

For all these reasons, the Chamber respectfully urges that the "Antitrust Civil Process Act Amendments" as found in H.R. 39, be rejected.

TESTIMONY OF WILLIAM F. ROGERS, SENIOR ATTORNEY, MONSANTO CO., ON BEHALF OF U.S. CHAMBER OF COMMERCE, ACCOMPANIED BY FRED BYSET, U.S. CHAMBER OF COMMERCE

Mr. ROGERS. Permit me to introduce myself. I am Bill Rogers. I am from St. Louis. I have been an attorney for quite a number of years, and I have had experience with the Justice Department, and I have been in the antitrust field for approximately 23 years almost exclusively.

I think that it is exceedingly fortunate that this forum should be the one that gives initial consideration to this bill in the House. I really do. I think that what is being asked here is to grant a very awesome power, the power of subpena at the investigative level, which I think is a very serious matter.

Basically, the highest enforcement agency of this country, the Department of Justice, is asking for powers which normally are vested in the judicial system. What we have here is a transfer of authority to a substantial degree from the judiciary to the executive branch of the Government, and to its criminal enforcement agency of the law.

Now, I do not want to give you the wrong impression at the very beginning, because I want you to know that I have had about 3 years of experience with the Antitrust Division, and I really feel that I was very fortunate to have been there. I know the people of that particular era to be people of very high integrity, very high, and they were very excellent lawyers, in my judgment. It was a real pleasure to have been there. And I carry with me a pride in having been there, and I carry with me a tremendous respect for that organization. I am not saying that it is perfect, but I have tremendous respect for the Antitrust Division of the Department of Justice.

But, I want to point out to this committee that they have the duty and the obligation to enforce the criminal aspects of the Sherman Act. To me, this duty has to be performed in a very careful and effective manner. But I think that they have all of the tools, with respect to criminal enforcement, that they need right now.

Personally, I think that if this bill is enacted it would, in effect, give the Department of Justice the power to really act as its own grand jury. I think it would be a mistake to give this power, remove it from the judiciary where it has always been, particularly because

I do not think that there has been any great demonstration for a need for this kind of an authority.

And let me say from experience that the Antitrust Division probably possesses more tools of detection, so to speak, or investigation than any agency of the Government. First of all, they receive letters of complaint from businessmen and citizens. They ask counsel for various companies and individuals to voluntarily give them information. And in my experience, we have never refused them except, I think, on one occasion when we did not want to get in the middle of a fight.

We have no reason to hide things. But on the other hand, we are talking about compulsion.

Another thing they have is the Federal Bureau of Investigation. When I was with the Department we used the Bureau all of the time, and it is the best; it is the best investigative agency in the world.

And let me add, let me just observe for a second that the FBI investigates many, many crimes. It investigates murder in Federal buildings and premises; it investigates kidnappings, white slavery, all of these types of investigations; but it does not have subpena power. That is vested in the courts. So I say why do they need it in the antitrust field, when we have the kind of crime that exists in this Nation today in these kinds of felonies?

Another means of obtaining information is from the district attorneys throughout the country. They are requested by the Attorney General and the Assistant Attorney General to send in information relating to any antitrust violations. The State attorneys general, 50 of those, are asked for and do submit information. And then we have plaintiffs' lawyers who love to come to the Department of Justice and say that you ought to bring this kind of an action, I have an aggrieved client, and that is the source of a tremendous amount of information.

They have the present CID authority to obtain documents from parties under investigation. And I might note that they say that they have used that authority in some 1,600 and some odd times, but they do not make any demonstration that it is ineffective. They have come in with the *Union* case, and in the *Upjohn* situation, and neither one has any substance to it, in my judgment.

They also have the present grand jury proceedings, and this is an awesome power. And let me say with respect to grand jury proceedings, they have the ability to say to somebody under investigation or to a witness, that I have the authority to have you appear before the grand jury, and I want certain information, and now do you want to present it to the grand jury or do you want to present it to me? This happens. This happens in everyday life in antitrust. I am not saying it is an everyday occurrence, but it does happen.

They also have something which they do not use in the way of investigative power, to any extent, and that is the power to use the investigative arm of the FTC. But, I have not seen anything on the record as to its use, and from my experience I do not think they use the power. But yet, they come to Congress and ask Congress to give them a subpena power for oral testimony and for written answers to interrogatories. To me, I cannot see justification for this request.

Now, in civil litigation they are just like other parties. Once they file a complaint they have all of the Federal Rules of Civil Procedure, and everybody knows the scope of those rules these days—fantastic. But in that instance they are playing by the same rules as the other side, and the rules are carefully guarded by the court when needed.

Let me say something about interrogatories that bothers me. The Department of Justice wants the ability to ask interrogatories of individuals, and I assume corporations, but they want it certified by the person that has knowledge. What happens to the question of immunity? I would say as counsel that I could not tell a person to certify to the answers to interrogatories in an antitrust investigation without asserting his or her right against self-incrimination. And I think we would find that experienced antitrust lawyers would share that same view. This concerns me.

I think also there is a question of whether or not this bill would deny a person the right to object to an interrogatory. I understand that Mr. Kauper in his appearance before some committee, and whether it be here or in the Senate, had suggested that counsel for the witness should have a right to object. To whom is the objection made? What is the basis of the relevancy of the objection? We are talking about leading questions, we are talking about hearsay, speculation on the part of witnesses, and we are talking about all kinds of things that come up in the normal participation in depositions. So, if this law is passed, I think there will be all kinds of problems.

I might say that I do not think that this bill provides a good basis to determine the relevancy in any way, which is the normal standard counsel look to when objecting as to relevancy. I do not see anything in this bill that permits the right of any company under investigation to have any position at all. It is only the right of the witness.

Now, let me talk about oral testimony in the context of criminality, and also as it relates to civil cases. First of all, it would appear to me that there is no right of a person under investigation to be represented at the hearing. It is only the right of the witness. The witness has a right of counsel as provided by the Constitution, but that counsel is muzzled, in my judgment, and he basically has no right to object. What can he do? I assume he has a right to move to quash the subpena to begin with. I assume that. But when he goes to the hearing he is told he cannot object, he cannot instruct his witness not to answer, except for privilege against self-incrimination. That is no right of counsel.

There is no right of counsel to cross-examine to test veracity. Certainly upon receiving the transcript the witness has certain rights to clarify answers. But to prohibit counsel the right to rehabilitate the witness, to remove ambiguities from his answers, to stop leading questions is fundamentally very dangerous.

It would appear that the only right that counsel would have is the right to face contempt, to tell his witness to face contempt, and then it is to the discretion of the criminal enforcer who is the one that recommends indictment, to determine whether or not to bring the contempt action.

Without the judiciary you have basically a star chamber proceeding if in secret. And if it is going to be held in public you have got confidential problems.

I think the power can be abused. I can just see a witness being called in to a conference and asked certain questions before he goes into the specific hearing to determine whether or not that man should be granted immunity. I can see that. That is terrible. That is awesome authority if possessed by the person responsible for enforcement of

the criminal law of the United States. And we are talking about felonies.

Now, with respect to antitrust criminal actions, the Department of Justice can proceed either by indictment or by information. They can proceed by information against a corporation. They would still have to go before the grand jury with respect to an individual, but what would it amount to? A copy of the transcript of the investigative hearing? We used to say down at the Department of Justice that any lawyer appearing before the grand jury who believes that an indictment should be returned is not worth his salt if he can't obtain one. He hasn't any opposition. Under present grand jury proceedings there are limited rights of counsel, despite the fact that counsel is not in the hearing room. And in my experience, witnesses are permitted to come out of the grand jury to ask advice of counsel in sticky situations.

And if a witness is being harassed, being required to speculate, being required to give opinion answers, counsel can go to the court. But this right is not in the present bill. One doesn't have that right. The right of the witness is to face contempt. And I think it would be terrible for a person or a citizen of the United States to be put in that kind of a position, particularly with respect to a situation where he could well be subject to indictment under the antitrust laws facing 3 years.

Those are my principal concerns. I can say that everything I say is out of due respect for the Department of Justice. But, the U.S. attorneys do not have this authority; the FBI does not have this authority. I do not know where any criminal enforcer has it except to a limited extent in the State antitrust laws, and I do not know of its being used to any extent at all. But we are talking about constitutional rights here; we are talking about a request for awesome authority when there has been no demonstration for a need, in my judgment.

Those are my remarks. Thank you.

Mr. MAZZOLI. Thank you very much, Mr. Rogers. I might suggest to you that other members of the subcommittee indeed were interested in the exhibit of need, or perhaps a lack of exhibit of need. So I think that Mr. Kauper was asked yesterday to supply to the committee some listing or some recital of the areas that he felt exhibited this need, and perhaps the 1,600 cases that have been ones wherein the CID's were used to show perhaps where they came up a little short and were thwarted and, therefore, needed some additional power. So that these concerns you have expressed today very well are the ones that at least some members of the subcommittee share, as well as I, and think Mr. Kauper will at some point respond to the committee.

Mr. Rogers, have you had the opportunity to read Mr. Kauper's statement of yesterday?

Mr. ROGERS. Well, sir, I read it last night. I was very late in getting in.

Mr. MAZZOLI. Right.

Mr. ROGERS. It was about 12. I did notice with interest that he felt that with respect to interrogatories the counsel should at least have the right to object.

Mr. MAZZOLI. Right. I would like to ask you this morning just a very few questions about his statement. And I would ask you if you

could at some future time, when you have had a chance to think it over and study it, to perhaps serve on the committee some written thoughts that might have to do with his statement, because as you know, his statement changes the tenor of the bill, and, in fact, requests certain amendments to it that would change the total effectiveness.

But, I would like to make mention that yesterday the members of the committee expressed interest and some concern about the problems that would be inherent in what you have characterized as a star chamber approach where certain accused parties would not be present, and where if they were counseled, via counsel, that counsel might have certain limitations, or inhibitions, and these I am convinced will be a large part of the subcommittee's study and deliberation and will deal with the proper protection of individual and corporate rights.

Mr. Kauper mentioned, and I will not take these necessarily in order, but he mentioned the relationship of the Freedom of Information Act and the CPA (Civil Process Act), and he said that should be carefully considered in that we, the Department, would favor clear and complete exemption from the FOIA for any information in whatever form obtained through a CID. Would you agree that that is a prudent step?

Mr. ROGERS. I would say that this would be an improvement, but I would say that it does not go to the fundamental issue.

Mr. MAZZOLI. What fundamentally would not be attacked by that?

Mr. ROGERS. The power of subpena at the investigative level without the control of the court; the transfer from the judiciary to the executive of that authority.

Mr. MAZZOLI. Let me ask you, sir, and I am not an expert on the Federal rules, but if the Federal Rules of Civil Procedure were to be adopted with regard to the handling of the CID's, in this act, would that be a satisfactory resolution of these problems?

Mr. ROGERS. You have got to remember, sir, that the Federal Rules of Civil Procedure apply after the complaint is filed. They do not apply at the investigative level.

Now, the procedures have been well thought out. It is the subject of 5 years of study at least by the judiciary, and by the leading counsel throughout this country. So with respect to rights, after the filing of the complaint, they have those rights now.

Now, certainly there are certain concepts that are embodied in the Federal Rules of Civil Procedure which would provide some type of safeguards in this kind of a situation, and it applies to civil litigation. But I do not think you can safeguard with respect to criminality in its present form by any reference to the Civil Rules of Procedure.

Mr. MAZZOLI. Two comments. One, as I judge Mr. Kauper's testimony of yesterday, it was that primarily these needs are exhibited in Clayton cases, and are they not civil cases rather than criminal?

Mr. ROGERS. Well, let me respond.

Mr. MAZZOLI. Please.

Mr. ROGERS. If you are talking about acquisitions, if you are talking about section 7 of the Clayton Act, I do not see any great need. You already have a requirement to report down at the FTC any acquisition over $10 million in sales. They do not seem to have

any trouble in obtaining restraining orders. Certainly they might have difficulty in assembling enough facts in haste, so to speak, but there is not any demonstrated need that they need it in acquisition areas.

Certainly in the *Union Oil* case, in that circumstance they were not going to make any acquisitions, and that is why the court said it did not have the power to ask for CID documents. And it was a very great case, and it is only an illustration of the fact that nobody went to any unnecessary effort when there was not any possibility of a violation of law, and also I quoted in my statement the various safeguards that were built into the CID, and that was one of them. "Is or was a violation of law," that is the area of investigation, not "might lead to some kind of violation." You must remember that every contract has a certain degree of restraint of trade. Two people are competing for a piece of business and one gets it, and to that extent the other is foreclosed. That is a restraint. It is only a question of the unreasonableness, so in that context this authority is extremely broad.

Mr. MAZZOLI. Mr. Kauper made the statement yesterday on page 2 that we, again the Justice Department, simply cannot depend on the voluntary cooperation of industry in our investigatory functions. And he then goes on to recite the fact that you have certain compulsory opportunities under Sherman that you didn't have under Clayton. Would you agree with the statement that the Justice Department does not receive cooperation? What has been your experience in industry

Mr. ROGERS. Let me take my experience when I was with the Department, let's say. If you suspected a violation of law, I never had any trouble getting facts. You have the FBI. And I can't understand the statement when the Department of Justice Antitrust Division has never used the subpena power of the investigative hearing of the FTC to any great extent. But in those instances, there is an administrative judge to whom you can appeal and make your objections. You have an administrative procedure. But here, what do you have?

Mr. MAZZOLI. Well, I would also like to make mention at least for the record here that the Federal Rules of Civil Procedure would seem to be applicable even in the early stages, and not just after complaint is issued, but in the early stages of the CID, and the response to it. And I would find it no great hurdle, and probably no insuperable difficulty to redraft the bill perhaps, or to be sure that anyone who might have some criminal or extensive civil liability is going to be present, able to object, and given proper protection. I think it is important that you bring these up, because that is why we have these hearings.

Mr. ROGERS. Yes, sir.

Mr. MAZZOLI. But I think those pose no insuperable hurdles. I think we are going to probably boil this whole thing down to philosophy. I think that is really going to be our ultimate and fundamental problem.

Mr. ROGERS. If this committee were to say that any information that is obtained by this process will never be used in any kind of criminal proceedings, I think you have taken away 90 percent of the problem.

Mr. MAZZOLI. Would you say that again, because that perhaps may be important for the members of the subcommittee who will read this.

Mr. ROGERS. If this bill were to say that information that was gained by this compulsion that they are asking for, this authority, shall never be used in a criminal proceeding, I think you have provided 90 percent of the necessary safeguards.

Mr. MCCLORY. If the Chairman would yield, the bill does provide for the taking of the fifth amendment, and the granting of immunity, as I recall the language of the bill, so information would not be used if a person claimed that the information might tend to incriminate him, and he wanted to claim the fifth amendment, and then he could refuse to testify or be granted immunity.

Mr. ROGERS. That is right, as against that individual, sir.

Mr. MCCLORY. So that would answer your objection, would it not?

Mr. ROGERS. No, sir. You must remember that we are talking about rights of witnesses as distinguished from parties who are under investigation. With respect to the rights of witnesses, there is use immunity involved. And it is very interesting as to who would have the power to grant it.

Mr. MAZZOLI. Excuse me. I'm sorry, sir. Counsel indicates that would it not be the grant of immunity that would come under title 18 under the same procedures as designated by title 18?

Mr. ROGERS. Yes; but only that title. What is the procedure?

Mr. MAZZOLI. I think this gentleman here wants to say something.

Mr. BYSET. I beg your pardon?

Mr. MAZZOLI. Did you want to address yourself to this question?

Mr. BYSET. I did a moment ago, but what I wanted to say has sort of escaped me.

Oh, yes, it is about the immunity problem. In an antitrust situation we never know—well, I should not say we never know—but frequently we do not know because of the complexity of the transactions involved whether you actually have a violation, and where immunity is granted with that kind of uncertainty it would seem to us that any well-informed counsel would advise his client to plead the fifth amendment on any question after he gets his name and affiliation. So the immunity thing just does not work.

Mr. MAZZOLI. Would the gentleman identify himself for the record?

Mr. BYSET. I beg your pardon, sir. Forgive me. I am Fred Byset, and I am staff executive for the Chamber's Antitrust Committee.

Mr. MAZZOLI. Thank you, sir. I should have asked for that myself.

Mr. ROGERS. I might observe, sir, that this is the first time that I have ever testified before Congress. Mr. Byset is trying to kind of hold my hand and give me proper guidance.

Mr. MAZZOLI. I think you have done a very commendable job.

Mr. ROGERS. May I extend the remarks on immunity?

Mr. MAZZOLI. Please.

Mr. ROGERS. This question of immunity as it now stands in antitrust is a subject of discretion with the court. I am not sure, I am not sure under the title that was referred to as to whether or not the Department of Justice is an agency which would have the power to grant the immunity on its own. I really do not know.

But I would say as counsel I would not permit an individual to go beyond his name, rank, and serial number without fully understanding

his rights against self-incrimination, even in responding to interrogatories because we are talking about felonies here.

Mr. MAZZOLI. Thank you. I have used more than my time.

The gentleman from Michigan.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

I think you spoke briefly to this question, Mr. Rogers, and what I would like to invite you to do is to develop it a little further if you care to. The definition of antitrust investigation under this billl is a much broader definition than the present law in that it would cover any activities which may lead to any antitrust investigation, and any antitrust violation. To me that is just the language of a witch hunt.

Mr. ROGERS. To me it is two things, sir. First of all, it is a fishing license.

Mr. HUTCHINSON. A fishing license. All right. Same thing.

Mr. ROGERS. Yes, sir, and you can fish in anybody's water. It is unlimited. It may lead to, like the example I gave before about the contract between two people, just a normal contract, frequently the question is, is it a reasonable contract, and this is a question of judgment. It is a question of legal precedent. But it is also a basis of fishing into every contract to determine whether or not it is reasonable. That is just one little illustration.

You will note that Representative McCulloch in the passage of the original CID was very mindful of the very thing you say, and that is why the words "is or has been a violation of law" is in that authority to begin with. Now, that is the authority to use the CID as it presently exists as distinct from "may lead to".

Now, the second aspect is that when you get into oral testimony, and want to protect the witnesses, first of all counsel does not have a right to go to court. But let us assume you were given a right. What is the stage upon which you argue? In the normal situation a complaint defines the issues. Then you can determine what is reasonable and unreasonable as to the extension of your answers, how far you go, how far you go from subject matter point of view and from a time point of view.

So, there is no basis, and Mr. Kauper said he felt that counsel should have a right to object, object on that standard that you just talked about and quoted. What is the basis of your objection? Normally you have some reasonable grounds, reasonable identification of the area of relevancy so that you can properly bring out the truth, and also properly guard against such things as leading questions, and hearsay objections. I hope that responded to your question.

Mr. HUTCHINSON. Well, I thank you very much for it.

You point out that this civil investigative demand is another word for a subpena, and you are concerned about vesting the subpena power in the executive branch rather than in the judicial branch of the Government. And still we have under the present statute, well, since the Antitrust Civil Process Act was passed, we have had this power vested in the Department of Justice with regard to documents.

Mr. ROGERS. Yes, sir.

Mr. HUTCHINSON. Now again, against only corporations as I understand it?

Mr. ROGERS. Yes, sir.

Mr. HUTCHINSON. Do you feel that that power has been abused by the Department? Do you think that the rights of the people have been compromised by its use in the 1,500 cases that they have used it?

Mr. ROGERS. I really do not think so, in my judgment. I think there has been abuse of subpena power of the courts, but I cannot point in my experience to an abuse of the CID power. Normally, because I work in this field, if I receive a CID, in my relationship, my professional relationship, we do not have a great deal of difficulty. We talk to the attorney and say this is difficult to answer, and what do you really need, how about modifying it and so on, and I have not seen any abuse. The closest thing to an abuse is that in one of the very cases which they identify, that is the *Upjohn* case where counsel tried to obtain documents which were subject to restrictions and subject to the safeguards that are built into the present CID. But the problem is broader than that, because basically what this bill does is remove all of the safeguards that were put into the CID as it presently is law.

Mr. HUTCHINSON. In other words, if the present CID law was unchanged except to permit the solicitation of information from individuals as well as corporations, and went no further, you would feel, based upon your experience already under the law, that it probably would not be abused. But you are alarmed by other things in this bill which would remove all safeguards, is that right?

Mr. ROGERS. Sir, let me——

Mr. HUTCHINSON. I did not want to put words in your mouth.

Mr. ROGERS. I was responding to the question with respect to the present CID's as it relates to corporations, because that is the only person to whom it relates now.

Mr. HUTCHINSON. Yes.

Mr. ROGERS. If you extend that right to seek information from individuals, you raise a whole host of problems under immunity, a host of problems. The corporation has no immunity, the individual does.

Mr. HUTCHINSON. Well, of course, immunity has to do with criminal offenses.

Mr. ROGERS. Yes, sir.

Mr. HUTCHINSON. But immunity does not enter into the picture so far as civil litigation is concerned.

Mr. ROGERS. Sir, let me explain. In antitrust, section 1 of the Sherman Act is both criminal and civil. The Department of Justice has an obligation and a duty to enforce it in both directions in appropriate cases, so frequently they file a civil case as a companion case to a criminal case. Sometimes they only go the civil route. But very seldom do they ever file only a criminal case.

Mr. HUTCHINSON. But they can use their civil investigative demand for the purposes of criminal investigation, can they, at the present time?

Mr. ROGERS. To a limited degree they have authority to do that, and then use the documents before the grand jury. But you still have the grand jury proceeding.

Mr. HUTCHINSON. Yes, in criminal proceedings.

Mr. ROGERS. That's right.

Mr. HUTCHINSON. Yes. And under this bill they would be permitted to use the civil investigative demand for criminal proceeding purposes, but against individuals as well as corporations.

Mr. ROGERS. Yes, sir.

Mr. HUTCHINSON. I thank you, sir. Thank you, Mr. Chairman.

Mr. MAZZOLI. Thank you.

The gentleman from Illinois.

Mr. MCCLORY. Thank you, Mr. Chairman.

I have grave doubts about this legislation as far as its scope is concerned.

On the other hand, I sense a need for something further. Now, I judge from your testimony and from your statement that you feel there may be an area where some additional tool may be appropriate?

Mr. ROGERS. No, sir.

Mr. MCCLORY. You don't?

Mr. ROGERS. I am very sorry, sir.

Mr. MCCLORY. But you stated a few minutes ago if the criminal aspects were eliminated, the bill would be all right? At least that is the way I interpreted it.

Mr. ROGERS. What I said, or what I intended to say, sir, was if the criminal aspects of this whole bill were to be removed so that any information that is obtained would never be used in a criminal proceeding, I think that you would remove a host of the problems. That was not intended to mean that I felt that they needed additional investigative authority, because I do not think they have made out a case.

Mr. MCCLORY. We had a rather extensive investigation a few years ago, you may recall, with regard to the subject of conglomerates, and we selected about half a dozen of these large conglomerates. And the investigation was very revealing as far as I was concerned in that we uncovered either outright illegality or improprieties which were so close to illegality that it was, well, for one who is a staunch supporter of the private enterprise system, kind of an embarrassment to see that these kinds of actions were countenanced by some of our corporate leaders.

Mr. ROGERS. Could I comment on that, sir.

Mr. MCCLORY. Yes. I was going to ask a question, but go ahead.

Mr. ROGERS. Let me say in my experience, I am with a company now, and I think the people that have the greatest influence on compliance with laws is the corporate and outside counsel advising the corporation. I think the concept of the corporation as a wrongdoer is exaggerated. I am not saying corporations are perfect. There are transgressions, everybody knows it, and that is why you have lawsuits, too. But I think one of the biggest things with regard to antitrust compliance is the integrity of the attorneys and the acceptance of the advice of the attorney properly given.

In my experience, corporations have compliance policies, and they certainly are strong. I know in the case of our company we have a very strong compliance program. That does not mean we are perfect. We cannot be.

But the second thing is the deterrent with respect to antitrust violations. I think the fact that a criminal antitrust violation is now a felony is very significant.

I think that another great deterrent is the threat of the treble damage action. Today, the threat of that kind of litigation is more effective as an enforcement vehicle than the Department of Justice itself.

Then, too, the Antitrust Division of the Department of Justice has its separate identity for budget purposes.

Mr. McCLORY. Well, I myself feel a great apprehension right now that the corporations, especially the big corporations, are being the fall guys and the scapegoats for a kind of popular attack in which we try to find an excuse for all of our ills through the way they operate. One of the reasons I am interested in this legislation and the question that we get around to is the ITT conglomerate. Now, we got into it, and it was a very, very awkward situation, it seemed to me, with respect to the absorption of the Hartford Fire Insurance Co. as I recall it. Now, it would seem to me that some authority such as this legislation might avoid this terrible dilemma which the company was in, which the Government was in, and which I think you know provided a source of embarrassment as far as the whole private enterprise community is concerned.

And I would just like to find some way in which we can caution overambitious or overzealous persons or those that might want to deviate from a correct application of the law to avoid the pitfall that they get into. Do you think that there is any sense to what I am saying?

Mr. ROGERS. Yes, sir, there is.

Now, I do not think it is through investigative authority. Let us just take the situation of a private plaintiff who sues an alleged antitrust violator. He does not have any investigative authority. He is a lawyer, he has a client, his client tells him certain facts, and on the basis of that he files his lawsuit if he thinks he has one. And then he has very broad discovery powers under the existing Federal Rules of Civil Procedure.

Now, this does not answer your question completely. I think antitrust compliance is a major program in any sophisticated and smart company today. Corporations have profit motives, they desire to make profits, and that is the reason for their existence. But at the same time, most corporations like to be law-abiding corporate citizens.

Mr. McCLORY. In a part of your statement you mention the FTC in its expanded investigative role is engaging in investigations of trivial antitrust cases. Now, are you suggesting that there are some big violations that they are overlooking while they are fooling around with unimportant ones? Do you know of any?

Mr. ROGERS. I believe that the background for that statement, Your Honor, or sir, is from source material as distinguished from personal experience.

Mr. McCLORY. You mean that you are suggesting that there do not appear to be any major violations of the antitrust laws, and so they are going into these things——

Mr. ROGERS. No, sir, no, sir. I think the remarks go back to one of the commissioners who said that he felt that they were engaging about 70 percent of their time in trivia. That was inside of the Commission.

Mr. McCLORY. Well, this is the third reason for the Chamber's opposition to this legislation. What do you mean by including that in your statement?

Mr. BYSET. May I explain that, please? The source of that was former Commissioner Elman, written in the Georgetown Law Review after he had left the Commission.

The point we are making is that there is a very good chance that the Commission became involved in trivia. At one time I worked there, and I think I can testify that they have been involved in trivia in the past, and that there is a very good chance that their attention to minor matters was because they do have these broad investigative powers. They are not compelled or forced to use their imagination, and we are very fearful that if the Justice Department is given similar powers it, too, might well become embroiled in matters of trivia. And I think there is also a distinction that we make there that these powers in the FTC, while they might be appropriate there because FTC was conceived as a policymaking body to look into, explore, and explain broad economic questions, the same would not be true of a prosecutorial body. While the FTC allowed itself to become involved in trivia prosecutions to the neglect possibly of its policymaking function, we feel that the Justice Department, which is principally and primarily a prosecuting body, might find itself involved in policy questions.

Mr. McCLORY. You are not suggesting the FTC was ignoring major violations?

Mr. BYSET. The FTC was operated much like a law firm in the days that Mr. Elman was talking about. They sat there waiting until clients came along to bring the case. The lawyers on the staff who got these complaints knew that the only way that they could make any progress in the Commission was to find a good case. So each time they would get a complaint they would field it out for the broad investigation, and that sort of tied up most of the time.

Mr. MCCLORY. Well, thank you very much. I yield back.

Mr. MAZZOLI. Thank you.

The gentleman from New Jersey, Mr. Hughes, is recognized

Mr. HUGHES. Thank you, Mr. Chairman. I want to apologize for being late, and I would just like to ask a couple of questions.

One of the things I inquired of counsel was whether we got into the whole area of whether you feel that first of all in our efforts to try to expand the civil process we are getting into legitimate areas of concern? Do you think——

Mr. ROGERS. Yes sir, I am expressly concerned, as I said when you were not here, sir, that basically in my judgment you are transferring the power from the judiciary to the executive, the power of subpena.

Mr. HUGHES. As I understand the major thrust of what these amendments attempt to do, it is to try to use a little preventive medicine where mergers take place, that there be the necessary investigation to make certain that proposed or contemplated mergers will not violate our antitrust laws. I understand that to be the thrust of the present amendments.

Mr. ROGERS. No, sir.

Mr. HUGHES. Is that your understanding?

Mr. ROGERS. That is not the danger of it.

Mr. HUGHES. Is that your understanding of the thrust of what these amendments do?

Mr. ROGERS. I think it is much broader than that. I think it is much broader than that. I think it has its basic relationship to section 1 of the Sherman Act.

Now, with respect to acquisitions, let me point out in mergers we presently have laws that require any acquisition by any major company to be reported 60 days in advance, basically.

Mr. HUGHES. Well——

Mr. ROGERS. And I do not see any demonstrated need or where the Government has demonstrated that they have been handicapped in any way with respect to getting information to go to court. Now, certainly, there is a rush, when one is talking about restraining orders, or temporary injunctions. But here we are talking about criminal investigations.

Mr. HUGHES. Is not the question really whether the 60 days is an adequate time for Justice or any other agency really to investigate the impact of a proposed or contemplated merger? We are dealing in highly technical areas requiring a great deal of study, and as I can see the thrust of the legislation it is to try to act in prevention, because divestiture, obviously, is not the answer. We have found that to be the case, and unfortunately there have been mergers that came about where the Justice Department, perhaps, should have been involved before the merger took place. It is disruptive too for the businesses involved. It is disruptive to the economy, and it has proven an unsatisfactory approach in the long run. Would you agree with that?

Mr. ROGERS. No, sir.

Mr. HUGHES. You do not think that the present cumbersome procedure of waiting until it takes place, and that apparently has been the procedure——

Mr. ROGERS. Well, let me tell you in my experience—and I can only speak from my experience, and my observations of the law—I think that 60 days is plenty of time in which to determine whether you should go to court. You have to remember in substance what we are talking about is the question of whether or not an acquisition violates section 7 of the Clayton Act, and also the companion section 1 of the Sherman Act.

Now, this bill is not limited to section 7. This bill is across the board. If there were a limitation to section 7, then maybe you would have a different situation.

Mr. HUGHES. You do concede, perhaps, if we were talking strictly about mergers——

Mr. ROGERS. Speaking in terms of mergers, I heard Mr. Kauper say that their activity in the Department of Justice in merger areas has diminished because the number of mergers of any substance has diminished in the American economy.

Mr. HUGHES. Well, is it not a fact, however, that these negotiations that take place over a long period of time involve a lot of detail, a lot of study on the part of the industries involved, so that 60 days is not a lot of time for Justice or anyone really to try to understand the full consequences or impact? These investigative studies that would be protective of the overall antitrust policy, and determine whether a merger does violate public policy, would you not say, it would be impossible to complete in 60 days?

Mr. ROGERS. What you are talking about here is investigative authority with a right to come in and try to preclude the acquisition or merger from going forward as distinct from the litigation of whether or not it does violate the law. With respect to whether an acquisition violates the law, once a case is filed, he has tremendous discovery

rights, just like any other party, and when I say "he," I am talking about the Attorney General and the Antitrust Division.

Mr. HUGHES. But that is after the fact. Would it not be a much better procedure to make these studies so that industry knows exactly Justice's point of view before the fact, not after the fact? It seems to me that the present approach just creates a storm of additional litigation, a great deal of uncertainty. I would think industry would welcome Justice's effort to try to make a determination before the fact, not after the fact.

Let me just take you to the next step, if I may.

Mr. ROGERS. Yes.

Mr. HUGHES. I am satisfied that you have legitimate concerns and I have the same concerns that you have. I want to make certain that we are not going to unduly burden industry and set down a mishmash of additional rules and perhaps violate basic rights. We are all, I think, concerned about that. But we have a serious problem, and I think the present approach of most responsible people in industry and Government recognizes that we have got to start directing ourselves a little more before the fact and perhaps less after the fact so that everybody knows what the ground rules are.

I have read your statement very carefully, even though I did not hear you give the statement. Do you not feel that for Justice to really do its job under the antitrust laws in this whole area of mergers, and acquisitions, that they have got to have additional tools to do it right, such as those we are talking about? The present law permits the acquisition of documents and would these amendments just extend that into the area of interrogatories and depositions? And do you not feel that these extensions are legitimate tools that Justice ought to have to make the kind of determination that it is responsible to make under the antitrust laws?

Mr. ROGERS. Well, when you say under the antitrust laws, it is different than under an acquisition.

Let me respond to the acquisition problem first. First of all, I point out to you that the Department of Justice has the right to use the investigative tools of the FTC in any particular acquisition problem. They choose not to do it. Why? I don't know. But they come and say they need additional tools when they have not used the ones that they have.

Now, with respect to the amount of time, 60 days has evidently been determined by this Congress as being a reasonable period of time. Do we want the Department of Justice to basically be a regulatory agency which will say yes or no to any given acquisition? That power is now vested in the courts.

So the question is the reasonableness of the time period, and this is over and above normal litigation. The normal plaintiff's lawyer determines on his own, without any type of CID authority, the fact that he needs to bring his lawsuit, and I might say that they are very successful.

Now, when you take a need, let's say, that you think might exist with respect to acquisitions and transform it over into the criminal area where the real danger lies here, there is a real danger, and that is of the greatest concern that I have personally.

Mr. HUGHES. Well, let me ask you this: You have indicated that Congress has determined a policy in laying down the 60-day provision

but the Congress is obviously reexamining that policy decision by the amendments before it?

Mr. ROGERS. Yes, sir.

Mr. HUGHES. And, one of the decisions that this committee is going to have to make in reexamining its policy, relates to what Justice has told us; namely, that in order for us to discharge our responsibility under the law, then we have to have additional tools. What do you say to the Justice Department when they say: "Well, we really cannot discharge our responsibilities; it is a very complex area; we have not been able to discharge our responsibilities because we do not have the present tools to do so even though we do have the authority to secure documents; we have no authority under present law where documents either do not exist because of oral conversations, which happens often, or because the documents have been either accidentally or intentionally destroyed." What do you say to this argument on the part of Justice?

Mr. ROGERS. Let me say this, sir. I was with the Department of Justice, and during the time I was there I did not feel any great need for additional investigative tools.

Mr HUGHES. How many years ago has that been, sir?

Mr. ROGERS. That was from 1952 to about 1956.

Mr. HUGHES. Well, there have been a lot of changes in the last 25 years.

Mr. ROGERS. Yes, sir, there have.

Now, let me also say that I do not think that the Department of Justice has made out a case of need. I do not see anything in their papers. They come in and say: "We would like to have additional tools," but we are talking about investigative tools, and we are talking about the civil rights of people, the rights of counsel, to search and seizure, due process of law, and all of these questions are in here. I am no constitutional expert, but I am saying that there is tremendous danger in what they are requesting.

Mr. HUGHES. Do you not think——

Mr. ROGERS. And I do not think they have made out a case.

Mr. HUGHES. Do you not think the present rules adequately protect against harassment, and undue and burdensome requests, that is, the protections that are guaranteed both by our rules and by the Constitutional mandate? I think first of all, you have to answer the question of whether or not it is a legitimate concern of Justice, and I think we have to agree that Justice does have a legitimate concern in acquisitions, particularly in these days when we are concerned, America is concerned about the concentration of economic power in the hands of a few corporations. There is an increasing concern on the part of Americans. So then the second question is well, if Justice is called upon in these difficult days, concededly different days, should not they be equipped with the tools to do so, and what should those tools be? And the tools we are talking about are the tools that we give to anybody in the civil area in trying to ferret out information.

I would think that industry would welcome the type of predetermination that we are talking about here, and that is what Justice will be doing. I would think that it is only fair to ask of industry where they have indicated that they are going to merge, or where there is going to be an acquisition that concerns Justice, that they submit themselves to the kind of questioning that these tools would propose.

I do not see how it is going to be any more unfair in this situation than it is in any civil court in making this information available.

Mr. ROGERS. Well, let me say you were not here when I talked before. I do not think that the Department of Justice has pointed to any given acquisition and said now, if we had this tool this acquisition would not have occurred.

Mr. HUGHES. But, they are going to do that. They are going to submit to us specifics where they have been hamstrung because there were no documents. They are going to cite specific instances which they have which furnishes us with those instances where they did not have the tools to do the job.

Mr. ROGERS. Well, I would think that they have more tools than any litigating unit of the government. They are an enforcer of the law, they are not a regulatory agency. You are talking about the executive branch of the government, and its criminal and civil enforcement of the antitrust laws. And I do not think they have demonstrated a need. And I recited, and it is in the record, 10 or 15 ways that they get information.

And let me give you an example. The FBI. As I understand, they do not like to use the FBI very much. Well, my God, it is the best investigator that the world has ever known. And we used to use it all of the time. And they are good. There is one example.

And here they want the subpena power. FBI does not have the subpena power. We are talking about giving them authority in antitrust which they do not have when they investigate murder cases, when they investigate kidnapping cases, when they investigate bank robberies and high felonies, and we are talking about constitutionality and the rights of people.

Mr. HUGHES. What do you mean they do not have the authority? They have the grand jury authority.

Mr. ROGERS. Yes; but they do not have the independent authority to subpena anybody. The FBI does not have that authority. That authority is under the court. The Department of Justice goes to the judiciary and asks for the authority to issue subpenas.

Mr. HUGHES. Well, actually Justice is acting just as an arm of the judiciary and even in those instances where a subpena has been issued and there has been a refusal, it is up to the Federal court first of all to mandate compliance with the subpena, or the production of documents, is that not so?

Let me ask you a more basic question. Under present laws and present procedures, is it not really true that one-tenth of 1 percent of the manufacturing corporations of this country have two-thirds of all of the U.S. industrial sales, and does not this fact, this aggregate concentration in the marketplace, does this not argue really for the tools we are now talking about?

Mr. ROGERS. I am not an expert on this, sir. Let me merely say that with respect to the observation you make, I do not know how you count the numbers, but as I understand this, the trend is in the other direction. And who is going to count the assets? Look at what a barrel of oil is worth in the ground today as distinct from what it was worth 2 years ago. There is a changing economic cycle, as I understand it, and studies indicate that there is less and less concentration.

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So, I cannot argue the proposition. I am not an economist and I have not specifically studied this subject. But I seriously question whether or not one can start out with that as a fundamental principle.

Mr. HUGHES. I cannot understand why industry would not welcome the kind of predetermination we are talking about. I would think from the standpoint of acquisitions, if I were in the position of a business that was considering the acquisition of another as part of its organization, I would be very happy to have Justice pass upon the merger and give me the kind of clean bill before the merger took place. Then, we would not be concerned and worried, and spend a great deal of money, time, and talent after the fact in trying to justify the merger only to have the court order divestiture, which could have all been avoided. It just seems to me that your argument runs counter to the best interests of industry.

Mr. ROGERS. Can we both answer this question?

Mr. HUGHES. Sure.

Mr. ROGERS. From my point of view, I have something to say and my counsel can add to it. I think that the corporations certainly want to know in advance as to whether or not a particular acquisition is illegal, but frequently it is a contest in the court. That is, a difference of opinion, and that is why we have lawsuits.

And secondarily, I do not think that it is a good idea to put somebody in a position where they are in effect a regulator of acquisitions. I think they should have reasonable access, and they have it, and they point out to you that you should ask the Department of Justice if they ever use the investigative hearings of the FTC with respect to acquisitions.

Mr. MAZZOLI. The gentleman's time has expired.

Mr. HUGHES. Thank you very much, Mr. Chairman.

Mr. MAZZOLI. Thank you very much. I would like to ask just a couple of housekeeping questions here. In your statement today, Mr. Rogers, are you speaking on behalf of the entire chamber, on behalf of your own antitrust section, or on behalf of yourself personally? Which is it?

Mr. ROGERS. As I understand it, I am not a person that has come to testify—this is the first time—perhaps my counsel can answer.

My. BYSET. Let me say that yes, he is speaking for the chamber.

Mr. MAZZOLI. Thank you. OK.

I believe that your testimony today has answered the question, but Mr. Kauper yesterday mentioned that he believed that H.R. 39, which is the bill before us, should be enacted in order to clarify Justice's authority to seek information on these incipient violations, and that is the mergers. So I would judge that you believe that there is no further need for tools in the area of either present notification or in the area of trying to determine whether or not there is a violation about to occur?

Mr. ROGERS. That is exactly right for two reasons. He has not demonstrated that need, and he has not used the tools that he has in the acquisition area.

Mr. MAZZOLI. OK. Let me ask one other question that he made mention of. He would like to extend section 3(a) which would be amended by this bill, H.R. 39, to add to the language "or may have knowledge of any fact or facts." Those would be the people who would have to answer a CID, and Mr. Kauper went further and said

he has concluded, however, that the limitation to "fact or facts" may prove unworkable and he would suggest, Mr. Kauper, that there be substituted the language "or may have any information." Would you agree or disagree that that would be a proper change?

Mr. ROGERS. I do not feel that I have examined it with that sufficiently critical an analysis, but I would observe to you that as an attorney, that if I represented any individual who was required to give that kind of an answer in an interrogatory I would insist upon rights as against self-incrimination, and that would be a difficult problem.

Mr. MAZZOLI. Counsel indicated to me that Mr. Kauper yesterday said that it is not typical that once a person were to object to providing information under the CID procedures that instantly they go into court to seek contempt orders, but in fact, they call back to the Antitrust Division for instructions. So it is not an automatic thing. But, of course, it is at least within their power, but it is not necessarily the very next step that occurs, which means that there is a certain input at a higher level on the policy of particulars in addition to that.

Mr. ROGERS. My experience under CID is when you receive one, frequently the questions that are asked are very, very broad. We are not talking about single little answers. We are talking about broad descriptions of documents which may be very voluminous. Personally, the way we handle these kinds of requests is to talk to the Antitrust Division attorney. I respect his integrity, and I tell him what the problems are, and ask: "What do you really need, and can't we modify this language so as to give you what you want, and at the same time not impose an undue burden on my client?" That is the first way.

The second way is to just go to court, which you have a right to do under the CID for documents right now.

The third way is simply to wait until they find you in contempt, or move to find you in contempt. And in my judgment, I do not think that many people wait for that third avenue.

But, in practice what really counts is the question of how responsive are counsel. Do you know them, do they know you, are they trying to trick you, so to speak, and it is a question of integrity, trust, and ethics.

Mr. MAZZOLI. Well, I thank you.

Does the gentleman from Michigan have any further questions?

Mr. HUTCHINSON. No.

Mr. MAZZOLI. Counsel would have some questions. Or excuse me, Mr. Hughes has a further question.

Mr. HUGHES. Now, getting back to the question of divestiture, one of the arguments that always seems to be used in divestiture proceedings is: Justice had not put them on notice that the merger would potentially violate the antitrust laws; there now has been a change in circumstances; and that to divest would disrupt the marketplace and disrupt the organizations involved. Is not that the argument that always seems to be used in divestiture proceedings? And is that not what we are trying to avoid by these amendments, and are they not directed to just that argument?

Mr. ROGERS. As I see it, this request for investigative authority is not limited to acquisition. That is the first point.

The second thing is that I think that this question of divestiture is a very complicated one.

Mr. HUGHES. How about if we limited it?

Mr. ROGERS. I have never had too much experience, all right? Because we look at acquisitions very carefully insofar as my experience is concerned, very cautiously, and we do not try to get into a situation where you have got that problem. So I cannot speak, but I know from having read case law that the difficulties that you have in these divestiture-type problems, it is true, but the courts are equipped to do this. Certainly it is complicated, and antitrust cases are complicated.

Mr. HUGHES. Would the Chamber feel differently if these amendments were restricted just to acquisitions and mergers? Would you feel differently?

Mr. BYSET. Well, I would have to answer yes to that, of course. That does not mean that we would support it. That means that maybe our resistance would be less vigorous.

Mr. HUGHES. I am just trying to find out what the lowest common denominator is.

Mr. BYSET. I would have to say we certainly would feel different, and I wanted to clarify something else here. I think it was suggested, or maybe it came out in casual discussion a moment ago, that the present merger notice used by the FTC might have a statutory base, and if that was said or suggested, it is an FTC rule. I do not know of any specific statute authorizing it. I am not saying that it is not authorized by general FTC authority.

But, getting back to whether we would have a different view, certainly we would. It would be less encompassing than it now is. But, we are talking now about a simple, pre-merger notice as we experience at FTC, and then if so, the problem there is that we would get the Justice Department into the regulating business much like ICC and the other independent regulatory agencies are. It would in effect become something of a licensing agency. You would have to then apply, in effect, to the Department of Justice for permission to merge, or to acquire substantial assets. And if the Justice Department would say no, then without a full bloomed and blossomed investigation of the possible competitive or anticompetitive effect, the merger might well die.

Mr. HUGHES. Well, don't you think that is really healthy? Do you think the Justice Department should sit back and wait for these events to occur and then say, "Ahah, you have violated the antitrust laws"? Or do you think that Justice ought to be doing as they are trying to do, trying to give some direction in this very complicated area, trying to get the tools to do so and to try to give industry the kind of direction it seems to me they have been asking for? Is that not really the issue?

Mr. BYSET. Well, the problem with stopping a merger before you have investigated all of the facts is that you might well stop a desirable merger. There are always two sides to a merger transaction, you know. There is not just an acquirer; there is also the acquired. And many people seek purchasers of their firms, and possibly a successful man may find that there is nobody left in the family to carry on the business, that his sons have opted for professions of law, or medicine, or something like that. And sometimes they might go into business on the very hope that they will have built something of substantial value that they might later sell.

Now, all of these things do not come out, except through thorough investigation. And with advanced power in the Justice Department just to stop a merger, many desirable transactions just would not take place.

Mr. HUGHES. I do not know that we are talking about stopping a merger. I think we are talking about trying to get input before the fact so that Justice can make a value judgment on whether the merger is in the public interest.

Let me just ask you another question. Are you familiar and I am sure you are, with the business review procedure?

Mr. BYSET. Yes, sir.

Mr. HUGHES. Would you agree that is then a colossal failure?

Mr. BYSET. Let Bill respond to this.

Mr. ROGERS. Let me.

Mr. HUGHES. And why would you say in your judgment it has been a failure?

Mr. ROGERS. Let me give you the remarks of a very distinguished attorney in New York.

Mr. HUGHES. Are you going to direct yourself to that question?

Mr. ROGERS. Yes.

Mr. HUGHES. OK.

Mr. ROGERS. He said oh, there are certain instances when I guess a company is forced to that business review procedure, but it is very rare. There are in this country many antitrust attorneys that have very precise, and great antitrust judgment. If you have a white area kind of thing you do not need to go, nobody needs to go, and don't waste your time. If you have got a black area, you should not go, and you should not go forward with the particular transaction, or whatever you propose to take for review.

If you are in the gray area it is the question of who has the greatest expertise in the final analysis, and so that when you go there, it basically is that you are saying well, will you make a decision for me as to the legality of this proposed transaction, and you are asking people who are of no greater qualification than perhaps you can find in the private bar who can answer that question, so that you do not use it. And so it is a failure in that sense, if you want to call it a failure. I consider it something that has very little use, and I think that historically that has been it.

The next thing is that any particular transaction that a businessman wants, he wants to have complete assurance on, so as he goes down to see the government on a review, business review kind of situation, he finds himself in a position of whatever he proposes to them suddenly becomes public information. He does not want his competitors to know what he is doing, and there is one other thing, but I can't think of it.

Mr. HUGHES. Now, does not this legislation try to contemplate some of the problems that you are now suggesting by that procedure?

Mr. ROGERS. I only came down to talk in terms of title II.

Mr. HUGHES. Let me ask you this: Of the more than 1,500 sizable industrial mergers in 1974, and of the equal or greater number among financial institutions, and there have been hoards of them, how many CID's do you know were served?

Mr. ROGERS. I don't know. You would have to ask the Department that question. I understand that they have issued some 1,600 CID's. I haven't seen any indications in the record where they have had any great difficulty.

Mr. HUGHES. Would you believe that there are roughly 1,600 or so in some 13 years?

Mr. ROGERS. Yes, sir. I saw that in the record. That's what I was saying.

Mr. HUGHES. Mergers as such are not per se illegal but for those that are of questionable legality, should not those relatively few be thoroughly investigated by Justice or some agency?

Mr. ROGERS. I think that if they are in the gray area, that is where you have lawsuits, and I think that the company has a right to be heard. And that is why you have a court.

Mr. HUGHES. Is that not what we are trying to avoid, trying to avoid the type of after-the-fact litigation?

Mr. ROGERS. I don't know.

Mr. HUGHES. I am sorry, I have taken more time than I should have, and I want to yield at this time to counsel to ask some questions.

Mr. DUDLEY. I would like to address myself to some areas in which you suggested this morning, Mr. Rogers, that matters be taken out of the hands of the judiciary and would be turned over to the Department of Justice. First of all, with respect to the mergers we are talking about, that you have been talking about with Mr. Hughes, nothing in this legislation would allow the Department of Justice to, in effect, prevent a merger without actually getting an injunction, isn't that correct? So that the power would still vest with the judiciary, and all the legislation would do is enhance the power of the Department of Justice to understand the facts before it went into court to seek an injunction?

Mr. ROGERS. I would say that your observation is substantially accurate. I think in real life that by the use of subpena power and interrogatories to a very substantial degree it would, the Department could have a very discouraging—it would be a very discouraging factor with respect to corporations who desire to make these questionable acquisitions.

Mr. DUDLEY. What the first-amendment lawyers call a chilling effect?

Now, going to the safeguards that are involved in the actual discovery devices themselves in the bill, you have suggested on a number of occasions again that matters will be taken out of the hands of the judiciary and allowed to be performed by the Department of Justice. Leaving aside for a minute the question of the party being investigated not being present, leaving his rights aside, looking at the rights of the witness, I believe you said that with respect to interrogatiories you viewed the bill as denying to the individual the right to object to an interrogatory?

Mr. ROGERS. Yes. And I understand that Mr. Kauper has made that suggestion, that he felt it ought to be in the bill.

Mr. DUDLEY. Well, looking at the bill on page 5, line 5——

Mr. ROGERS. Yes.

Mr. DUDLEY [continuing]. Actually that entire section which begins on line 3 it says: "Each interrogatory in a demand served pursuant

to this section shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer." So, does not the legislation already provide for not only the assertion of an objection, but obviously ultimately the resolution of those objections by a court?

Mr. ROGERS. Yes; it does.

Mr. DUDLEY. Now, with respect to the presence of counsel for a party being interrogated at a deposition, I think I am quoting you correctly where you suggested that counsel would effectively be muzzled, and that he would not be able to object or instruct his witness not to answer, is that what you said?

Mr. ROGERS. I don't think he can instruct him not to answer.

Mr. DUDLEY. Well, I would invite your attention to page 6 of the bill.

Mr. ROGERS. Six?

Mr. DUDLEY. Yes, beginning on line 22 where it says, and I am quoting, "Such person or counsel may object on the record, stating the reason therefor, where it is claimed that such person is entitled to refuse to answer on grounds of privilege, or self-incrimination or other lawful grounds."

Mr. ROGERS. Yes.

Mr. DUDLEY. So the bill does provide for the assertion of an objection by counsel during the course of the deposition?

Mr. ROGERS. Yes; but it doesn't mean—he doesn't have the right to tell the counsel that I can't answer.

Mr. DUDLEY. Let's go on to the next page, page 7, line 4. "Upon a refusal to answer, the antitrust investigator or investigators conducting the examination may petition the district court of the United States for the judicial district within which the examination is conducted for an order requiring such person to answer."

Mr. ROGERS. Yes, sir.

Mr. DUDLEY. So that would, it seems to me, contemplate refusals to answer on the part of witnesses in judicial process for the enforcement?

Mr. ROGERS. Yes; I understand that, but only under threat of contempt. That's right. They have no right, as I understand it, the counsel has no right representing the witness to go to court and say I should not be required to answer that question.

Mr. DUDLEY. Well, in effect though the witness is given greater protection because instead of having to do that himself, instead of having the burden on himself to do that, he is allowed to refuse to answer until the Department of Justice petitions the court for an order to require him to answer?

Mr. ROGERS. Yes. It is a question of judgment, and I frankly think that it ought to be given both ways.

Mr. DUDLEY. Well, I don't quite understand that, because he would not have to answer unless the court told him to. Is that not correct?

Mr. ROGERS. Yes, that is right.

Mr. DUDLEY. So that really the kinds of investigatory tools that are involved with the bill, so far as the witness is concerned, are hedged about with precisely the same safeguards which you have in discovery provisions in the Federal rules, and perhaps in fact even greater ones, are they not?

Mr. ROGERS. Well, I would say this: What concerns me is the criminal aspects of the whole thing more so than the civil aspects when you are talking about the rules. I think it is much better, as I said, that the authority rests in the judiciary rather than in the Department.

Mr. DUDLEY. But you see, that is my question. I don't understand what this bill takes away from the judiciary. It does not seem to me to grant any power to compel answers absent the intervention of a judge.

Mr. ROGERS. Well, it puts the—it really brings to the Department of Justice the right to bring a citizen of the United States to a certain place to answer their questions, and that is what it basically does, whereas before it was under the auspices of the court.

Mr. DUDLEY. Let us go one step down the road with that. If the Department of Justice, in fact, files a lawsuit, puts a document in the court called a complaint, it has the power to do this in precisely the same manner under the Federal Rules of Civil Procedure, and in fact, has greater powers under the Federal rules?

Mr. ROGERS. I think that is correct, after the case is filed, yes.

Mr. DUDLEY. So all this would do is say that the intervention of the filing of the complaint is unnecessary to obtaining these powers by the Department of Justice.

Mr. BYSET. May I attempt to make a response to that, Mr. Dudley? The filing of the complaint, and this does not—would not solve all of your objections—but the filing of the complaint spells out the limits of relevancy. In the kind of investigation we are talking about here, we are talking about things that might possibly lead to some antitrust violation. Heaven knows what the relevancy bounds of that might be.

Mr. DUDLEY. Well, with respect to the present statute, the Antitrust Division is required, is it not, to state the violation that it is investigating?

Mr. BYSET. With specificity, yes.

Mr. DUDLEY. That is right, so again you have relevance boundaries set out in the statute.

Mr. BYSET. You would have less of a boundary with this new statute where possible—I have forgotten the precise language, but it is possible, or potential, or things that may lead to antitrust violations. That is almost unlimited.

Mr. DUDLEY. Well, it may lead to language, and there may be some problems with the way the language is, but I think that is designed to get at the incipient violation under section 7 of the Clayton Act. But the standard of relevance that is incorporated in the discovery provisions of the Federal Rules of Civil Procedure is quite a broad one, and it includes the production of information that may lead to relevant——

Mr. BYSET. But it is circumscribed by the complaint.

Mr. DUDLEY. Again though, this would be circumscribed by the Department's statement of the violation that it was investigating.

Mr. BYSET. But there is a court intervening with the complaint to judge the relevancy. The relevancy is determined here at the time of questioning by the Department of Justice, unless you want to go through the contempt process.

Mr. DUDLEY. Well, you characterize it as a contempt process, but I think it is the same kind of judicial intervention you have when you have a dispute in discovery.

Mr. BYSET. Yes, sir. That is correct.

Mr. DUDLEY. So that in reality all you are doing is perhaps giving the Department of Justice an opportunity in advance of filing a complaint, and putting an antitrust defendant to the expense, and difficulty of defending a lawsuit, and the opportunity to investigate it with the same sorts of discovery tools that it would have after it filed the complaint.

Mr. BYSET. Well, I keep having to return to the fact that when a complaint is filed you have live litigation. It is inconceivable to me that the power would be the same in echelons of government as high as the Justice Department is. It was suggested a moment ago that Justice is an arm of the judiciary, which is true, but it is also an arm of the executive, answerable to the White House. It is inconceivable that we would want to put this kind of authority in the executive.

I would pose a question: Would we want to give, or would we seriously consider giving subpena power to the Justice Department in its pursuit of say street crimes? I doubt that. Would the American Civil Liberties Union tolerate it? Any why the invidious distinction? Why treat one in one fashion and another in another fashion?

Mr. DUDLEY. I do not believe I have any further questions.

Mr. MAZZOLI. Thank you very much.

Minority counsel.

Mr. POLK. Thank you, Mr. Chairman.

I share Mr. Dudley's difficulties in understanding some of the arguments you made. You have also mentioned in this regard several times that the target of the CID could be held in contempt.

I would like to make clear your understanding with regard to that. Who would hold the target of the CID in contempt?

Mr. ROGERS. It would be the court. It would have to be.

Mr. POLK. It would not be the Department of Justice.

Mr. ROGERS. No. But they would be in the position to, I would say, go to court, whereas the counsel for the witness would not be in that position here, and also the counsel for the company under investigation would not be in that position. They have no rights at all.

Mr. POLK. If the Department went to court because a target refused to cooperate with the CID, would the first act of the court be to hold the target in contempt?

Mr. ROGERS. I could not answer for any given court. I would think that that would be one of the things that would be the tool that the Department could decide whether they wanted to urge upon the court to exercise its descretion in that respect.

Mr. POLK. But that would come later on, would it not? Would not the court first order——

Mr. ROGERS. I would assume that would be right, and I think probably the first thing that would happen would be the right of counsel of the witness to consider moving the court for a motion to quash the subpena. That would be the first thing. But then, when you get in there, and you start on this oral examination, it is not like a lawsuit where you have got parties representing interests. The only interest being represented is the interest of the witness.

Mr. POLK. You feel that that is a valid distinction?

Mr. ROGERS. It is a great distinction.

Mr. POLK. Well, we have a court ordering the witness to answer a question.

Mr. ROGERS. Yes. And either he has to answer or he is in civil contempt, I would assume, unless he has a basis, a constitutional basis for refusing to answer.

Mr. POLK. Well, in any case, the person can only have sanctions applied to him if he refuses to answer the order of the court that directs him to answer?

Mr. ROGERS. Yes, sir; that's right.

Mr. POLK. OK. You also indicated in one part of your testimony that you believed that the Federal Rules of Civil Procedure cannot apply to the Antitrust Civil Process Act, or did I misunderstand what you said?

Mr. ROGERS. I think I said that it did not apply until after the case was filed.

Mr. POLK. Until which case was filed?

Mr. ROGERS. The complaint is filed. The basic rules of discovery I am talking about.

Mr. POLK. Section 5(e) of the act says that the Federal Rules of Civil Procedure shall apply to any petition under this chapter, referring to the Antitrust Civil Process Act.

Mr. ROGERS. What page is that on, sir?

Mr. POLK. It is in the law.

Mr. BYSET. He is not talking about the bill, he is talking about the act.

Mr. POLK. It is the very last paragraph.

Mr. ROGERS. Yes; it says it may have application.

Mr. POLK. In fact, would not that provision, the incorporation of the Federal rules, also carry with it the additional safeguards such as those found in rule 26(c) of the Federal rules, which allow the target of discovery to argue that there is an undue burden, and to ask the court to either set aside or modify the attempt to obtain discovery?

Mr. ROGERS. I would think that would be part of a motion to quash the subpena, so to speak, that kind of a consideration. Or if we got to the question of harassment that consideration might be available. But I think that the real problem is the question of being able to test the relevancy which you get in or when you have a witness where he might or might not have counsel with him, and he gets in there, and it may lead to any antitrust violation, and what is the basis upon which you are going to argue?

Mr. POLK. Well, turning to the bill, if we look at page 2 beginning with line 24, reading just two lines thereof, it indicates that a demand shall state the nature of the conduct constituting the alleged antitrust violation. Is that not the test of the relevancy?

Mr. ROGERS. I think that serves as some kind of a basis for determining relevancy.

Mr. BYSET. I believe also Mr. Kauper wants to strike that language. One of his amendments yesterday was to strike the language: "conduct constituting alleged antitrust violation." He wants to strike that.

Mr. POLK. I understand that. It will be up to the committee to determine though whether it accepts that recommendation.

Well, what greater standard of relevancy would you seek?

Mr. ROGERS. I would seek a complaint so you know what the issues are, so that the persons that would be the subject of the lawsuit would have an opportunity to know and to object.

Mr. POLK. Well, the opportunity to know and to object——

Mr. ROGERS. Yes.

Mr. POLK [continuing]. Are they not provided for under the law and the bill as it amends it?

Mr. ROGERS. Not as to the person under investigation, no.

Mr. POLK. Well, I thought Mr. Dudley just pointed out several provisions where those rights are available.

Mr. ROGERS. With respect—that is right, with respect to the right of the witness.

Mr. POLK. I understand your distinction. OK.

On page 6 of your prepared statement you indicated opposition to CID's for depositions because there is no requirement that an impartial arbiter is present. Would an amendment to provide such a safeguard induce your support for that aspect of the bill?

Mr. BYSET. Yes; I understand the question, and I will attempt to respond to it. I do not think it would perfect the bill, but it would certainly be an improvement. But I have to emphasize that we want to be helpful, but we are resisting the bill in its entirety. But in the interest of being helpful, certainly that would help to not perfect the bill, but improve it, a hearing examiner.

Mr. POLK. Mr. Byset, am I correct in infering that you are not only opposing the bill in its entirety, but also with respect to any of its separate parts?

Mr. BYSET. Yes.

Mr. POLK. I seemed to get that impression.

Mr. BYSET. The sum is greater than the parts, or is as great as the parts, yes, that is correct.

Mr. POLK. And there is no part of the bill that you support, is that correct?

Mr. BYSET. I am not authorized to support any part of the bill.

Mr. ROGERS. I am ready to address myself to any kind of suggestions for judicial safeguards in the bill, but the basic objection I have to it is the criminal aspects of the whole thing which are really more so my objection than the civil aspects.

Mr. BYSET. Of course, if it is the committee's judgment and the judgment of the Congress that this legislation should be passed, we would abide by that judgment, and we would welcome a maximum of safeguards.

Mr. POLK. On another point, yesterday the Department of Justice suggested an amendment to the bill that would require all depositions under the legislation to be taken in private. Do you believe that that amendment would improve the bill?

Mr. ROGERS. Well, that is a pretty tough judgment question. I really think that it would have a tendency to improve the procedures. I think that, but in doing it, you shut out the access of the party under investigation.

Mr. FALCO. Would the gentleman yield?

Mr. POLK. Yes; I do.

Mr. FALCO. I would like to follow up. I have one or two questions right in this area, and I am getting the impression that you are

riding two horses. The bill presently provides, does it not, that the Publicity In Taking Evidence Act, which applies to depositions in litigation, will be made inapplicable, which makes them wholly what you are calling star chamber proceedings, that is, nobody has a right to come in.

Mr. ROGERS. Yes.

Mr. FALCO. Correct?

Mr. ROGERS. Yes.

Mr. FALCO. Yet, you have also argued, have you not, that under the bill, unless amended further, the Government in a third-party deposition has the power to exclude actually companies who are the target of the investigation?

Mr. ROGERS. As I understand the provisions of the bill, yes, sir.

Mr. FALCO. Well, those are the two points, as I see it, as being fundamentally in conflict. Would you not say that given your concern about excluding targets of the actual investigation, rather than people with information, that it would be better to amend the bill to make the Publicity In Taking Evidence Act apply so that if the deponent or the Government wants to exclude they have got to go to a court to exclude?

Mr. ROGERS. That is a very difficult judgment question. I do not know that I can answer it.

Mr. FALCO. But you would agree that there are two concerns there that you have?

Mr. ROGERS. Yes.

Mr. FALCO. We have got to go one way or the other, don't we?

Mr. ROGERS. Yes.

Mr. FALCO. And if we reason that the bigger concern is a potential abuse of excluding actual companies under investigation from third-party depositions, it would be a much better provision to make the Publicity In Taking Evidence Act apply so that the third-party deponent—excuse me, your answer is yes?

Mr. ROGERS. Yes; I think so on balance. I think so, yes. But I think what that would cause is, you know, in these lawsuits, and when you get in a lawsuit the depositions are very, very important, so that the rights of rehabilitation of witnesses, and clarity, and not permitting the interrogator to lead the witness improperly, all of these kinds of things and so on, so what you would have is the beginning of a lawsuit at the investigative level where this is all going on. And to me it does not make good judicial process.

Mr. FALCO. But in short, you would agree, would you not, that it would be better to make the Publicity In Taking Evidence Act apply, so if either the deponent or the Government wants to exclude anybody, they would have to get the court to sanction that under a showing of good cause?

Mr. ROGERS. Yes; I think so.

Mr. BYSET. Yes; I think you have got two problems. First, you do not want the star chamber situation, but second, you do not want the disclosure of confidential information. And possibly the suggestion you are making there might be the cure.

Mr. FALCO. I have one more question if I may. On page 8 of your testimony you mention "gray areas of antitrust." And although I agree that such areas may exist, I disagree with your argument. Based on the historical facts of enforcement, is it not true that under

Antitrust Division officials of both political parties who have been the executive branch, so-called new or innovative antitrust cases are always brought on the civil side, such as the *Container* case in 1969 involving price fixing in a declining market or the *Smog* case involving joint suppression of technology? They are very wary of stigmatizing people through the grand jury in an area where they are really extending the principles of antitrust to perhaps new procedures by business. Is that not correct?

Mr. ROGERS. I think that is generally a cogent observation.

Mr. FALCO. And I have one last question, Mr. Chairman. On page 10 of your statement you say that the H.R. 39 powers, if enacted, would result in the Antitrust Division becoming bogged down in investigation of antitrust trivia, don't you?

Mr. BYSET. Yes; we say that, Mr. Falco.

Mr. FALCO. Proceeding on that, is this not at a bare, rock minimum, an implicit assertion that the Congress has not been performing legislative oversight to prevent this, and your citation of studies critical of the FTC have been based in part because Congress did not oversee the FTC? For this subcommittee in particular perhaps you would be impliedly suggesting that it would abdicate its special oversight responsibilities with respect to the Antitrust Division?

Mr. BYSET. We intended no implication of congressional dereliction; no, sir.

Mr. FALCO. But in the matter of congressional oversight, and I would close with this, are you aware because of this potential abuse, either through the law or its subsequent enforcement upon enactment, that Chairman Rodino's opening statement mentioned that this bill does, indeed, touch upon this subcommittee's oversight responsibilities?

Mr. ROGERS. I think Chairman Rodino is very concerned about some of the things we were talking about here today.

Mr. FALCO. I would like to yield to the gentleman from New Jersey.

Mr. HUGHES. I think Mr. Polk has more questions, Mr. Chairman.

Mr. MAZZOLI. Mr. Polk, the counsel has the time.

Mr. POLK. If I may continue?

Mr. MAZZOLI. Please.

Mr. POLK. Mr. Rogers, I think if I understand the basic thrust of your testimony, you indicated a concern with regard to what you called the criminal aspects.

Mr. ROGERS. That is my grave concern.

Mr. POLK. In using CID's, and when I asked you earlier about the safeguards that are provided, you indicated they applied to the witnesses under demand, but not with regard to the eventual target of the investigation. Just to pursue that a little further, just exactly what is the fear that you have? Is it that the evidence that is obtained from these witnesses may be used in a criminal proceeding against the defendant? Is that It?

Mr. ROGERS. Let me tell you something, I do not fear anything? All right? I have come down to express myself the best I can here and to say that I think that it is an awesome power to give the criminal enforcer of the antitrust laws this kind of authority.

I also say that they have made no demonstration for need for this kind of authority. I also say that they have not used the investigative tools that they have, and that they are the best, and they have avail-

able to them the greatest ability to investigate of any organization I have ever known, and they have got good men.

Now, I understand they are also sending out to the consumer now a request to send in additional information. I think Mr. Nader has urged them to do that, and that is one more area where they will have additional power of detection as distinct from investigative authority of a compulsion nature.

My concern is the criminal aspect. That is really the great concern I have as an attorney and as a citizen. There is a great amount of crime in this country, and one of the great strengths in our country is our Federal courts, and they have had experience, and they know how to conduct, properly conduct, grand jury type subpena authority and to control that authority. And I see no need to change that. I think it is dangerous.

And with respect to the question of immunity, I think that the law says that the agency who has this subpena power has a right to determine whether or not immunity should be granted. I really do not know if that would include the Department of Justice, and that is what I am saying as an attorney. Maybe you have studied the question, but to give the criminal enforcer all of these kinds of authorities, I think there has to be some tremendous demonstration, and I also say that the function of the grand jury is to protect the citizens of this country. That is the way it originated.

And we know historically, let us take why it came about, it is because of the possibility of abuse.

Mr. POLK. Well, to come back to my question, what is the criminal aspect, as you put it, over which you are expressing your concern?

Mr. ROGERS. All right. Very good. I think we are talking about the right of self-incrimination, the right of counsel, we are talking about the constitutional rights, the right of search and seizure without probable cause.

Mr. POLK. Well, are you suggesting——

Mr. ROGERS. Assume also the right of invasion, and I told you that I am not a constitutional lawyer.

Mr. POLK. Well, in recounting those rights, are you suggesting that the bill takes them away?

Mr. ROGERS. Well, let's take a normal situation now, for example, in St. Louis where I come from. Recently a man was arrested for driving while under the influence of alcohol, and he had a gun that was laying on the front of his car on the seat. And the officer saw the gun, and they charged him with improper possession of a firearm, a felony. The court said that was an invasion of his rights, that the proper procedure was to go and get a warrant, to show, demonstrate probable cause, and then do that. Here we have no probable cause. You are asking a citizen off the street to come in, you say I want to talk to you under oath.

Mr. POLK. Well, it seems to me you are riding both horses again.

Mr. ROGERS. All right. I am just trying to tell you my feelings about this.

Mr. POLK. Well, I understand your feelings.

I believe Mr. Hughes would like the floor.

Mr. HUGHES. Yes; thank you very much. I just have two brief questions, and I know the hour is getting late. It just seems to me that

your concerns about relevancy are well taken. I think one of the reasons for some of the language in the bill dealing with specifying in the demand the nature of the alleged antitrust violation under investigation really is directed to that argument that you make.

But, let me just turn it around just a little bit. One of the biggest risks I think in this whole area is the great stigma that is attached to a filing of a complaint or to an indictment. One of the things from a public relations standpoint that industry ought to be concerned about is if Justice is forced to file the complaint where there are these investigations. As an attorney I am sure that you are well aware of the fact that there is nothing magical about the filing of a complaint. If they reach that stage, ordinarily there is enough information to file a complaint, and would you rather Justice filed a complaint to get into the civil rules of procedure? Is that what you are suggesting?

Mr. ROGERS. We welcome no lawsuits. We comply with the law.

Mr. HUGHES. I would think that your public relations department might have a different approach, and I am sure your stockholders might.

Mr. ROGERS. You are exactly right.

Mr. HUGHES. And might feel a different way about that statement.

Mr. ROGERS. Let me say this, we would also, and when I say we, I mean, you also have to consider the question in a context of what kind of publicity arises from the mere fact of an investigation.

Mr. HUGHES. I agree. Your testimony has been very helpful to me today, and I do appreciate your giving of your time.

Mr. ROGERS. Well thank you. It is my first opportunity to ever discuss matters of this nature before a body of this type.

Mr. HUGHES. Thank you very much, Mr. Chairman.

Mr. MAZZOLI. Are there any further questions?

If not, let me also join in thanking you, Mr. Rogers, and your associate for your interesting testimony. It has been very helpful and, as you can tell, on the very points that are of concern to this committee, because the very questions that we were prepared to ask were the ones which you anticipated. And it shows you that we are not too far off at least on the issues that are involved, and now how we resolve them, of course, remains to be seen.

Mr. ROGERS. Yes.

Mr. MAZZOLI. But I would appreciate if, as I mentioned earlier on, perhaps you could take Mr. Kauper's testimony, and it would be helpful for me, and I would hope for the committee, to have your written comments at whatever length you feel necessary that perhaps challenge or agree with his statements, because they were different, and you have not had a chance to study them.

Mr. ROGERS. It is very good of you to give me the opportunity to do that.

Mr. MAZZOLI. And I might say, and I am sure I am speaking for the committee, that any evidence, any further information that you or your associates would feel helpful to the committee in determining these pivotal questions would certainly be helpful.

Mr. ROGERS. Yes, sir, and I would like to specifically address myself to this question of the grant of immunity by the agency under the present omnibus crime bill.

Mr. MAZZOLI. Right.

Counsel had earlier given me a paragraph which was interesting on the use immunity as against transactional immunity, and it is the case of *Kastigar* v. *United States*, 406 U.S. 441 (1972). And it has an interesting point, and the essence of it is that the witnesses may be more apt to produce the fullest evidence because, as I understand use immunity, they cannot use that against an individual, though they can prosecute him later, so there would be a compulsion or perhaps an urgency to give as much as possible, because the more you give the less likely they are to have something else to pin or to hang your hat on. So it is an interesting question which we would appreciate some information on.

Mr. ROGERS. Yes; thank you.

Mr. MAZZOLI. Thank you very much.

And so the committee stands adjourned, subject to the call of the Chair.

[Whereupon, at 12:10 p.m., the hearing was adjourned, subject to the call of the Chair.]

SUPPLEMENTAL STATEMENT FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES, JUNE 18, 1975, BY WILLIAM F. ROGERS, SENIOR ATTORNEY, MONSANTO CO. OF ST. LOUIS, MO., AND A MEMBER OF THE NATIONAL CHAMBER'S ANTITRUST AND TRADE REGULATION COMMITTEE

At the hearing of May 9, the National Chamber was invited to submit further record comment on changes to H.R. 39, as suggested in testimony of the preceding day by Thomas E. Kauper, Assistant Attorney General for Antitrust. We appreciate this added opportunity, and we hope that our comments will be helpful to the Subcommittee as it considers this legislation.

Whether or not the changes suggested by the Assistant Attorney General are accepted, the objections to H.R. 39 as presented in our testimony of May 8 would apply with equal force. Legislation, unneeded in the first place, cannot become acceptable by procedural changes; the only acceptable course is complete rejection.

Since the Department of Justice claims that it needs more powers to investigate possible antitrust violations, it would be a useful reminder at this point to reiterate the investigatory and discovery powers now vested in the Department. They include:

—Pre-complaint Civil Investigation Demands (CID) to compel disclosure of documents of business entities under antitrust investigation.

—Pre-complaint or pre-indictment grand jury subpoenas to compel disclosure of documents and oral testimony from any business entities or natural persons for all information relevant to possible criminal antitrust violations and companion civil actions.

—FBI investigations to collect evidence of possible antitrust violations.

—Use of FTC investigative powers, upon request of the Attorney General.

—Post-complaint compulsory discovery procedures under the Federal Rules of Civil Procedure, which include oral depositions, written interrogatories, production of documents and requests for admissions.

—Use of discovery powers of regulatory agencies with respect to regulatory matters under consideration.

These powers provide the Department of Justice with a full and adequate arsenal of weapons to fulfill its prosecutorial role. In addition, facts are obtained from the U.S. Attorneys, State Attorneys General, Congressional Committees, complaints from the public, and voluntary responses to requests for information.

Aside from a continued failure to show justification for added powers, the amendments to H.R. 39 offered by the Assistant Attorney General would do nothing to mitigate the substantive or procedural problems inherent in the bill, or to eliminate the potential for abuse.

That the amendments do not change or attempt to justify the basic purpose of the bill to give the Attorney General and his designates unprecedented powers of pre-complaint investigation is not surprising. And if no abuse of these powers is intended, procedural safeguards for witnesses and those being investigated might have been expected. The amendments do not, however, offer witnesses more effective protection of counsel at the time of taking testimony; the stipulation that counsel for the witness may neither object nor interrupt remains unchanged.

Neither do the amendments in any way remedy the total failure of H.R. 39 to provide effective judicial or administrative appeal or review of investigative hearings.

1. The primary intent of the amendments is to give confidential status to the interrogation of witnesses under the process provided in H.R. 39, both at the hearing and as transcribed. The ultimate effect, however, would be to constitute the Attorney General or his designate as a grand jury in civil cases. The evidence would be collected and kept by the Attorney General in secret. Presumably, it would not be available to defendants after the filing of a complaint. If this is the intention, the result in civil cases would be to thwart the plan of the Federal Rules of Civil Procedure. A fundamental purpose of those rules is to eliminate surprise by making evidence available to all parties under supervision and procedural protection of the court.

Under the scheme of H.R. 39, the Attorney General would be able to collect evidence ex parte, without the right of a party under investigation to examine witnesses or even be present, and without judicial conduct or review of the hearing other than a contempt proceeding for refusal to answer. The Attorney General could then keep the evidence secret until such time in the course of the trial as he wished to reveal it.

Of course, a defendant could depose the same witnesses after the filing of complaint, but the defendant would not know whether they could be impeached by the secret transcript. Nor would the defendant have any way of testing the circumstances under which the testimony of an independent witness was given. Although what the defendant's own witnesses said may be known, they too would have testified without the protection normally afforded by counsel acting within the Federal Rules of Civil Procedure.

If the Attorney General should then decide to proceed criminally, there would be a parallel undermining of established criminal procedure. Not only would there be the secret transcript before the grand jury, but also secret transcripts taken without the constitutional protection of the grand jury, thus thwarting the purpose of the grand jury and the general scheme of procedural due process.

In view of this secrecy, the suggested provision for allowing a copy of the transcript to be withheld from the witness for "good cause" takes on new meaning. It insures absolute secrecy, especially as the determination of "good cause" seems to be wholly within the antitrust investigator's discretion.

2. Otherwise the amendments are merely intended to enhance the grant of power to the Attorney General under H.R. 39 in four respects:

(*a*) They would expand the jurisdiction over witnesses from those having "knowledge of the facts" to those having "information." The reason for this is to avoid controversy as to the meaning of "facts" by substituting a broader, vaguer term. It would, in effect, make hearsay evidence available through the Civil Investigative Demand process.

(*b*) The CID itself would no longer be required to describe the "conduct constituting the alleged antitrust violation" but only the "nature of the investigation." Again, the change is in the direction of giving the Attorney General broader scope and freeing him from the procedural requirements of due process.

(*c*) The Attorney General could exercise the CID power to obtain information for use in proceedings before other governmental agencies. Other participants in such proceedings, however, would be limited to the investigatory processes available through enabling statutes of agencies conducting the proceedings—including the other agencies themselves. There simply is no reason for the Department of Justice to be allowed to intervene in an agency matter with discovery powers that may be far more searching than those held by any of the other parties, including the agency holding the hearing.

In addition, using CID materials before such agencies would operate to disclose them, not in the course of litigation to which disclosure is otherwise limited, but in miscellaneous regulatory hearings. The proposed legislation contains no provision for protecting the sensitive information once so used. The result could very well be disclosure of confidential business information of persons not accused of, or being prosecuted for, any antitrust violation whatever.

(*d*) It is specifically provided that oral testimony may be obtained relating to documents already produced under a CID, despite the provision elsewhere for confidentiality. If this provision is intended to encompass only documents produced by the witness, the proffered language amending Section (h) is too broad.

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3. The proposed change in the requirements for correcting and signing transcripts of testimony introduces some confusion. The signature of a witness to a transcript of testimony could be waived by the "parties", but the new confidentiality provisions would exclude any "party." Only the witness and his restrained counsel could be present at the taking of testimony or see the transcript. Probably this reference to "parties" is not intended to change the procedure to allow a prospective defendant representation at the hearing. Likely, it results only from copying language from the Federal Rules, which are intended for use after the filing of a complaint. In a small way, however, this inconsistency shows the conflict between the procedures proposed in H.R. 39 and in the Federal Rules. H.R. 39 as amended introduces a procedure inconsistent with the letter and speech of those rules, one which undermines previously conceived safeguards of due process in civil as well as criminal situations.

There have been frequent references to the application of the Federal Rules of Civil Procedure to the H.R. 39 investigatory powers and process. The discovery rules apply only after litigation has been instituted and generally describe the rights of the "parties", meaning plaintiffs and defendants. H.R. 39, on the other hand, makes no provision for potential defendants ("parties"). They would not even be permitted to be present.

4. With reference to the granting of immunity to individuals—third party or those affiliated with corporations under investigation—who are required to respond to interrogatories or submit to oral questioning, the basic objections still remain. The bill would give the Department of Justice almost unlimited powers to require anyone to appear for involuntary questioning under oath, or to respond to interrogatories. Before such extraordinary powers are granted, a persuasive showing needs to be made that (a) such powers are required for the effective administration of justice, and (b) that there are adequate safeguards of the constitutional rights of witnesses and parties under investigation.

We submit that the Department of Justice has not sustained the burden of showing need; and that the potential for abuse would always remain, whatever safeguards may be added. Finally, we suggest that the Congress should consider seriously whether we should ever give powers of the kind contemplated by H.R. 39 to an officer serving at the will and pleasure of the President.

ANTITRUST CIVIL PROCESS ACT AMENDMENT

THURSDAY, JULY 17, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:10 a.m. in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. [chairman] presiding.

Present: Representatives Rodino, Seiberling, Jordan, Mazzoli, Hughes, McClory, and Railsback.

Also present: Earl C. Dudley, Jr., general counsel; James F. Falco, counsel; and Franklin G. Polk, associate counsel.

Chairman RODINO. The committee will come to order and we will resume our hearing on H.R. 39. Since our last hearing on this important antitrust legislation in May, a number of statements have been received for which entry into the record of proceedings of the Monopolies Subcommittee has been requested. Accordingly, in our record shall be entered the additional statements of the Assistant Attorney General for Antitrust and of the Chamber of Commerce of the United States who appeared before the Monopolies Subcommittee on May 8 and 9, respectively, as well as a joint statement by Consumers Union, Consumer Federation of America, and National Consumer Congress; a statement by the National Association of Manufacturers; and correspondence from a private practitioner from Connecticut. If there is no objection, those statements will be included at this point in the record. No objection being heard, it is so ordered.

[The information referred to follows:]

CONSUMERS UNION,
Washington, D.C., June 12, 1975.

Hon. PETER W. RODINO, Jr.
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

Dear MR. CHAIRMAN: Thank you for your letter of June 6, 1975, requesting the views of Consumers Union, [1] Consumer Federation of America, [2] and National

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of *Consumer Reports* (magazine and TV) and other publications. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, noncommercial grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with its almost 2 million circulation, regularly carries articles on health, products safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Consumer Federation of America is the nation's largest consumer organization. It is composed of over 200 National, State, and Local nonprofit organizations that have joined together to espouse the consumer viewpoint. Among our members are Consumers Union, Publisher of *Consumer Reports;* 117 Cooperatives and Credit Union Leagues; 45 state and local consumer organizations, 66 rural electric cooperatives; 27 National Organizations ranging from the National Board of the YWCA to the National Education Association, and 16 National Labor Unions.

Consumer Congress [3] on H.R. 39, a Bill to amend the Antitrust Civil Process Act, which is presently under consideration by the Monopolies Subcommittee. As your letter states, I recently testified before the Senate Antitrust and Monopoly Subcommittee, on behalf of these three organizations, in support of S. 1284, Title II of which is essentially similar to H.R. 39.

The purpose of these amendments to the Antitrust Civil Process Act is to increase the effectiveness of discovery by the Antitrust Division, U.S. Department of Justice, in antitrust investigations. The Antitrust Division has testified that such increased authority would indeed increase their ability to enforce the antitrust laws, and we concur with this conclusion.

However, we do not concur with Assistant Attorney General Kauper's requests that the Bill be amended to treat the evidence discovered by the use of Civil Investigation Demands (CIDs) as exempt from public disclosure, even beyond the exemptions contained in the Freedom of Information Act. To the contrary, we believe that neither S. 1284 nor H.R. 39 goes far enough in providing for such public disclosure of evidence obtained by use of CIDs as would eliminate the need for duplicative discovery, by actual or potential plaintiffs in private antitrust proceedings, of evidence which the Antitrust Division has already obtained through the use of CIDs.

Wrapping the evidentiary fruits of CIDs in a cloak of eternal secrecy, as recommended by the Justice Department, would perpetuate the need for such duplicative discovery. This duplication adds to the workloads of the Federal Courts. It increases the costs, including attorneys fees, of private litigation both to plaintiffs and to defendants. Additionally, the increased "costs" and attorneys fees may discourage all but the most wealthy potential private plaintiffs from bringing suit under the antitrust laws, thus lessening the potential deterrent effect of these laws and increasing the enforcement problems faced by the Antitrust Division and the FTC.

For this reason we do not agree with the Justice Department that it is inappropriate to authorize introduction into evidence by Antitrust Division attorneys of information obtained by CID in proceedings before courts, grand juries, administrative and regulatory agencies, and in other antitrust investigations. To the contrary, we suggest that, once the Antitrust Division has terminated or fulfilled its law enforcement purpose related to the evidence in question, CID files should also be available to any member of the public on request under the provisions of the Freedom of Information Act, subject only to the exemptions of the Act (other than the law enforcement purpose exemption) and to such additional exemptions as are presently provided for in Federal Trade Commission rules governing public disclosure of FTC investigative files. The FTC does have similar provisions for public access to such files, and we are unaware of any resulting harm either to the FTC's ability to conduct antitrust investigations or to business corporations whose practices were once under investigation.

Therefore, we strongly urge adoption of H.R. 39 with such a public disclosure provision. However, if the Committee or the House should not concur with our recommendations regarding public disclosure, there should at least be a provision requiring the Antitrust Division to maintain and to disclose upon request—after its law enforcement purposes in the case have been terminated or fulfilled—a list of the documents and testimony obtained by CID. This would at least partially reduce the duplicative discovery which private plaintiffs must now undertake. H.R. 39 should also be clarified as authorizing the Justice Department to share with other agencies for law enforcement or economic study purposes the evidence obtained through the use of CIDs.

We would also like to comment on one difference between H.R. 39 and S. 1284. The Senate Bill would authorize the Antitrust Division to use the powers of the Antitrust Civil Process Act to obtain information or evidence for use in proceedings in which it participates before other Federal Administrative or regulatory agencies. The House Bill, however, would prohibit such use where "an adequate opportunity for discovery is available under the rules and procedures of the agency conducting the proceeding."

We foresee significant potential for unnecessary litigation over what opportunity is "adequate". Also, determinations on this and other issues of discovery will be controlled in the first instance by administrative law judges and commissioners of regulatory agencies who may be more sympathetic to the parties they regulate than to the basic goals and purposes of the Antitrust Division or to the antitrust

[3] National Consumers Congress is a mass membership, grassroots consumer organization which grew out of the meat boycott of 1973.

laws. The fear of competition as something evil is a way of life in some federal agencies, as Consumers Union discovered in commenting on an ICC proposal to relax somewhat the "gateway" restriction on the trucking industry.

We believe that the purposes of competition and the welfare of the economy and the consuming public are best served when the Antitrust Division has the power to gather evidence needed to make the best case possible in a proceeding before another agency. Therefore, we strongly recommend that you amend H.R. 39 by deleting Section (i)(2) and substituting therefore the wording of the second paragraph of Section 201(j) of S. 1284, appearing at page 12, lines 17–20 of that Bill.

We hope that our views will be of use to the Committee in its consideration of H.R. 39, the adoption of which we strongly urge. Your invitation to comment is appreciated.

Sincerely,

MARK SILBERGELD, *Attorney.*

DELIO AND MONTGOMERY,
New Haven, Conn., June 12, 1975.

Re: HR39

CHAIRMAN, SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
House Committee on the Judiciary, House Office Building, Washington, D.C.

DEAR SIR: I am unalterably opposed to the HR39 legislation which would amend the Anti-Trust Civil Process Act.

The right of the government to obtain full discovery before initiating an action seems to place inordinant power in the hands of the Justice Department without the necessity to launch litigation.

I believe that anti-trust enforcement is important, but there will be no rebuilding of the country's moral fiber by the passage of HR39.

Very truly yours,

ANTHONY P. DELIO.

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The Antitrust Civil Process Act (15 U.S.C. 1311, hereafter referred to as ACPA) provides that whenever the Attorney General has reason to believe that any person, other than a natural person, under investigation may have documentary material relevant to a present or past antitrust violation, he may require its production by the issuance and service of a civil investigative demand (hereafter referred to as C.I.D.).

During the floor debates on S. 167 proposing the ACPA in the 87th Congress, and during the Committee hearings on the bill, there was considerable concern that the bill be interposed with adequate safeguards and proper limitations on the scope of the C.I.D. Mr. McCulloch, a member of the House Subcommittee which considered the bill, demonstrated the deep fear within the Subcommittee members as to the danger of improper use of investigative power:

The grant of a civil process to the Attorney General does not mean, however, that he shall now be permitted to engage in fishing expeditions. Far from it. The fact that the Attorney General is the chief prosecuting officer of the Federal Government and the fact that an untrammeled right to obtain information could severely harm the rights of the individual have led the Committee on the Judiciary to *strictly circumscribe the extent to which the civil process may be used.* (Emphasis supplied.)[1]

A list of ways in which the Congress strictly circumscribed the extent to which C.I.D.'s may be used was presented during the House debates:

. . . Second, the use of a civil investigative demand is restricted to situations where a concern "is or has been engaged in an antitrust violation"—*not* in some activity which may develop into a violation in the future;

Third, a civil demand is limited to the receipt of *documentary* evidence, *not* to the taking of *oral* testimony.

Fourth, a demand may only be made upon a corporation, association, partnership, or other entity. It cannot be used to obtain personal documents of a natural person . . .

[1] 108 Cong. Rec. Part Three, March 13, 1962, p. 3999.

Eighth, the Attorney General is prohibited from turning over to any other department or government agency documents received under a C.I.D. (Emphasis supplied)[2]

H.R. 39 would destroy each of these safeguards specifically provided for in the ACPA by the 87th Congress to protect the rights of the individual, and ward off possible abuses of investigative power. It would extend the scope of the permitted inquiry far beyond what is reasonable and proper, to include investigation of "*any* activities which *may* lead to any antitrust violation," (including possible future violations in addition to those present or past; an open invitation to fishing expeditions); oral and written interrogatories would be unnecessarily authorized in addition to the production of documents; innocent third persons (including natural persons) could be swept into the net of investigation, and perhaps tainted with criminality unnecessarily; and the evidence obtained by the C.I.D. could unfairly be used in other cases or regulatory proceedings totally unrelated to the one for which the C.I.D. was issued. It is NAM's view that each of the amendments proposed in H.R. 39 should be rejected in order to uphold the high standards and the great concern expressed in the 87th Congress for the rights of the individual.

NAM objects to that portion of H.R. 39 which would allow the C.I.D. to be served upon persons (including natural persons) not under investigation or even suspected of an antitrust violation. Such a proposal could traumatize innocent persons who may not be aware that they are not the target of the investigation, since the C.I.D. need only state the nature of the conduct constituting the alleged antitrust violation, a description of the type of information required (documents, oral or written interrogatories) and the name of an antitrust custodian. Furthermore, innocent third parties could suffer economic setbacks as a result of being placed under the "umbrella" of an investigation; for example, if word should leak out to the public, they could become victims of "guilt by association." Clearly, innocent persons should not be forced to spend the necessarily involved time and money unless they are the subject of the investigation.

This particular issue of whether to expand the arm of the C.I.D. to persons not under investigation was dealt with specifically by the 87th Congress, and positions in favor of limiting coverage to "corporations, firms, or associations under investigation" were taken by the American Bar Association[3] and the Attorney General's National Committee to Study the Antitrust Laws.[4]

Mr. MacGregor, a Congressman from Minnesota, expressed serious reservation during the floor debates on S. 167 about the particular proposal which would have given the Attorney General the right to serve a C.I.D. upon any person (including natural persons) not under investigation:

> Much has been said about the need to avoid an unlimited fishing expedition . . . A careful reading of the hearings, and of the testimony of Mr. William Simon appearing on behalf of the American Bar Association, will clearly show the recommendation of the ABA that this power, the power to draft and serve these investigative demands, be limited to *companies under investigation* . . . (Emphasis supplied.)
>
> Thus, Mr. Chairman, at the appropriate time I will move to amend the bill . . . so to insert after the work "persons" the words "under investigation." This would be a legitimate and proper restraint . . .[5]

The MacGregor amendment limiting the reach of ACPA to persons (other than natural persons) under investigation was adopted and became a part of the ACPA as finally enacted. NAM agrees that such a limitation is a "legitimate and proper restraint", and we believe it should be maintained in the ACPA.

NAM is further opposed to amending the ACPA to include within the scope of inquiry "any activity which may lead to an antitrust violation." It is logical and just to allow inquiries for the purpose of ascertaining whether a violation is *presently* occurring, or *has occurred* in the past, but to allow inquiries of *any* activities which *may* lead to future violations would promote unlimited fishing expeditions and deal a great blow to individual freedoms.

Throughout the legislative history of the bill establishing the ACPA, there are numerous statements indicating that the bill was consciously limited to investigations of *past* and *existing* violations only.[6] The issue of whether to include

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[2] *Ibid.*

[3] 108 Cong. Rec. Part Three, March 13, 1962, p. 3999.

[4] Report of the Attorney General's National Committee to study the Antitrust Laws, 1955, p. 343.

[5] 108 Cong. Rec. Part Three, March 13, 1962, p. 4004.

[6] Senate Report No. 451, 86th Cong., 1st Sess., pp. 2, 5, 6, 7; Hearing before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 86th Cong., 1st Sess., pursuant to S. Res. 57 on S. 716 and S. 1003, pp. 2, 10; 105 Cong. Rec. Part 11, pp. 14608, 14612; *United States* v. *Union Oil Company of California*, 343 F.Supp. 34, 35 (1965).

"prospective" violations within the realm of investigation was rejected after opposition was received from the ABA, as well as the Attorney General's National Committee to Study the Antitrust Laws. The Committee's report stated:

"We believe that the use of criminal processes other than for investigation with an eye toward indictment and prosecution subverts the Department's policy of proceeding criminally only against flagrant offenses and debases the law by tarring respectable citizens with the brush of crime when their deeds involve no criminality." [7]

NAM concurs with the view repeatedly expressed throughout the legislative history of the ACPA that inquiries of possible future violations go far beyond the government's reasonable needs, and are entirely susceptible to unwarranted abuse. It is possible that such an enlarged, overbroad scope of inquiry could easily become a prime means of harassment of innocent persons. If this proposal is enacted, we will surely be opening the door to 1984's "big brother". NAM urges you to reject this proposal, and maintain the safeguard consciously placed in the original bill to protect the individual by limiting the scope of the inquiry to past or existing violations.

The Report of the "Attorney General's Committee to Study the Antitrust Laws" also voiced disapproval of any subpena power that would permit prosecuting officers in antitrust investigations to summon sworn oral testimony by placing businessmen under oath. The Committee believed that such authority is readily susceptible to grave abuse, and is unnecessary.[8] NAM concurs with the Committee Report's view that the C.I.D. should be limited to the securing of documentary evidence only. Documentary evidence, which either constitutes the evidence, or contains evidence, is by far the most reliable type of evidence, surely more reliable than individuals with fallible memories or third persons (subpenable under H.R. 39 as mentioned earlier) who might harbor evil motives toward their competitors. Clearly, limiting the C.I.D. to the production of documentary evidence offers an effective safeguard for the right of individuals—this limitation was specifically imposed in 1962 as such a safeguard.[9] It should not be abandoned now.

Once again, similar proposals to those in H.R. 39 were dealt with specifically by the 87th Congress and were consciously rejected. It was a major concern in both Houses that the Justice Department should not be allowed to pass on documents acquired under the C.I.D. procedure to other governmental agencies.[10] During Senate debates, Senators Keating of New York and Ervin of North Carolina expressed serious reservations as to the provisions of then proposed bill S. 716 (S. 167's predecessor) which would have allowed the Attorney General to transfer to other agencies supenaed documents. Senator Keating stated:

"Complaint has been voiced by the ABA and the Association of the Bar of the City of New York to the provisions of this bill which allow the Department of Justice to turn over subpenaed documents to congressional committees or any other agencies . . . There is no justification, it seems to me, for jeopardizing secret processess, developments, research, or privileged matters which might be contained in the material subpenaed by the Attorney General in the process of investigating antitrust cases." [11]

Senator Ervin's complaint was that if the Attorney General obtains the data for one purpose, he should pursue that purpose, and should not undertake to transfer the information he obtains either to the legislative branch or to any other administrative agency, without at least giving the injured person a chance to go into court and protect his rights.[12] But the proposal in H.R. 39 would do exactly what Senators Ervin and Keating feared: it would allow other regulatory agencies to use the evidence obtained with the C.I.D. in other investigations and cases in addition to the specific investigation to which the issued demand relates; the material acquired by the C.I.D. for one purpose, could then be used for purposes totally unrelated to the reasons which induced the original demand, without any regard for the rights of the person subpenaed by the C.I.D. Further, it totally discards the ACPA requirement that material be "relevant", by in turn allowing such information to be utilized in separate proceedings, where it may or may not be "relevant". Accordingly, we strongly urge that this proposal be rejected.

[7] Report, supra, pp. 343, 346.
[8] *Ibid.*
[9] 108 Cong. Rec. Part Three, March 13, 1962, p. 399.
[10] 105 Cong. Rec. Part Eleven, pp. 14611–14613; 108 Cong. Rec. Part Three, pp. 4000–4003.
[11] 105 Cong. Rec. Part Eleven, pp. 14613.
[12] *Ibid.*, p. 14612.

In short, under H.R. 39 many of the safeguards specifically selected by the Congress in its enactment of ACPA would be destroyed—important individual rights would be abandoned. In an expressed desire to protect the individual, the 87th Congress specifically chose to limit the ACPA to:

(1) past or present antitrust violations;
(2) the production of documents only;
(3) subpenaing corporations, organizations, and entities but not natural persons;
(4) allowing the subpenaed information to be used only by the Justice Department,[13] and,

after these limits on the extent of the C.I.D. were circumscribed, Congressman McCulloch stated:

"In summation, it may be seen that the Committee has sought to fashion a workable tool for aiding antitrust enforcement, In so doing, however, the committee has imposed effective safeguards to insure that the tool will not be converted into a weapon." [14]

NAM strongly urges that the proposals in H.R. 39, which would effectively eliminate the above-mentioned important safeguards painstakingly thought out and included in the ACPA when enacted in the 87th Congress, be rejected. We cannot support legislation which would convert the C.I.D. from a "tool" into a "weapon".

Chairman RODINO. Now, we are pleased to have this morning as our first witnesses Eleanor Fox, Esq., and Myra Schubin, Esq., who will appear on behalf of the Association of the Bar of the City of New York.

We are pleased to welcome you, Ms. Fox. I understand you have a prepared statement which we will have inserted in the record in its entirety, and then you may—as I understand you would like to—summarize and then we will question you.

TESTIMONY OF ELEANOR FOX, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, ACCOMPANIED BY MYRA SCHUBIN

Miss Fox. Thank you, Mr. Chairman.

On behalf of the City Bar we are very pleased to accept your invitation to testify here today on H.R. 39. I would like to introduce my colleague, Myra Schubin, who did a major part of the work and thinking on the Trade Regulation Committee's report on H.R. 39.

As you have seen in our report, the City Bar's view of the bill is mixed. We support the bill in part and oppose it in part. We wholly support the view that the Department of Justice should have the necessary power to investigate antitrust violations prior to suit. To this end we support extension of the Antitrust Civil Process Act to allow investigation of mergers prior to their consummation; we support extension to natural persons, but only if important constitutional protections would be granted. We support the Department's power to obtain written interrogatories ancillary and in aid of a document request from persons under investigation.

We do believe that the CID powers should have limits. There is a point at which in our view the usefulness of CID to the Government is minimal, the facts can be learned in other ways, and the opportunity for abuse of personal and company rights is great and is not outweighed by proper government purpose.

Thus, we oppose the use of CID power to obtain oral testimony prior to suit from third-party witnesses. We oppose the extension of the CID power to aid in exploring the amorphous realm of acts that may

[13] 108 Cong. Rec. Part Three, March 13, 1962, p. 3999.
[14] *Ibid.*

lead to any antitrust violations. We strongly oppose an expansive use of the CID power for administrative and regulatory proceedings related to specific suspected violations.

Within these outer limits we have different views and state no position. Some members approach the increased discovery powers with skepticism and cite the past experience of Watergate and fears of bureaucratic abuse; they feel the Department has not shown the need for new and broad powers in these other areas. Other members expect that discovery will be conducted and used in good faith for authorized purposes, and they believe that the Department should have reasonable powers to investigate the existence of suspected violations.

We do, however, take a strong position on one additional point. We believe the bill conspicuously omits—and should include—a variety of available protections for both the persons on whom the CID is served and for the persons under investigation.

Let me summarize briefly the seven important extensions of the CID powers that would be effected by the Act, and make a few comments on them; and then I should like to hear any questions you may have.

First, the extension to incipient violations. The provision would give the Department power to investigate planned mergers; we think it should have that power. We think that the period just prior to the consummation of a merger is precisely the time when investigation is most important. Beyond mergers, however, we oppose the extension. It seems to us that no case has been made for use of the CID powers for the vague category of "activities which may lead to any antitrust violations."

We find this language very broad and disturbing. We do not know what it means. Does it include, for example, the power to investigate into an attempt to attempt to monopolize? The Justice Department's testimony has not suggested one circumstance other than mergers for which this provision is intended, and we think it is properly limited to that activity—mergers.

As to natural persons, we see no reason why the CID power should not be available as against natural persons as well as corporations. However, although we support that extension in principle, we believe that if the power is extended to natural persons, there must be various safeguards. As to safeguards on document discovery, the bill should explicitly make available objection on grounds of self-incrimination.

The third extension is written interrogatories. We believe that written interrogatories are often very useful in aid of a document request; that is, written interrogatories related to the nature and location of documents. Beyond that our members have divergent views, and I express no position.

But, if your committee should approve written interrogatories in principle, we do strongly believe that available protections should be added, including objection on the grounds of self-incrimination and all other grounds available under the Federal Rules of Civil Procedure.

The fourth extension, oral testimony, we would oppose unequivocally without available protections, and even with it the consensus is against the extension. The consensus is that no case has been made out for the Department's right to require oral testimony prior to suit.

The Department, of course, has the right to get oral testimony after suit; it has adequate means of getting the facts in other ways before the suit; and the burden and opportunity for harassment and other misuse, in our view, outweigh marginal benefits.

If the bill is extended to allow oral testimony prior to suit we would strongly urge the addition of various fundamental rights including rights as fundamental as the right of confrontation and cross-examination. The rights that we would include in the bill are set forth in our prepared statement at pages 9 and 10.

I will pass over, for the moment, the fifth extension, discovery from third-party witnesses; and the sixth extension, which is the use of evidence secured through CID powers for other investigations and proceedings. I shall pass to the seventh extension, which is, we believe, enormously significant and one which is underplayed. This is the extension in (i)(2). By negative implication, the provision clearly implies that the Division may use its CID powers to obtain evidence for administrative and regulatory proceedings if it can not get the evidence under procedures of the relevant agency. Mr. Kauper, as you know, would strike the "if" clause, and I think we must address the provision without the qualification. The provision would give the Department the power to use CID's for investigative reasons not related to suspected violation. This is a very far-reaching power. It is far afield from pre-complaint investigation of a probable violation.

However appropriate it may be to an administrative agency, we do not think it is appropriate to an enforcement body. We are particularly concerned about the enactment of this provision in the context of the present form of the bill. The taking of oral testimony from witnesses for use in nonadjudicatory proceedings without the protection of the Federal rules, and with the testifying party having only the most circumscribed rights of objection, provides, in our view, far too much latitude with too few safeguards, and too little relationship to any proper needs of the Department.

I thank you and should like very much to hear any questions you may have.

Chairman RODINO. Well, thank you very much.

I would like to call attention to some of the statements you have made, and in reflecting I would like you to consider the fact that some of the provisions of the Antitrust Civil Process Act of 1962, namely, 15 U.S.C. 1312 (c)(1), and 15 U.S.C. 1314(e) are not changed by the proposed amendments to the act expressed in H.R. 39; and yet, they are not addressed by you in your prepared statement. You state, "The bill conspicuously omits a variety of available protections for the person on whom the CID is served," and then, "important constitutional and personal protections must be extended," and again, "the other protections of the Federal rules, including particularly rule 30, should be available."

Aren't the safeguards that you are talking about and suggesting already expressed in the provisions of the act that I cited and wouldn't they apply to the new investigative tools which are in the proposed legislation?

Miss FOX. Yes, Mr. Chairman. But the existing statute, of course, does not extend to natural persons, and a great many of our suggestions are protections that arise particularly with respect to natural persons.

Also, the protections which we suggest are particularly important if the bill is extended to oral testimony. For example, since there is no right of deposition prior to complaint in the existing law, there is, of course, no right to cross-examine in the existing law because it's not relevant.

Chairman RODINO. In other words, your objection is the fact it doesn't extend to persons, natural persons; is that it?

Miss FOX. No. It is simply that the addition of natural persons, oral testimony, and third-party discovery produces the need for new protections.

Chairman RODINO. Well, wouldn't rule 33 dealing with interrogatories apply, if we add interrogatories to the tools of investigation?

Miss FOX. I worry because the bill itself is inconsistent with application of the Federal rules. For example, the party under investigation would apparently have no notice or knowledge of third-party interrogatory answers implicating the party under investigation. If oral testimony is taken, the hearing could be closed to counsel other than counsel for the party under examination. Suppose that a witness is expected to testify to exchanges of price information by a party under investigation. The party under investigation has no right to notice of the examination and no right to attend and cross-examine. And the person deposed has virtually no right to object.

Chairman RODINO. Well, would you still insist on your position when reading the act we find, "no such demand shall contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum, issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation;" nor, "require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged antitrust violation," and in 15 U.S.C. 1314(e): "to the extent that such rules may have application and are not inconsistent with the provisions of this chapter, the Federal rules of civil procedure shall apply to any petition under this chapter".

Wouldn't they be safeguards?

Miss FOX. The first applies to document demands, not depositions. The bill is in some respects distinctly inconsistent with the Federal rules. For example, the bill says that a witness may not refuse to answer any questions, nor may himself or through counsel interrupt the examination by making objections or statements on the record, except for privilege, self-incrimination and, "other lawful purposes."

Now, I must disregard from my own thinking "other lawful purposes" because I don't know what it means and it is bound to invite controversy.

And I must assume that the specific limitation is going to override the general applicability of the Federal rules, so that counsel would not be able to make a statement on the record, and would not be able to object for reasons available in Federal practice. For example, the normal practice in the southern district of New York is that an attorney can object and even instruct a witness not to answer when the question is very far afield from the issue in the law suit.

First of all, I think there is no right to do so under the bill, by its express language. Second, even the nominal granting of such a right

might be meaningless under this bill. Given the investigative type discovery it would make possible, there may be no way to know the proper limits of discovery.

Even an objection of unreasonableness would probably never be upheld because there would be no limits of the investigation.

Chairman RODINO. Mr. Mazzoli?

Mr. MAZZOLI. Thank you, Mr. Chairman.

I don't have any specific questions of Miss Fox. May I just ask you, Ma'am, you practice law in the area of antitrust and worked with the present law; is that correct?

Miss FOX. Yes. I practice in the southern district of New York. I have worked with the CID law to a limited extent.

Mr. MAZZOLI. Then, let me ask you, these recommendations of the New York Bar are in part your own, your own experience as well as the collective wisdom of the panel; is that how it is constructed?

Miss FOX. The report is the report of the Bar Association. As a matter of procedure, it was initially a report of the Trade Regulation Committee of the Bar Association, which was adopted by the Association of the Bar, and we are here authorized to speak for the Association of the Bar. I am not here to express my personal views.

Mr. MAZZOLI. I understand. Well, what I was really driving at, I guess, I thought your statement made a lot of good sense because one of the personal concerns I have—and I have never practiced in the area of antitrust and I am not particularly astute on these CID's—it does appear that there could be some overreaching, and some mischievous actions taken; and if not mischievous, at least overzealous in the disruption of a person or a business.

I am not saying the committee ought to take all of these, but certainly I think the recommendations and observations you made are worthy of the committee's subsequent attention because they do tend to show the potential here for some difficulties, unless there are certain limitations, or certain leavening put into this formula.

So, I was just curious as to how they came to pass. Presumably, then, those on the panel who worked with this are experienced in the practice?

Miss FOX. Yes. The Trade Regulation Committee is composed of people who basically do a lot of antitrust litigation and consulting, and deal with the antitrust laws in their work and thinking.

Mr. MAZZOLI. Well, thank you very much.

Chairman RODINO. Miss Fox, on page 5 of the bar statement, you state, "We agree that CID's should be available to investigate incipient mergers." And then the statement is qualified by adding, "Beyond mergers, we oppose this provision."

As you know, we have had the Antitrust Division testify on H.R. 39 already, and I don't know whether you are aware of the fact that the Department of Justice does share some of the concerns which are reflected in the statement about the language amending section 2 of the ACPA, and has suggested that present section 2(c) be amended by adding the words, "or in preparation for any activity such as mergers, acquisitions, joint ventures, or similar transactions which may lead to antitrust violation."

Do you think that this language that I have just brought to your attention, which has been suggested by the Justice Department and

the Monopoly Subcommittee staff limits the phrase "or in any activity which may lead to any antitrust violation," on lines 1 and 2 of page 2 of H.R. 39?

Miss Fox. I think, Mr. Chairman, there is no reason to include in such an amendment "may lead to any antitrust violation"; I think that it should be "mergers, acquisitions, or joint ventures that, if consummated, may be antitrust violations."

Chairman Rodino. Would you state that again, please?

Miss Fox. "Mergers, acquisitions, or joint ventures which, if consummated, may be antitrust violations." I see no reason to include the broad, ambiguous language, "which may lead to any antitrust violation." I think that would get into many unnecessary problems.

Chairman Rodino. Mr. McClory?

Mr. McClory. Thank you, Mr. Chairman.

I can understand that this recommendation for additional investigative authority in the Department of Justice could be helpful in developing evidence and providing information. But, could you inform the committee in what respect the Department of Justice is failing at the present time, or are these just suspicions, or do you have any particular instances or cases where they are failing because they don't have this added authority?

Miss Fox. I don't, Mr. McClory, and we as a committee were very disturbed that the Justice Department did not come forward with such instances. We would have felt much more comfortable supporting provisions of the bill if we knew of such instances. Indeed we may have gone further in supporting the bill if the Justice Department had come forward and said, "In this case, and in this case, and in this case I needed this data and couldn't get it; there was no way for us to get it."

Mr. McClory. Well, you have suspicions, or you have a feeling that there could be a better enforcement, or more antitrust cases developed with this authority?

Miss Fox. Let me answer this way. I think there might be more enlightened enforcement with the adoption of the additional provisions we recommend, which may mean some cases are not brought; it may mean that the pre-complaint investigation discloses facts leading the Government not to sue. That might amount to more enlightened enforcement.

Mr. McClory. Are you not apprehensive that perhaps this would just result in satisfying curiosity with regard to operations, without any basic antitrust case?

Miss Fox. We do think that a line should be drawn, and this line drawing would cut off possibilities for abuse. For example, we do not suggest the extension of the act to allow oral testimony.

Mr. McClory. I thank you very much. I did arrive here late, I will have occasion to examine your views and testimony. I thank you very much, and I yield back the balance of my time, Mr. Chairman.

Chairman Rodino. Miss Fox, before I yield to counsel who wants to clarify a point, on page 11 of your statement you state that the application of the new investigative tools to persons not under investigation but who do have information that is relevant to an antitrust investigation would, in the opinion of a number of your members, be generally unnecessary and unduly burdensome since the relevant facts can be learned by less burdensome means.

Haven't we always, in opposing some new provisions, or new procedures, reverted to the general use of the word "burdensome" without being explicit; and could you tell me whether or not there are any specifics that you could apply when you say there could be less burdensome means?

Miss Fox. Yes. I appreciate your concern with the word "burdensome," and we, as a committee, would not have used it alone. In other words, I don't believe it is the sense of the committee that the burden on a witness is any reason why, in itself, the Government shouldn't be granted more power for pre-complaint discovery.

I will address your question specifically, but I just want it to be clear that those who felt that powers were unnecessary and could be used to inflict burden put a stress on the word "unnecessary" and really felt that the Government hadn't made its case for need.

To address your question as to the less burdensome ways in which the Government can get the information: The way, as a practical matter, in which it gets the information most often is by voluntary cooperation. I understand there are some difficult problems in voluntary cooperation. Small competitors in an industry may often have fears of telling on the large companies in the industry, fears—if their communications become known—of retribution. So, maybe some information will not be forthcoming. However, in my experience, if a company feels it is being unduly restricted by another company, and feels that it needs relief, it will very often give the facts to the Justice Department and cooperate to the extent necessary.

In addition to obtaining information through cooperation, the Attorney General has the right, in theory, to get discovery through the FTC. As I understand it, that option is generally not used, and the Justice Department would like the power itself, rather than going through the FTC. There is, of course, also the ability to get the facts directly from the person under investigation through the existing CID power, and, if it is a criminal matter, through grand jury proceedings.

And then, of course, after the complaint is filed, witnesses can be subpenaed.

Those members who felt there should be no extension of CID powers to third-party witnesses basically felt that voluntary cooperation would bring forth most of the facts needed, and that otherwise the direct route to the party under investigation would be satisfactory.

Chairman Rodino. On page 12, you state: "The bill should require that the CID specify whether the person upon whom the subpena is served is under investigation, or is merely a witness." Do you think that this would really comply with the need to assure that the investigative tools are used in a manner to obtain the facts in an expedient manner or to insure that the investigation is finally settled? And, doesn't what you are suggesting really limit the purpose of the CID, and put on an undue restriction?

Miss Fox. I don't think it is an undue restriction. The Justice Department should know whether this person served is under investigation. That does not mean that if the person is first asked for documents as a witness, he cannot thereafter become a person under investigation. I think that subsequent option provides the necessary flexibility.

A person who is testifying—supposing it's oral testimony—really ought to know why he is there. This knowledge might affect his preparation. It might offset the advice he gets from counsel. And simply as a matter of basic fairness, he ought to know why he is there.

Also, this protection directly answers an argument that was made against extension of CID powers to witnesses by the Chamber of Commerce or the NAM—that innocent people called to testify may be under tremendous psychological pressure and may be ostracized as wrongdoers. At least a witness will know when he is only a witness.

Chairman RODINO. Well, but don't the Federal rules really seek a broader purpose in using comparable investigative tools to get an accurate acquisition of the facts, and to speed things up? Aren't you trying to bring about a distinction between the use of discovery depositions and trial depositions in order to begin to restrict and confine?

Miss FOX. Mr. Chairman, under the Federal rules one absolutely knows whether he is a witness or a party. There is no way for him not to know. As to your specific question, yes; the philosophy of the Federal rules is that all the facts should come out. We, as a committee, believe that all the facts should come out.

Chairman RODINO. Excuse me. Aren't the CID's subpenas now intended to assure the coming out of the facts?

Miss FOX. Yes. If properly used a CID should get the facts out. I don't really think specification of whether a person is a witness would slow things down, or tend to prevent the facts from coming out. I think the facts will come out just as fast if the CID specifies whether a person is under investigation or not.

Chairman RODINO. Mr. Mazzoli?

Mr. MAZZOLI. Thank you, Mr. Chairman.

I was going to ask, Miss Fox, a rather technical question. In your recollection of the meetings that may have taken place in formulating these recommendations today, was there a grudging acceptance of the fact that there was a need for furtherance of the CID route, or was it sort of a lusty desire to really give the Justice Department more; or was this just, again, begrudging and was there no real enthusiasm?

I'm just kind of curious if you have a real recollection about the tenor of the meeting.

Miss FOX. The Trade Regulation Committee is a diverse group. We come with different points of view. I say quite frankly that some come with a presumption on the part of the Justice Department, saying, if a tool is appropriate to get out the facts, then it probably should be authorized. Those who come with this view generally feel that the Justice Department is going to use its tools fairly and properly, and that it doesn't really have the resources for scrounging around for details it doesn't need.

Others have a different point of view. If the Justice Department needs more power, they say, it had better make a strong showing of need; and it has not. They believe that power should be granted sparingly. They fear its abuse.

Mr. MAZZOLI. So, you ran the whole gamut.

Miss FOX. Yes, we ran the whole gamut. We gave it a lot of consideration, with people making all the arguments for one side and the other.

Mr. MAZZOLI. Very good. Thank you, that was just sort of a little background for my help. Thank you very much.

Mr. RODINO. Mr. Falco?

Mr. FALCO. Miss Fox, on page 2 of your statement you express support for, "The Department's power to obtain written interrogatories ancillary to a document request."

You expand on that in pages 6 and 7. This is a very limited endorsement for the use of interrogatories during an investigation during discovery. Doesn't rule 33 provide, "Interrogatories may relate to any matter which can be inquired into under rule 26(b), and the answers may be used to the extent permitted by the rule of evidence"?

Miss Fox. That's right. To the extent our committee states a position on written interrogatories, it's very limited. The whole area of substantive written interrogatories is an unresolved point, because of our differences of view.

Of course, under the Federal rules you can get very broad discovery with written interrogatories, and the Justice Department can, of course, do so after the action has started. The question is whether it ought to be able to get all of this discovery prior to starting the action.

Mr. FALCO. Well, I notice on page 6 you report that some of your members supported a limited use of interrogatories, endorsed by the Association because they believe, "That helpful facts will be volunteered" to Federal antitrust enforcers.

Isn't this anachronistic in light of the extensive testimony in 1962 why the original act was necessary in that the Justice Department was not getting cooperation; potential targets for investigation were not cooperating; and that in the perspective of the last 13 years there has been a well known rise in document destruction, particularly in the antitrust area? I will mention three that come to my mind, United States against ITT; United States against IBM, destruction of the Telex Code; and the AMPI case out in the Midwest. Concerning your assumption that people will be volunteering during investigations, isn't that outmoded both in light of the issues in the 1962 hearings, and in the subsequent facts in the course of antitrust investigations in the next 13 years, to 1975?

Miss Fox. I'm not sure at all that cooperation is outmoded. And I doubt that destruction of evidence has increased—although any such destruction is egregious. I don't believe all your examples reflect destruction of evidence. For example, in the IBM situation there was destruction of attorneys' work product, not the documents themselves. This raises serious questions that many people debate, but it isn't equivalent to destroying the basic data.

I believe that companies are better advised than ever, and are more frightened than ever, because of available penalties, to destroy evidence. There will always be some document destruction, but I think it is happening less.

However, I don't think that the question of document destruction goes to the question of whether substantive written interrogatories ought to be allowed.

Mr. FALCO. Well, perhaps I have a broader question. Throughout your statement it appears to me that it is the basic position of the City Bar that investigative depositions and investigative interrogatories ought to be put into a full environment of adversary proceedings. Would that be a fair summary?

Miss Fox. That is right. We believe that prior to complaint it is probably unnecessary to have depositions and use substantive written interrogatories; but if they are endorsed, it should be adversarial; you should let the person under investigation be present and hear the charges made against him.

Under the bill, as it now stands, you can have a third-party witness testifying against a person under investigation. The person under investigation is not notified of the proceeding; he doesn't know anything about it. This testimony not only can be used by the Justice Department; it can be sent to wholly unrelated agencies without notice or knowledge of the person under investigation.

Now, it may be factually accurate testimony, and it may be useful testimony, but it may be that it is not factually accurate and the person under investigation never has the opportunity even to know what it says.

Mr. Falco. Well, I just like to postulate this assumption, if the bill remains as it is, without the adversarial environment or safeguards that your association deems is necessary, wouldn't, if a complaint or a grand jury indictment follows an investigation, a defense attorney have extensive power to discover what was obtained in the investigation by way of a bill of particulars, interrogatories, depositions, et cetera, so that most of your concern for the adversarial environment is only merely delay if a case results; and, doesn't exist and is moot if no case results?

Miss Fox. There may be some rights to obtain the information. There is a question whether a deposition taken of third-party witnesses would or should be within the Freedom of Information Act; and I believe that Mr. Kauper said it should not be.

However, you are assuming that an indictment or a case is properly brought. There might be reliance on inaccurate testimony for purposes of bringing suit; or inaccurate testimony may be used against a person in an administrative proceeding without his ever knowing it.

Mr. Falco. Well, before proceeding I would just like to be clear: Your position is that you really would like to move the adversarial setting into the investigative stage?

Miss Fox. Well, let me step back. First of all, we would not like to see all of the traditional post-complaint powers extended to pre-complaint proceedings. We would like to reserve the adversarial stage for the period after the complaint is issued. We do think that the Department ought to have the powers necessary to get the basic facts before a complaint is brought, but we do think that it can get the facts necessary to know whether a complaint should be brought by available means plus the extensions that we recommend should be adopted.

Mr. Falco. Mr. Chairman, may I have a few more minutes?

Mr. Mazzoli. Certainly.

Mr. Falco. I would like to continue the analog or comparison between CID tools and the tools available through discovery, to ascertain some principles that are common to both. For example, in discovery practice, doesn't the person wanting, or seeking, to take a deposition merely serve notice of taking of deposition, with the burden being on the other party, the proposed deponent, to seek a protective order if they have some reason why they think the deposition shouldn't be taken?

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Miss Fox. That's right.

Mr. Falco. Wouldn't that also be available to the person under investigation, or the proposed deponent in the investigative CID deposition?

Miss Fox. We believe it should be available.

Mr. Falco. Would your anxiety be assuaged if it were assumed that the provisions of the act not changed by the bill would continue to apply?

Miss Fox. I worry about the provisions of the bill inconsistent or arguably inconsistent with the Federal rules.

Mr. Falco. But the common principle is that the person being served with the order to be present, whose deposition will be taken, has the burden of going to the court to seek a protective order, doesn't he?

Miss Fox. Yes, that's right.

Mr. Falco. And under the ACPA procedures, if a person wants to resist any investigative tool, they just don't have to respond, so that the Attorney General has to make application to the court; or, alternatively the target of the CID has the option, already, which is merely entrenched under the bill, of going to the court in the first instance and taking the initiative of seeking a protective order or a motion to quash whatever investigative tool is served. Isn't that correct and aren't burdens thus delineated?

Miss Fox. In theory, yes. My colleague, Mrs. Schubin, just mentioned an important point. If the bill does extend, as it now does to allow investigative discovery—that is, discovery without a view to bringing an action for a specific, suspected violation—there is no way even to apply fundamental concepts of the Federal rules. There are virtually no proper limits of discovery. And there is no way for the party served to know his relationship to the investigation. In other words, the right to move to quash would be an empty right, because the motion would virtually never be granted.

Mr. Falco. Well, the bill does provide for rendering inapplicable the Publicity in Taking Evidence Act, which covers depositions in a civil case; isn't that true?

Miss Fox. I didn't hear you, I'm sorry.

Mr. Falco. The bill presently renders inapplicable the Publicity in Taking Evidence Act for investigative depositions unlike discovery depositions for which the congressional policy that depositions in discovery should be open to the public, 15 U.S.C. 30, will continue to apply, doesn't it?

Miss Fox. Yes.

Mr. Falco. Is the substance of what you have been saying that you oppose rendering inapplicable the Publicity in Taking Evidence Act to investigative depositions?

Miss Fox. The association has expressed no views on it.

Mr. Falco. I think the chairman will agree that if you have further comments, you could submit them for the committee.

Mr. Mazzoli. They would be received by the committee and made part of the record any further comments you wish to make, or amplification of questions that occurred today; they would be welcomed and would be made part of our record.

Counsel for the minority, Mr. Polk?

Mr. Polk. Mr. Chairman, thank you.

Miss Fox, I would like to point out that at least in regard to one aspect of section 30, title 15, you have taken a position, I believe. You said that you oppose the exclusion of the target of the investigation from the taking of oral testimony. So, to the extent that the taking of oral testimony would be in secret——

Miss Fox. That's right.

Mr. Polk. I believe you oppose——

Miss Fox. That's right; we believe the testimony about a person under investigation should not be secreted from the person under investigation. My reservation extended to other persons.

Mr. Polk. Fine. I would like to perhaps give you an opportunity to explain further what seems to be a fundamental premise of much of your position, and that is that the Department of Justice is and ought to be merely a law enforcement agency. Very often you have simply said, "The granting of this power would be inconsistent with the function of the Department of Justice merely to enforce the law; it shouldn't be like the FTC that has investigative powers." Why shouldn't it be?

Miss Fox. You are right—it certainly is the consensus, and more or less the assumption, of our committee that the Justice Department is an enforcement agency and should not have investigatory functions regarding competition policy.

There are now two antitrust organizations in Government: the FTC and the Justice Department. The FTC has investigative powers and duties generally, along with its adjudicatory duties and powers.

The Justice Department is in the executive branch. It is basically an enforcement body. It has limited resources, although efforts are being made to get it more. There are many potential cases that should be investigated. There are policy questions to be dealt with: What cases should be brought? Investigations of what probable violations should be pursued? What part of its resources should be devoted to hard-core violations? What part should be devoted to developing areas of the law—structural monopoly, whatever performance of these functions requires thinking, direction, and commitment of money and staff. These are the things that, in our view, should basically occupy the Justice Department.

Mr. Polk. I note that you do not mention the Department's participation in regulatory agency proceedings.

Miss Fox. I did not.

Mr. Polk. Does your committee frown on that?

Miss Fox. I'm sorry?

Mr. Polk. Does your committee frown on that participation?

Miss Fox. No. The Justice Department is and should be extraordinarily knowledgeable in the antitrust-regulatory area, and has expertise to contribute in that area of the law.

Functions of some administrative agencies are intimately related to those of the Department. An example is the once pending ITT–ABC merger. The Justice Department participated before the FCC. That seems logical. Also, the Justice Department participates in shaping the direction of regulatory laws insofar as they reflect or relate to competition policy—the trucking law, the airlines law, et cetera. They should be doing this thinking and making these contributions. That is a proper use of their expertise.

However, whether the Division should be conducting grassroots investigations with a veiw to formulating policy, as opposed to lending their expert point of view that they have gained from their enforcement function, is another question. It is the committee's view that the Division is not the body that ought to be doing grassroots exploratory investigations.

Mr. POLK. So, although you believe the Department of Justice serves a valuable purpose in regard to participating before these agencies, you don't believe it's so valuable that they should have the use of CID authority with respect to that. Is that your position?

Miss FOX. No. I don't derogate the Department's function before agencies. I simply do not think that it is the body that ought to extend its resources to grassroots investigations for administrative reasons, as opposed to bringing actions.

Mr. POLK. Well, if we may move from policy to a more technical point, with regard to section 5(b) of the current act—I believe counsel referred to that earlier—the target of a CID may petition the court for an order modifying or setting aside such a demand. At that point, there is rule 26 of the Federal Rules of Civil Procedures regarding protective orders; is that applicable in view of section 5(e) of the current act which says, "To the extent that such rules may have application and are not inconsistent with the provisions of this chapter, the Federal Rules of Civil Procedure shall apply to any petition under the chapter."?

Miss FOX. On the face of the present bill there are many areas where the Federal rules would necessarily have limited application because of specific provisions inconsistent with application of the rules. One would be the limitation of the right to object to deposition questions. Another would arise from the fact that the bill allows use of the CID power for administrative and regulatory proceedings, so that one cannot know the limits of the investigation; in fact, there may be virtually no limit.

Mr. POLK. Of course, under the present act the limits are with regard to a petition that has been filed.

Miss FOX. I would have to study the present act to see whether there may be provisions inconsistent with application of the Federal rules. I would worry that there may be inconsistencies.

However, the issue comes up in its most troublesome form only when you extend the CID powers to natural persons, oral depositions, and investigative discovery.

Mr. MAZZOLI. The gentleman's time has expired.

I would like the record to reflect that Ms. Jordan and Mr. Railsback are with us. We will now recess, to reconvene at 10:30, following the quorum call.

[Whereupon, at 10:15 a.m. a recess was taken until 10:35 a.m.]

Mr. MAZZOLI. The committee will be in order. If I understand correctly, Miss Fox, you have some further words and further statements that you wish to make a matter of record?

Miss FOX. Yes, Mr. Chairman. A number of the members of the committee raised questions about the applicability of the Federal rules.

Section 5(e) provides that the Federal rules should be applied to the extent that they may be applicable and are not inconsistent.

I think that the words of 5(e) might be clarified. But, passing that for a moment, I think that a provision mandating that the Federal rules apply where they are not inconsistent with any provision of the act would be generally sufficient if there were no pre-complaint right to oral testimony and no right to use the CID for regulatory and administrative discovery. If you wish to allow administrative or regulatory use, there is no easy way to make Federal rule protections applicable. If you wish to allow oral discovery, we think inconsistencies with the rules that appear on the face of the bill should be cured. These include the provisions disallowing the rights of objection and cross-examination, and contemplating no notification when a third-party witness is called to testify.

Mr. MAZZOLI. Are those inconsistencies a matter of draftsmanship?

Miss FOX. Both a matter of draftsmanship and of policy.

Mr. MAZZOLI. Policy?

Miss FOX. There are important policy questions raised—the question of whether the person under investigation has the right to get notice to come and cross-examine; that is an important question; whether he has the right to object—assuming that he is there either because he is under investigation or the bill is changed; and whether his counsel has the right to make a statement on the record. These are matters of policy. They are matters regarding the fundamental right to counsel.

Mr. MAZZOLI. That is for this committee to decide.

Miss FOX. That is right.

The argument we have heard against the right to cross-examine, and against the right to make statements on the record, is that defense counsel will so clutter the record and use strategies to complicate and delay that the Government will never complete pretrial discovery. Of course, that may be a possibility; counsel may use strategies for delay; that is a risk; but the committee believes that the right to cross-examine and the right to counsel are so fundamental that they should be extended.

Mr. MAZZOLI. Well, we thank you very much. Does counsel want to pursue this?

Well, if not, we thank you very much for your testimony. And, as I mentioned earlier, the subcommittee would be delighted to receive any further statement that you might have, an afterthought, or upon reflection you might wish to add, to amplify your testimony today.

We thank you very much, you and your colleague, for your help today.

Miss FOX. Thank you.

[The prepared statement of Eleanor Fox follows:]

STATEMENT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK BY ELEANOR M. FOX, CHAIRPERSON, COMMITTEE ON TRADE REGULATION

My name is Eleanor M. Fox. I am Chairperson of the Committee on Trade Regulation of the Association of the Bar of the City of New York.

The Association of the Bar of the City of New York (which I shall call the "City Bar") consists of more than 10,000 members, many of whom practice in the field of antitrust among others. The City Bar includes attorneys in private practice representing plaintiffs and defendants, and it includes attorneys who are serving or have served with the Department of Justice or the Federal Trade Commission.

On behalf of the City Bar, I am pleased to accept your invitation to testify on H.R. 39.

H.R. 39 would broaden the Department of Justice's pre-complaint discovery powers in a number of important respects, and it may be read to give the Department new investigatory powers as well.

The City Bar's view of the bill is mixed; that is, it supports the bill in part and opposes it in part. It wholly supports the view that the Department of Justice should have the necessary powers to investigate antitrust violations prior to suit. Indeed, it believes that sufficiently full and careful pre-complaint investigation may often result in a decision not to sue.

To advance this end, the City Bar supports an extension of the Civil Process Act to allow investigation of mergers prior to their consummation; it supports extension of the CID powers to natural persons under investigation if important Constitutional and other personal protections are extended, and it supports the Department's power to obtain written interrogatories ancillary to a document request from persons under investigation.

However, the City Bar believes that the CID power should have limits. There is a point beyond which, in our view, the usefulness to the Government of this aid in antitrust enforcement is minimal; the necessary facts can be learned in other ways, and the opportunity for abuse of personal and company rights is great and is not outweighed by a proper Governmental purpose. Thus, we oppose the use of the CID power to obtain oral testimony from third party witnesses. We oppose the extension of the CID power to aid in exploring the amorphous realm of acts that "may lead to any antitrust violation"—a grant of authority we believe more nearly suited to investigative and regulatory bodies than to enforcement bodies. And we oppose an expansive use of the CID power for the purpose of getting evidence in Federal administrative and regulatory proceedings.

Within these outer limits, we have widely differing views. Some members approach the increased discovery powers with skepticism; cite the experience of Watergate in expressing fears of bureaucratic abuse, and feel that the Attorney General and Assistant Attorney General have not shown that such potentially far-reaching pre-complaint discovery is needed. Other members of the Committee expect that discovery will be conducted and used in good faith for authorized purposes, and believe that the Department of Justice should have all reasonable powers to investigate, and confirm or controvert, the existence of suspected violations.

We do, however, take a strong position on one additional point: We believe that the bill conspicuously omits a variety of available protections for the persons on whom the CID is served and for the persons under investigation. For example, one whose deposition is taken may "not refuse to answer any question, nor by himself or through counsel interrupt the examination by making objections or statements on the record," except that he may refuse to answer on grounds of privilege or self-incrimination; and the person under investigation is entitled to no notice of depositions of third party witnesses and has no right to appear and cross-examine these witnesses—even though the testimony so obtained may later be used against him without his knowledge before a wholly different body on a wholly different matter. We believe that if new powers of the type proposed are to be legislated, important Constitutional and personal protections must be extended to the persons from whom discovery is sought and the persons under investigation.

ANALYSIS OF THE PROPOSED POWERS

There are seven important respects in which the bill extends existing law, and I would like to deal briefly with each of these.

1. Investigation of incipient violations

H.R. 39 would extend the scope of the Department's pre-complaint investigation to "any activity which may lead to any antitrust violation." Title II of S. 1284, the bill's counterpart in the Senate, would further extend this provision by permitting the Department to ascertain whether any person "is *about to* engage in . . . any activities which may lead to any antitrust violation."

This provision would give the Department CID powers to investigate planned mergers and all other inchoate violations.

We agree that CIDs should be available to investigate incipient mergers. The CID should not be unavailable merely because the merger has not been consummated; indeed, the period just prior to consummation is precisely the time when investigatory powers are most important.

Beyond mergers, we oppose this provision. No case has been made for extension of the CID powers to the vague category of "activities which may lead to any antitrust violation." The Department of Justice, in the testimony on its behalf, has not even suggested a circumstance, apart from mergers, for which this language is designed. Much less has it shown need for powers of discovery into these undefined prospective violations.

2. Natural persons

There seems to us to be no reason why pre-complaint discovery available against corporations and other business entities under investigation should not also be available against individuals under investigation. In principle, we support such an extension. However, we worry about the lack of safeguards to protect the rights of individuals and we cannot support the extension unless safeguards are accorded.

With respect to document discovery, we note that the proposed legislation does not provide any right to object on grounds of self-incrimination. To require a natural person to produce documents that might be self-incriminating may create Constitutional problems if there are no provisions for immunity. We believe it should be made clear that objection on the grounds of self-incrimination is available in a demand for production of documents.

3. Written interrogatories

Written interrogatories may often be necessary in aid of and ancillary to a document request. With addition of certain safeguards we support extension of CID powers over persons under investigation to include such discovery rights.

As to more substantive written interrogatories, we express no view. Some members are not convinced that the Department has a need for this pre-complaint discovery. They believe that interrogatories are not likely to produce facts damaging to the putative defendant, that helpful facts will be volunteered, and that any tangential utility of substantive written interrogatories is outweighed by a large potential for burden and abuse. Others view written interrogatories as a potentially important pre-complaint aid that ought to be available for such occasions as the Department should find appropriate.

If you support the principle of written interrogatories addressed to natural persons, we strongly urge that objection on the grounds of self-incrimination expressly be made available; and we urge that the answering party (corporate or natural) be accorded the other basic protections of the Federal Rules of Civil Procedure.

4. Oral testimony

The provision for the taking of oral testimony pursuant to a CID is probably the most far reaching and controversial of the proposed amendments to the Civil Process Act.

We would oppose this power unequivocally without the addition of important protections. Even with such protections, our consensus is against this extension on the grounds that (1) no case has been made for the need for oral testimony prior to suit, and (2) the burden, and the opportunities for harassment and other misuse, outweigh possible marginal benefits to the Government.

In arguing for extension of the CID powers to cover oral testimony, the Department of Justice cites, among other things, the fact that similar powers have been given in the antitrust field to the Federal Trade Commission.

The analogy to the Federal Trade Commission is not helpful. The Federal Trade Commission has important investigative functions, including those relating to general economic effects of acts, practices and business structure, while the Division's responsibilities are essentially for enforcement. Broad powers, similar to those of the FTC, were considered and rejected prior to enactment of the existing Antitrust Civil Process Act. The Attorney General's National Committee to Study the Antitrust Laws stated the following recommendation in 1955:

"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 safeguard. Such authority is alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary." [1]

If, however, you should favor the use of the CID to compel oral testimony, we have strong recommendations for the addition of protections.

(1) As the bill now stands, all persons under investigation but not testifying, and their counsel, may be excluded from the examination. Indeed, they are not entitled to any notice of it. We believe that all persons under investigation or their counsel should receive reasonable notice of the examination and should be entitled to attend and cross-examine. These are fundamental rights.

(2) The bill now gives the deponent only a limited right to obtain a copy of his testimony; for "good cause" he may be limited to inspection of his transcript. There is no right given to any person under investigation to obtain a copy of a transcript, unless he was the deponent. We believe that the deponent and all persons under investigation should be permitted to receive a copy of the testimony.

(3) The bill provides that the deponent "shall not refuse to answer any questions, nor by himself or through counsel interrupt the examination by making objections or statements on the record," except for "privilege, or self-incrimination, or other lawful grounds." We believe that the deponent or his counsel should be permitted to make all objections permissible under the Federal Rules; that he should be permitted to refuse to answer in situations appropriate in federal practice; and that there should be no ban against statements on the record. The bill as it now stands is an undue limitation on the right to counsel.

(4) The bill provides no right to review, correct or certify testimony. The deponent should have these rights.

(5) The other protections of the Federal Rules, including particularly Rule 30, should be available. This would include the right to move to terminate or limit testimony on a showing that the examination is being conducted in bad faith or to annoy, embarrass or oppress.

5. Discovery from witnesses

The proposed power to compel testimony and get other discovery from persons not under investigation, but "with information relevant to" one, is similarly controversial. Analogous language was contained in prior versions of the original Antitrust Civil Process Act and was eliminated, apparently on the grounds that it is unfair to subject a witness to the burdens of pre-complaint discovery, and that there is generally no need for the extension because in most cases witnesses are cooperative.

While a number of our members would grant limited rights of pre-complaint discovery against witnesses—particularly if restricted to document requests and possibly also to written interrogatories, a number of others believe the extension generally unnecessary and unduly burdensome.

As to the provision extending the CID powers to allow oral testimony from parties not under investigation, we oppose it. We think the relevant facts can be learned by less burdensome means and without such an expensive grant of powers.

If you should support the proposed extensions regarding third party witnesses, we strongly urge that certain substantive protections should be accorded and certain technical changes should be made. These include:

(1) The bills should require that the CID specify whether the person upon whom it is served is under investigation or is merely a witness.

(2) All persons under investigation should have the right to obtain copies of all written discovery, subject to deletion of confidential proprietary information as necessary, and they should be notified of all depositions of witnesses and should be given the right to attend by their counsel, to cross-examine, and to obtain a copy of the transcript of testimony.

(3) The witness served with a CID should have the benefit of all the protections we urge for persons under investigation.

[1] The Antitrust Division challenges this characterization of its role, stating that although it is primarily a law enforcement agency, in recent years it has become one of the prime advocates of competition policy. If the new powers are sought with a view towards development of policy rather than investigation of violations, the bills may have a broader reach than they are commonly understood to have.

6. Use of evidence secured through CID powers to investigate violations in other investigations, proceedings and cases

The Department's main thrust in support of this provision appears to be economy; *i.e.*, that it would be wasteful to require the Department and administrative agencies to duplicate evidence already in the hands of the Department.

We support the concept that the Department should have the right to use documents secured in one investigation in a related investigation, proceeding or case. Thus, if the Department obtains documents from ITT to investigate an ITT–ABC merger, it should be free to use those documents in connection with its participation in FCC proceedings regarding the same matter. Beyond this, however, many of our members fear that the provision is a license to the Department to create a dossier on companies and individuals for unspecified future use. We worry, too, about the loss of confidentiality of proprietary documents thus used.

If you favor this amendment, we believe that the bill should be made clear that the CID is to be used only for an authorized, specified purpose (that is, investigation of a certain suspected civil violation); and if it becomes necessary or appropriate to use the discovery so obtained in other proceedings, reasonable notice of such intended use should be given to the party from whom the discovery was taken and the person under investigation.

7. Use of CID power to get evidence for administrative and regulatory proceedings

H.R. 39 provides that:

"The Antitrust Division, while participating in any Federal administrative or regulatory agency proceeding, shall not employ the authority granted by this Act to obtain information or evidence for use in such proceeding where an adequate opportunity for discovery is available under the rules and procedures of the agency conducting the proceeding."

The provision implies that the Division *may* use its CID powers to obtain evidence for use in administrative and regulatory proceedings where there is no adequate opportunity for discovery under the procedures of the relevant agency. The Hart-Scott Bill, S. 1284, would specifically permit the Division to utilize CID powers to obtain information for use in regulatory agency proceedings, and Assistant Attorney General Kauper has endorsed this approach over that contained in H.R. 39.

We strongly oppose the provision, both for its express language and the far-reaching authority it implies. We do not believe that the CID powers should be available for such administrative and regulatory purposes. We are particularly concerned about the enactment of this provision in the context of the present form of the bill. The taking of oral testimony from witnesses for use in legislative proceedings, without the protections of the Federal Rules, and with the testifying party having only the most limited right of objection, provides in our view far too much latitude with too few safeguards and too little relationship to proper needs of the Department.

CONCLUSION

We appreciate the work that has gone into this bill. We believe, as the bill suggests, that the Department of Justice should have the power to obtain the facts necessary to a well-considered determination of whether to bring antitrust litigation. To the extent we are convinced that it needs broader powers to obtain these facts, we support extension of the Antitrust Civil Process Act, qualified by important Constitutional and other protections.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036

Report on

PROPOSED AMENDMENTS TO THE ANTITRUST CIVIL PROCESS ACT

(S. 1284; H.R. 39)

By The Committee on Trade Regulation

INTRODUCTION

S. 1284 and H.R. 39 would amend the Antitrust Civil Process Act to increase the Justice Department's powers of pre-complaint discovery. The Department now has the power to compel production, by corporations and other business entities under investigation, of documents relevant to civil antitrust violations. This procedure, involving Civil Investigative Demands ("CIDs"), would be expanded by the proposed legislation to allow pre-complaint discovery: (1) against natural persons as well as legal entities, (2) by written interrogatories and oral deposition as well as documents requests, (3) from third party witnesses as well as parties under investigation, and (4) regarding incipient as well as completed violations. Also, the bills would allow attorneys in the Antitrust Division to use the information so obtained in actions, proceedings, or investigations in which they appear other than the one for which the demand was issued, including proceedings of other agencies; and they would allow the Department to use CID powers to obtain evidence for use in administrative or regulatory proceedings in which it is participating.

The bills conspicuously omit a variety of available protections for the persons on whom the CID is served and for the persons under investigation. For example, one whose deposition is taken "shall not refuse to answer any question, nor by himself or through counsel interrupt the examination by making objections or statements on the record" [except he may refuse to answer on grounds of privilege or self-incrimination]; and the person under investigation is entitled to no notice of depositions of third party witnesses and has no right to appear and cross-examine such witnesses – even though the testimony so obtained may later be used before a wholly different agency on a wholly different matter.

Federal Legislation Report No. 75-3 (June 20, 1975).

The Committee supports the view that the Antitrust Division should have reasonable access to the facts necessary for proper antitrust enforcement. It believes that the Division should (and therefore must have the necessary powers to) investigate prior to suit the facts underlying a violation; indeed it believes that sufficiently full and careful pre-complaint investigation may often result in a decision not to sue.

To advance these ends, the Committee supports an extension of the Antitrust Civil Process Act to allow investigation of mergers prior to their consummation; it supports extension of the CID powers to natural persons under investigation if important Constitutional and other personal protections, detailed below, are extended, and it supports the Department's power to obtain written interrogatories ancillary to a document request from persons under investigation.

However, the Committee believes that the CID power should have limits. There is a point beyond which, in our view, the usefulness to the Government of this aid in antitrust enforcement is minimal; the necessary facts can be learned in other and better ways, and the opportunity for abuse of personal and company rights is great and is not outweighed by a proper Governmental purpose. Thus, the Committee opposes the use of the CID power to obtain oral testimony from third party witnesses, and most members of the Committee would not support extension of the CID powers to oral testimony even of companies under investigation. The Committee opposes the extension of the CID power to aid in exploring the amorphous realm of acts that "may lead to any antitrust violation" – a grant of authority we believe more nearly suited to investigative and regulatory agencies than to enforcement bodies. And the Committee likewise opposes an expansive use of the CID power for the purpose of getting evidence in Federal administrative or regulatory proceedings.

Within these outer limits, the members of the Committee have differing views on the appropriate scope of a revised Civil Process Act – whether, for example, written interrogatories not ancillary to a document request are reasonably necessary and should be authorized; whether CID discovery against third party witnesses should be permitted, and whether discovery so obtained should be available for use before other agencies. Some members of the Committee approach such increased powers of the Department with skepticism; cite the experience of Watergate in expressing fears of bureaucratic abuses, and feel that the Attorney General and Assistant Attorney General have not shown that such potentially far-reaching pre-complaint discovery is needed. Other members of the Committee expect discovery to be conducted and used in good faith for authorized purposes, and believe that the Department of Justice should have all reasonable powers to investigate, and confirm or controvert, the existence of suspected violations.

The Committee strongly urges that, if new powers of the type proposed are to be legislated, important Constitutional and personal protections must be extended to the persons from whom discovery is sought and the persons under investigation.

HISTORY

Prior to the enactment of the antitrust Civil Process Act in 1962,[1] the Justice Department had four possible methods of obtaining information on which to base a civil antitrust suit: voluntary cooperation,[2] grand jury investigation,[3] the pre-complaint investigatory powers of the Federal Trade Commission, on request of the Attorney General,[4] and the bringing of suit and then using the discovery provisions of the Federal Rules of Civil Procedure.[5] The present Antitrust Civil Process Act can be traced back to the 1955 report of the Attorney General's National Committee to Study the Antitrust Laws, which found the above methods inadequate and endorsed a grant to the Department of Justice of Greater investigative authority in civil antitrust matters through the vehicle of the Civil Investigative Demand (CID).[6] The Supreme Court gave further impetus to this proposal when it held in *United States* v. *Procter & Gamble*[7] that the Justice Department's proceeding by way of grand jury investigation in instances in which it had no intent to bring a criminal suit constituted an abuse of process.

Bills to grant pre-complaint discovery powers were introduced in the 84th through 87th Congresses,[8] and, in 1962, after extensive hearings, the Antitrust Civil Process Act was passed in a form closely following the recommendations of the 1955 Attorney General's Committee's report.

In its present form, the statute gives the Antitrust Division the power to compel a prospective civil defendant (other than a natural person)[9] to produce documents at the investigative stage of a proceeding before a complaint has been filed. The demand must state the nature of the conduct constituting the alleged violation and must describe the documents to be produced with sufficient particularity to identify them fairly.[10] The demand may not seek privileged documents, nor may it contain that which would be considered unreasonable if contained in an antitrust grand jury subpoena.[11] Examination of the documents produced in response to the CID is restricted to the Department of Justice,[12] and the original documents are to be returned on request if no case or proceeding arising from the investigation has been instituted within a reasonable time.[13] The Act provides for enforcement of the demand by the Department[14] and for the testing of its sufficiency in the federal district court by the company served.[15]

The constitutionality of the Act under the Fourth Amendment's prohibition against unreasonable search and seizure was upheld in *Petition of Gold Bond Stamp Company.*[16]

Further investigative powers were sought by the Department in 1974 when, in response to the President's anti-inflation message to Congress urging a "return to the vigorous enforcement of the antitrust laws" as one means of increasing productivity and containing prices,[17] a bipartisan bill (H.R. 13992) was introduced by the Chairman of the House Committee on the Judiciary and his Republican counterpart. No hearings were held on the bill during the 93rd Congress and it was reintroduced in the 94th Congress as H.R. 39. In March of 1975, Senators Hart and Scott included a similar but broader proposal as part of their comprehensive antitrust improvements bill, S. 1284,[18] and on April 21, 1975, Senator Fong, for himself and Senators Hart and Scott, introduced S. 1637, a duplicate of H.R. 39.

The proposed legislation seeks to extend the Department's civil investigative powers in the important respects detailed on page 1 *supra*.[19]

NEED FOR THE LEGISLATION

The basic rationale in support of the bills is contained in the Attorney General's letter of April 4, 1974 to the Speaker of the House accompanying the predecessor bill in the 93rd Congress, H.R. 13992.[20] The letter advises, first, that the legislation seeks (1) to correct the decision in *United States* v. *Union Oil of California*,[21] which held that the Department could not issue a CID to investigate a merger which had not yet been consummated because no violation of law had occurred, and (2) to clarify that evidence obtained by a CID may be used in cases other than those arising out of the investigation that gave rise to the CID.[22] However, the major purpose of the legislation, as stated in the Attorney General's letter, is "simply [to] make available to the Attorney General the same antitrust investigatory powers in civil investigations that he now has in criminal investigations, and provide him with authority similar to that of the Federal Trade Commission."[23] The letter also notes that similar powers have been granted to a number of states' Attorneys General in investigating violations.[24]

The Attorney General criticizes the limitations placed in the 1962 legislation as having "left the Act far from meeting essential investigatory needs of the Department's Antitrust Division; and he asserts that "the same reasons that supported enactment of the Civil Process Act speak for the Act's expansion." However, we note that a number of the additional powers proposed by the legislation had appeared in bills for the initial Civil Process Act and were deleted before its enactment.[25] This fact, combined with the absence of any attempt by the Department to show that it needs the additional powers proposed, has led members of the Committee to question whether sufficient need exists and to consider whether the Department should be required to show more clearly how the existing law has proved inadequate and why the concerns that led to deletion from the 1962 bills of many of the powers now sought are no longer valid.[26]

ANALYSIS OF THE PROPOSED POWERS

1. *Premerger Investigation and Investigation of Other Incipient Violations*

H.R. 39 would extend the scope of pre-complaint investigation to "any activity which may lead to any antitrust violation." S. 1284 would further extend this provision by permitting the Department to ascertain whether any person "is *about to* engage in . . . any activities which may lead to any antitrust violation."

The Committee agrees that CIDs should be available to investigate incipient mergers. The CID should not be unavailable merely because the merger has not been consummated; indeed, the period just prior to consummation is precisely the time when investigatory powers are most important.[27] Extension of the CID to premerger investigation would satisfy entirely the Department's stated rationale for extension to incipient violations.

Beyond such an extension the Committee opposes the provision discussed. No case has been made for extension of the CID powers to the vague category of "any activities which may lead to any antitrust violation"; much less has the case been made for use of the CID to ascertain whether any person "is about to engage in . . . any activities which may lead to any antitrust violation."[28]

While the merger situation is the only circumstance for which such a case has been made, in no event should the language be so broad and indefinite as that contained in the bills. If Congress should support broader discovery into inchoate violations in addition to mergers, we would then suggest the following language of limitation:

> "The term 'antitrust investigation' means any inquiry conducted by any antitrust investigation for the purpose of ascertaining whether any person is or has been engaged in any antitrust violation or *is planning to perform in the immediate future an act which if consummated would violate the antitrust laws.*" (proposed language underscored)

2. *Natural persons*

There seems to us to be no reason why pre-complaint discovery available against corporations and other business entities under investigation should not also be available against individuals under investigation, and in principle we support such an extension. However, we worry about the lack of safeguards to protect the rights of individuals and we cannot support the extension unless safeguards are accorded.

Since we address, in this Section 2, only document requests served on natural persons under investigation, we shall limit our comments in this section to document requests only.

While the proposed legislation provides for objections to oral testimony on grounds of self-incrimination and for the use of existing immunity powers to compel such testimony, there appears to be no counterpart for document production. As then Assistant Attorney General in charge of the Antitrust Division Mr. Lee Loevinger pointed out during the 1962 hearings, to require a natural person to produce documents that might be self-incriminating could create Constitutional problems if there are no provisions for immunity, and there is some question whether a document request without testimony would grant immunity.[29] We believe it should be made clear that objection on the grounds of self-incrimination is available in a demand for production of documents.

3. *Written interrogatories*

The Committee understands that written interrogatories may often be necessary in aid of and ancillary to a document request, and supports (with addition of certain safeguards) extension of CID powers over persons under investigation to include such discovery rights.

As to more substantive written interrogatories, the Committee expresses no view. Some members of the Committee are not convinced that the Department has a need for this pre-complaint discovery. They believe that interrogatories are seldom very useful for uncovering facts damaging to the putative defendant, and that any tangential utility is outweighed by the large potential for burden and chance of abuse. Others view written interrogatories as a potentially important pre-complaint aid that ought to be available to the Government for such occasions as the Government should find appropriate.

If the principle of written interrogatories addressed to natural persons is supported by the legislators, we strongly urge that objection on the grounds of self-incrimination expressly be made available; and we urge that the answering party (corporate or natural) be accorded all other basic protections of the Federal Rules of Civil Procedure.

4. *Oral testimony*

The provision for the taking of oral testimony pursuant to a CID is probably the most far reaching and controversial of the proposed amendments to the Civil Process Act.

We would unequivocally oppose this power without the addition of important protections, discussed below. Even with such protections, the large majority of the Committee recommends against such an extension even as to companies under investigation, on the grounds that (1) need has not been demonstrated; there has not been a showing that oral evidence is needed in determining whether a civil antitrust complaint should be brought, and (2) the burden, and the opportunities for harassment and other misuse,[30] outweigh possible marginal benefits to the Government.

In arguing for extension of the CID powers to cover oral testimony, the Department of Justice cites the fact that similar powers have been given in the antitrust field to the Federal Trade Commission, to certain states' attorneys general, and, through the grand jury procedure, to the Department itself in criminal antitrust investigations. The grand jury analogy seems to us inapt; oral testimony is likely to be needed in criminal cases, and the need for a grand jury indictment is intended to be a protection to the putative defendant.

The analogy to the Federal Trade Commission is similarly not helpful, for the Federal Trade Commission has important investigative functions, including those relating to general economic effects of acts, practices and business structure, while the Division's responsibilities essentially regard enforcement. The Attorney General's Committee's original recommendation in 1955 stated:

> "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 safeguard. Such authority is alien to our legal traditions, readily susceptible to grave abuse and, moreover, seems unnecessary."[31]

As for the possible abuses, we strongly urge that, if the power to compel oral testimony is favored in principle, the available protections be added. We are concerned that, in their present form:

(1) The bills allow for exclusion from the examination of all persons other than the antitrust investigators conducting the examination, the person being examined, his counsel, the officer administering the oath, and the stenographer. Thus, any person under investigation who is not testifying, and his counsel, may be excluded.

(2) The bills provide that, on good cause shown, the deponent may be limited to inspection only of the transcript of his testimony; thus, he may not be entitled to obtain a copy of the transcript.

(3) The bills provide that, except for "privilege, or self-incrimination, or other lawful grounds," the deponent "shall not refuse to answer

any questions, nor by himself or through counsel interrupt the examination by making objections or statements on the record."[32]

(4) The bills provide no right to review, correct or certify testimony.

If the bills should be favored in principle by the members of the legislature, we urge that they be revised to provide:

(1) All persons under investigation or their counsel should receive reasonable notice of the examination and be entitled to attend and cross-examine.

(2) The deponent, and all persons under investigation, should be permitted to receive a copy of his testimony.

(3) The deponent should be permitted to make all objections permissible under the Federal Rules and should be permitted to refuse to answer in situations appropriate in federal practice; and there should be no ban against statements on the record.

(4) The deponent should have the right to review, correct and certify his testimony.

(5) The other protections of the Federal Rules including particularly Rule 30, should be available. This would include the right to move to terminate or limit testimony on a showing that the examination is being conducted in bad faith or to annoy, embarrass or oppress.

5. *Discovery from witnesses*

The proposed power to compel testimony and get other discovery of persons not under investigation but "with information relevant to a civil antitrust investigation" is a similarly controversial one. Analogous language was contained in prior versions of the original Antitrust Civil Process Act and was eliminated at the suggestion of the American Bar Association. The thrust of the ABA's objection was that it is unfair to subject one who is merely a witness to the burdens of pre-complaint discovery, and that in general there is no need to increase the Government's powers in this regard because in most cases witnesses are glad to cooperate.[33]

While a number of the members of the Committee would grant limited rights of pre-complaint discovery against witnesses — particularly if restricted to document requests and possibly also to written interrogatories, a number of others agree with the rationale of the ABA. It is suggested, however, by some generally skeptical about the extension of CID powers to witnesses, that limited discovery against witnesses may be supportable if the Government is first required to show good cause in the particular case.

The large majority of the Committee opposes extension of the CID

56-900 O - 75 - 10

powers to allow oral testimony from parties not under investigation. We think the relevant facts can be learned by less burdensome means and without such an expansive grant of powers.

If discovery from witnesses should be allowed, we urge the following substantive protections and technical changes:

(1) The bills should require that each CID specify whether the person upon whom it is served is under investigation or is merely a witness.

(2) All persons under investigation should have the right to obtain copies of all written discovery, subject to deletion of confidential proprietary information as necessary, and they should be notified of all depositions of witnesses and should be given the right to attend by their counsel to cross-examine,[34] and to obtain a copy of the transcript of testimony.

(3) The witness served with a CID should have the benefit of all the protections we urge for persons under investigation.

6. *Use of evidence secured through CID powers to investigate violations in other investigation, proceedings and cases*

The Department's main thrust in support of this provision appears to be economy; *i.e.*, that it would be wasteful to require the Department and administrative agencies to duplicate evidence already in the hands of the Department. We note that a similar but narrower provision was considered in connection with the original Civil Process Act, and it was removed from the 1962 bill before its enactment.[35]

The Committee approves the concept that the Department should have the right to use documents secured in one investigation in a related investigation, proceeding or case. Thus, if the Department had obtained documents from ITT to investigate the once planned ITT-ABC merger, it should have been free to use those documents in connection with its participation in the FCC proceedings regarding the same matter. However, a number of Committee members fear that, beyond its application to such related proceedings, the provision is a license to the Department to create a dossier on companies and individuals for unspecified future use.[36]

There is concern that if this amendment is adopted, the many carefully drawn provisions in the existing law dealing with confidentiality of evidence obtained under CID powers and return of documents when the investigation is closed could be rendered ineffective.

If this amendment is adopted, it should be made clear that the CID is to be used only for an authorized, specified purpose (investigation of a suspected civil violation);[37] and if it becomes necessary or appropriate to

use the discovery so obtained in other proceedings, notice of such intended use should be given both to the party from whom the discovery has been taken and the person under investigation.

7. *Use of CID power to get evidence for administrative and regulatory proceedings*

H.R. 39 provides that:

> "The Antitrust Division, while participating in any Federal administrative or regulatory agency proceeding, shall not employ the authority granted by this Act to obtain information or evidence for use in such proceeding where an adequate opportunity for discovery is available under the rules and procedures of the agency conducting the proceeding."

The provision implies that the Division *may* use its CID powers to obtain evidence for use in such proceedings where there is no adequate opportunity for discovery under the procedures of the relevant agency. S. 1284 would specifically permit the Division to utilize CID powers to obtain information for use in regulatory agency proceedings, and Assistant Attorney General Kauper has endorsed this approach over that contained in H.R. 39.[38]

The Committee opposes this provision. We believe that while the Division is participating in proceedings before other agencies it should use the discovery available under procedures of the other agency. While we of course would urge that the protections advocated elsewhere should limit this section, too, if enacted,[39] we are particularly concerned about the enactment of this provision in the context of the present form of the bills. The taking of oral testimony from witnesses for use in often broad and undirected proceedings of a legislative sort, having no relation to the Justice Department's own enforcement function, without the protections of the Federal Rules, and with the testifying party having the most limited right of objection and having no opportunity to defend or explain his testimony, provides in our view far too much latitude with too few safeguards and too little relationship to the needs of the Department.

CONCLUSION

We believe that the Department of Justice should have the power to obtain the facts necessary to a well-considered determination of whether to bring antitrust litigation. To the extent we are convinced that it needs broader powers to obtain these facts, we support extension of the Antitrust Civil Process Act.

However, we are concerned with the rights of persons and companies under investigation or in possession of possibly relevant information. We therefore urge against the broadening of the CID powers without clear provisions extending appropriate protections.

June 20, 1975 Respectfully submitted,

COMMITTEE ON TRADE REGULATION

ELEANOR M. FOX, *Chairperson*

HARLAN BLAKE
JOHN A. DONOVAN
ROBERT M. HELLER
THOMAS V. HEYMAN
MALCOLM A. HOFFMAN
ROBERT N. KAPLAN*
LOUIS LAUER
BLANCHE LIVINGSTON
MICHAEL MALINA
J. PAUL McGRATH
JOSEPH RUSKAY
MYRA SCHUBIN
RICHARD SEXTON*
ASA SOKOLOW
LAURENCE T. SORKIN
PETER D. STANDISH
DAVID J. STERN
GEORGE WADE

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* Richard Sexton concurs in many of the points made in the Report, but dissents because he believes the bills should be opposed in their entirety. He argues that the Department of Justice has "more than adequate means for making pre-complaint investigations" and that there has been no showing of a need for the proposed "far reaching extensions of the Federal police power." He contends that, "If the bills are as bad as is suggested by the Report's many serious objections, substantive and constitutional, they should be straightforwardly disapproved in toto as a matter of principle."

Robert N. Kaplan concurs in many of the points made in the Report, but dissents because he supports the legislation in principle, while supporting also the addition of certain safeguards. He believes that the Department needs expanded powers of pre-complaint discovery so that it can sufficiently and effectively investigate probable violations and ascertain necessary facts before determining whether to bring suit. Also, he believes that the Antitrust Division has proper investigative functions ancillary to its enforcement and policy responsibilities, for which powers of discovery should be granted.

FOOTNOTES

1. 15 U.S.C. §§1311-1314, 76 Stat. 548-552.

2. Without the power of enforcement, this was generally conceded to be ineffective. See remarks of Assistant Attorney General Victor R. Hansen, Hearings on S.716 and S.1003 before a Subcommittee of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. 12 (1959); 108 Cong. Rec. 3997, 4002 (1962).

3. Fed. R. Crim. P. 6(e) permits the Department of Justice to use in a civil action evidence it obtains in a grand jury investigation.

4. Section 6(e) of the Federal Trade Commission Act provides that, upon application of the Attorney General, the FTC can make pre-complaint investigations for the Justice Department. 38 Stat. 721 (1914), as amended, 15 U.S.C. §46(e) (1958).

5. For criticism of this procedure as a method for learning whether a violation exists, see Yankwich, "Short Cuts" in Long Cases, 13 F.R.D. 41, 67 (1952).

6. Report of the Attorney General's Comm. to Study the Antitrust Laws 343-347 (1955).

7. 356 U.S. 677 (1958).

8. See H.R. 7309, 84th Cong., 1st Sess.; S. 3425, 84th Cong., 2nd Sess.; S. 716 and S. 1003, 86th Cong., 1st Sess.; H.R. 4792, 86th Cong., 1st Sess.; S. 167, 87th Cong., 1st Sess.; H.R. 6689, 87th Cong., 1st Sess.

9. 15 U.S.C. §1311(f).

10. 15 U.S.C. §1312(b). The courts however have given the Department broad latitude in meeting this requirement. See, *e.g.*, Material Handling Institute v. McLaren, 426 F.2d 90 (3rd Cir.), *cert. denied*, 400 U.S. 826 (1970); Lightning Rod Mfgrs. Ass'n v. Staal, 339 F.2d 346 (7th Cir. 1964); Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964); Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd per curiam sub nom.* Gold Bond Stamp Co. v. United States, 325 F.2d 1018 (8th Cir. 1964).

11. 15 U.S.C. §1312(c).

12. 15 U.S.C. §1313(c), (d).

13. 15 U.S.C. §1313(f). However, it is customary for the Department to accept production of copies rather than originals in the first instance.

14. 15 U.S.C. §1314(a).

15. 15 U.S.C. §1314(g).

16. N. 10 *supra.*

17. CCH Trade Reg. Report No. 146, October 14, 1974.

18. Certain of the ways in which S. 1284 is broader than H.R. 39 are discussed in the text of this Report. Others include provisions, in S. 1284, permitting service of a CID on "a body acting under color or authority of State law," and on persons who "may have reasonable means of access to" documents, or "may reasonably be able to secure any information," relevant to the subject matter of an investigation.

19. Other proposed changes include authorizing the Department of Justice to extend the period in which persons served may judicially contest the demand (thus sanctioning existing practice), and requiring certification of compliance by the party producing the documents.

20. 120 CONG. REC. H2670 (1974).

21. 343 F.2d 29 (9th Cir. 1965).

22. Cf. Upjohn v. Bernstein, 1966 Trade Cas. ¶71,830 (D.D.C. 1966), in which the court ordered the return of all documents produced pursuant to a CID that were alleged to contain trade secrets except for a small group of documents that the Government had chosen for use in a case in another district involving other companies.

23. The fact-finding powers granted the FTC are among the broadest available to any agency of the Government. They include the right to compel oral testimony. See 15 U.S.C. §§41-58.

24. The Statutes of Arizona, Connecticut, Florida, Hawaii, Illinois, Kansas, Louisiana, Maine, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Texas, Wisconsin and Puerto Rico are cited as giving their Attorneys General the power to summons witnesses to give oral testimony in antitrust investigations prior to initiation of any suit or proceeding. However, there are significant differences between the CID bills and many of these state statutes, and in any event we find no reason to give deference to the existence of such statutes.

25. S. 167, as originally submitted, would have authorized issuance of a CID whenever there was "reason to believe that [such] person may be in possession, custody or control of any documentary material pertinent to any antitrust investigation." It also would have permitted the documentary material produced to be used before any court, grand jury or antitrust agency (defined as a United States agency charged with administration or enforcement of any antitrust law) and the Congressional Committees on the Judiciary.

26. See statement of Rep. McCulloch, 108 CONG. REC. p. 3999 (1962).

27. Some members of the Committee nevertheless question the usefulness of the CID procedure for getting the necessary facts regarding incipient mergers. Assistant Attorney General Kauper, in his testimony on the merger notification provisions of S. 1284, admitted that the use of the Civil Process Act can be a slower means of securing information than informal means, and is subject to many procedural delays. Thus, if the facts can be secured by voluntary co-

operation, as they often can be, cooperation would be a preferred method of investigation.

28. Indeed the breadth and vagueness of the two formulations may raise serious Constitutional issues under the Fourth and Fifth Amendments for both corporations and natural persons. See United States v. Morton Salt Co., 338 U.S. 632, 652 (1959), FTC v. American Tobacco Co., 264 U.S. 298, 306-307 (1924). See also Note, "Antitrust – Congress Enacts Antitrust Civil Process Act," 111 U. Pa. L. Rev. 1021 (1963).

29. Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 87th Cong., 1st Sess., Pursuant to S. Res. 52 or S. 167, pp. 46-47 (1961).

30. Some fear that the CID, if the bill is enacted in its present form, could become the preferred method of pre-complaint investigation even where criminal prosecution is contemplated, and might even sometimes replace post-complaint discovery under the Federal Rules, by postponement of suit until pre-complaint discovery is completed.

31. Report of Attorney General's Nat'l Comm. to Study the Antitrust Laws, 343, 345-346 (1955). The Antitrust Division now challenges this characterization of its role, stating that although it is primarily a law enforcement agency, in recent years it has become one of the prime advocates of competition policy. If the powers now sought are primarily in aid of the Department's policy-advocacy functions, we are concerned that these bills may be much more than they purport to be.

32. This limitation seems to us to run counter to increased judicial concern regarding the right to counsel during the investigative stages of criminal cases. See United States v. Ash, 413 U.S. 300 (1973); United States v. Wade, 388 U.S. 218, 220, 230 (1967).

33. See Hearings, *supra* n. 29.

34. We have considered the argument that the right of cross-examination may be abused by persons under investigation or their counsel, who could so extend the depositions that the investigation could not be completed within a reasonable time. However, we believe that the right of cross-examination is so fundamental that it should not be withheld.

35. See n. 25 *supra.*

36. See Report of The Committee on Federal Legislation, "Government Databanks and Rights of Individuals," 30 The Record 55 (1975).

37. This is the present interpretation of the law. *E.g.,* Chattanooga Pharmaceutical Ass'n v. United States Department of Justice, 358 F.2d 864 (6th Cir. 1966); In re Cleveland Trust Co., 1972 Trade Cas. ¶73,991 (N.D. Ohio 1969).

38. Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, Senate 94th Cong., May 7, 1975.

39. Among other things, we believe it would be essential for the CID to state precisely the nature of the investigation, the intended use of the testimony, and the relationship of the party served to the investigation.

Mr. MAZZOLI. I would like to call to the witness chair Mr. Mark Green, director, Corporate Accountability Research Group, Washington, D.C.

Mr. Green, you have a statement and, of course, without objection, it will be made a matter of the record. I would mention to you that our schedule for this week, and for the remainder of July, is going into session at 10 o'clock, so, we have actually work on the floor. So, if you think your statement would lend itself to a certain amount of summary, and then to perhaps questions that might occur thereafter—well, let the record show that my statement was interrupted by the very bells—well, that appears to be a notice quorum.

But, it might be possible for you to summarize your statement, and then we will get into the questions.

TESTIMONY OF MARK GREEN, DIRECTOR, CORPORATE ACCOUNTABILITY RESEARCH GROUP

Mr. GREEN. Mr. Chairman, I will be glad to very briefly summarize my remarks, and then be available for questions.

In my view the importance of this bill is a reflection of the importance of antitrust, and it is well that people other than the chairmen of the respective House and Senate Antitrust subcommittees are finally beginning to appreciate the importance and damage of monopoly power to our economy in both its recession- and inflation-relating tendency; and are beginning to recognize how antitrust enforcement itself is floundering.

One reason it's floundering are the unnecessary restraints or restrictions on information flow prior to complaint from the business sector to the antitrust enforcement agency. In my view there is no rationale for these restrictions, other than merely historic habit and neglect. Antitrust attorneys frequently conveyed the image to me—as I was doing research for a Ralph Nader study on antitrust enforcement—that they were less prosecutors than dentists straining to pull teeth from uncooperative business patients.

Yet, inadequate information about business practices strikes at the heart of the antitrust process. Developing complex antitrust cases is a chore and an art. H.R. 39 addresses itself to this issue and I think makes commendable strides to addressing the problem. In summary it does three things:

It applies CID's not merely to business entities, but to natural persons; it permits written interrogatories or oral testimony prior to complaint; and it permits the use of CID's to investigate potential and proposed anticompetitive activities prior to their consummation.

I strongly support these major parts of H.R. 39, as does my organization, the Corporate Accountability Research Group. We cannot see what purpose is served by forcing the Antitrust Division to grope around in the dark prior to filing a complaint. Indeed, pre-complaint interrogatories or oral testimony give antitrust enforcement direct access to the best evidence; that is, those potentially culpable. Just as talking can be more interactive and informative than writing, so can oral CID's be more informative than the mere introduction of documentary material.

The benefit of this provision should be apparent. First, to the extent that deposed individuals are persuasive about their innocence and can provide reasonable rebutting arguments, cases which should not be brought will now be less likely to be brought, sparing potential defendants the expense and travail of trial.

But, to the extent that the Antitrust Division attorneys are more knowledgeable about the relevant facts, those cases which are tried will be better framed and more precisely argued, which could save both antitrust and judicial resources after a complaint is brought.

And second, such additional pre-complaint discovery can avoid the kind of intentional delay that has been historically inflicted on the antitrust enforcement agencies, as has been documented too numerous times to repeat here and as I cite in my testimony.

In the effort to deny these specific benefits of expanded CID's, the U.S. Chamber of Commerce offered a generalized rebuttal that, in their words, "Experience has proved time and again that broad powers breed abuse."

It is perhaps fatal to this admission that not one antitrust example is cited as support. I am referring to their testimony on S. 1284 before the Senate Antitrust Subcommittee. The fact of the matter is that it is impossible to make the case that the antitrust authorities have actively abused their powers. Government antitrust cases are hardly ever dismissed on summary motion. The Antitrust Division's won and lost record between 1945 and 1967 was a very unabusive 86 percent. Of the 1,626 CID's sent out since the 1962 act, no more than a very small handful has ever been voided as beyond their authority; in fact, 17 State attorneys general already possess authority comparable to H.R 39, without leading to harassment. Indeed, if there is any antitrust prosecutorial abuse at the Justice Department, it is to thwart cases that should be brought, rather than to harass putative defendants. As if the chamber needs to be told, the ITT scandal of 1972 was hardly about Government harassment of business.

Another argument I have been told about the bill, that has been made by representatives of the Business Roundtable, is that it is unnecessary because lawyers are increasingly able to civilize their antitrust clients into complying with the law. That argument is possible before a congressional inquiry seeking the broadest range of views, and in a government with the first amendment, but there is little more to commend it. Lawyers, in their own eyes, are not independent auditors of clients' activities, but are retained counsel representing their clients. In my study of Washington lawyers—and I have conducted up to 300 interviews of them in writing a book called "The Other Government" about how they do counsel their clients—I have found numerous instances where Washington lawyers did not civilize their clients, but collaborated with them in trying to avoid the thrust of the antitrust laws, or even to violate the antitrust laws.

Auto manufacturers in 1965 and meat packers in 1905 also claimed that Federal attention was not necessary because they were able to self-regulate themselves in the public interest. It was untrue then, and it would be naive to depend on that now.

While I support the purpose of H.R. 39, I believe it could be strengthened by the addition of several additional passages. I believe it should cover individuals "not under investigation". Often suppliers,

competitors, retailers can provide valuable information about an antitrust violation, yet they are not within the scope of the 1962 act nor of H.R. 39. H.R. 39 says that CID's as modified by it are not to be used in regulatory or administrative proceedings if those proceedings have adequate subpena powers themselves. The negative pregnant of that, I suspect, is that they can be used if those regulatory powers prove to be inadequate.

I am troubled by this "back door" approach, which will encourage businesses to attempt to block CID's in regulatory proceedings, based on this restrictive language, and they can hold up such investigations for years. I think it is a matter of record how the agencies have failed to be sensitive to antitrust considerations and I would hesitate to presume that they can, in good faith, collect antitrust information. I would rather that more declarative language be used to allow the Antitrust Division to use CID's—as modified by H.R. 39—in regulatory and administrative proceedings.

Third, H.R. 39 permits a deposed party to obtain a transcript of his or her testimony after pre-complaint oral testimony. Because we are dealing with inherently conspiratorial matters in the antitrust laws, and in the era of the Xerox machine, I worry that the first witness in a series of projected witnesses may quickly circulate his or her testimony to later witnesses, so as to choreograph pre-complaint replies to the Antitrust Division. Perhaps a possible compromise would be to provide a transcript within 90 days of the oral testimony, so that they have the benefit of their remarks prior to trial, but not so early that the purpose of the pre-complaint discovery can be thwarted.

And finally, and very briefly, if the goal of this bill as looked at broadly is to obtain more knowledge prior to complaint, to make complaints more specific and effective, I would suggest that this committee look into obtaining Bureau of Census data and making them available to the antitrust agencies, as they are not now made available; they can provide some of the best data on antitrust activities, although under existing law they are not now provided to the agencies.

And secondly, there should be pre-merger notification to the agencies, so that they can be sufficiently forewarned about potential anticompetitive activities before they occur, so that they are not presented with faits accomplis, which are terribly hard to unscramble in the antitrust area, as we have learned.

In conclusion, then, I believe it is time to give the Antitrust Division the same pre-complaint investigative power that the Federal Trade Commission has, that many State attorneys general have, and that the Antitrust Division already itself has in investigating criminal matters.

Thank you, Mr. Chairman.

Mr. MAZZOLI. Thank you very much, Mr. Green. We appreciate your testimony.

Mr. Chairman, do you have any questions?

Chairman RODINO. I will defer at this time.

Mr. MAZZOLI. Mr. Green, I was interested in your statement on your concerns, or worries, about providing a copy of the testimony to the individual who has been deposed. And you are worried because conspiracy is inherent in this whole type of case; and you worry that with the advent of these various copy machines, that this could be disseminated and a story could be patched together. Wouldn't that be

true, that possibility, in any kind of evidence, whether it is a grand jury sitting, or in any other kind of a deposition, which could be then used? Isn't there certainly a type of conspiratorial action in any case, whether it is an accident case on the corner, involving witnesses, or any other type of an action; and therefore, why wouldn't that concern you as much as in the case of antitrust?

Mr. GREEN. Assuming that is as true in other cases as in antitrust, one does not get a copy of his statement before a grand jury. A criminal matter like that, I assume, is usually more serious than a civil matter as we are discussing today. So, if you can't before a grand jury, I would hardly think it a violation of civil rights if a business entity, or individual, could not obtain it in a civil antitrust case pre-complaint.

But secondly, I think that the antitrust laws are peculiarly based on conspiratorial notions—as section 1 says, a combination or conspiracy to violate the antitrust laws. A traffic accident does not necessarily have that same kind of a combination.

So, my point could perhaps be made to other law violations, but it is peculiarly able to be made, and is especially relevant, I think, to the antitrust laws.

Mr. MAZZOLI. I'm not exactly sure in your statement, but do you have a concern about allowing an attorney present in the room with a witness being deposed, whether a witness is party to the action, or a non-defendant person?

Mr. GREEN. Again, I make analogy to the grand jury process; I would prefer to see the witness deposed alone, as in the grand jury process. Prior to his or her appearance, there would have been served a CID, and the existing laws and H.R. 39 are careful to allow application to court if the CID goes beyond its authority, so that the court could modify it.

But, to have the attorney there would raise the same problems, in my view, as providing a transcript immediately after a deposition.

Mr. MAZZOLI. Well, let me ask you this question, then, are you satisfied with the grand jury proceeding itself, as a proceeding that properly protects the defendant and all his various civil rights?

Mr. GREEN. The grand jury, as an investigative technique, can be abused, and in the last couple of years there have been serious articles about its abuse, permitting prosecutors to an extent to obtain indictments merely on their own presentation. There has been a move toward more use of the information, rather than a grand jury proceeding.

The result of prosecutorial abuse in criminal proceedings is the grossest violation of human rights, as an innocent person may be incarcerated. Our constitutional system puts a higher premium on human rights than civil rights, to the extent that you must have a lawyer in a criminal proceeding. There is no constitutional requirement that you must have a lawyer in a civil proceeding, for example. This is not to understate the importance of the property right that would be affected by noncriminal proceedings, but our Constitution itself does make the distinction.

So, while there should perhaps be a reform of the grand jury process, that I will not speak to today, I think the argument is less compelling in antitrust pre-complaint discovery that abuse can lead to human rights violations.

Mr. MAZZOLI. Of course my point in asking you this question—and I appreciate your answer—was to say, if we are not satisfied with the grand jury, we may want to make changes in these areas to reflect what we consider to be a move forward in protection of the rights of individuals, even though I concur that a criminal matter is far different from a civil matter. There are some fairly profound obligations, and profound penalties that attend antitrust investigations which come to fruition.

But I appreciate your answer. Now, Mr. Chairman, do you have any questions?

Mr. RODINO. Mr. Green, on page 8——

Mr. MAZZOLI. Mr. Chairman, if I might interrupt at this point, counsel indicates this is a recorded quorum. So, if you wish to maybe suspend until we——

Chairman RODINO. Well, let me ask this question, and maybe he can think about it until we come back.

On page 8 you reference a need to have easy access to Census and FTC classifications, and that in this way the legislation would do what needs to be done in order to effectively discharge responsibility in mergers and other antitrust enforcements. Then you go on to say, though—and this troubles me—that corporations are entitled to privacy about such data since we know how sacrosanct some of the Census information and data is.

How can you really say—do you intend it as you say it, that you dismiss it so lightly?

Mr. GREEN. Yes. In Wisconsin several decades ago, when Gaylord Nelson was Governor, they had a provision that income tax data as to individuals and corporations could be disclosed. After several years business was able to beat this back.

I cite that as an example of my view that the right to privacy attaches to people with blood and flesh, and not institutions which in effect, although not in laissez-faire theory, are public institutions having an impact on 210 million Americans.

Mr. RODINO. In other words, you make a distinction, then, between what we understand is the right of privacy that attaches to an individual as against a corporate entity?

Mr. GREEN. That's correct, Mr. Chairman. I fully appreciate that business has long argued that they are entitled to parallel rights of privacy, but it is both a verbal and a legal abuse of what the word "privacy" really means. Now, that is not to say there is not such a thing as trade secrets; there are, and they have to be protected. But business has taken the words "trade secret," as administrations have taken the words "national security," to cover far more than they were ever intended to cover.

Recently Ralph Nader, after a debate with Mr. Swearington, who is the chairman of Standard Oil of Indiana, asked Mr. Swearington if he would be willing to reveal confidential data that he shares with joint venturers that Standard Oil works with, since the very basis of trade secrets is not to competitively disadvantage yourself by telling it to somebody else. The argument was, since competitors already know it, why don't you make it public. He said, "No, we don't want to make it public."

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There is a disposition towards secrecy far beyond the rationale of trade secrets, and I think Government, investors, consumers, and shareholders should know far more about our giant corporations than they do, Mr. Chairman.

I apologize for that one brief sentence in the prepared testimony and not elaborating on it, though I do have many thoughts on the matter.

Mr. MAZZOLI. The subcommittee will stand in recess until 11:15 when we will proceed with our hearing.

[Whereupon, at 11 a.m. a 15-minute recess was taken.]

Chairman RODINO. The committee will come to order, and I recognize Mr. Seiberling.

Mr. SEIBERLING. Thank you, Mr. Chairman.

I would like to continue the colloquy that was taking place when we recessed, Mr. Green. I think I would agree with you that the investigative abilities of the Department of Justice, the Antitrust Division, do need strengthening. However, I would take issue with the idea that there is no legitimate area for protecting the competitive position of a corporation. It is not equivalent to the individual's right of privacy, but it is a matter of preserving our competitive system and a matter of fairness.

I can see why a company doesn't want publicly to reveal information with respect to a joint venture because that joint venturer has competitors. Just because they get in bed with one or two competitors in forming a joint venture doesn't mean they are telling all their internal business to all of their other competitors.

I wonder if you would care to refine your position on that subject.

Mr. GREEN. Often joint ventures in the oil industry, as in the example, I believe, that Ralph Nader cited to Mr. Swearington, involve the eight major oil companies, for example, the trans-Alaskan pipeline, and the Colonial pipeline are not merely two or three venturers, but the bulk of the major companies in the field.

However, I agree with you that a joint venture can be among two, and they would hesitate to make that information known to others. But, if I could elaborate on the point for a moment, one of the results of the conglomerate movement was that profit and loss statements by subsidiaries were made impossible because of the aggregate reporting by an ITT, or a Gulf and Western.

So, I could understand why corporate executives would not want to make more information public, and it might be in their perceived self-interest not to make it public. But that is not the same thing as to say it is in the public interest to keep it secret. It is my view that more reporting by subsidiaries, rather than aggregate statements, could be very procompetitive and help the free enterprise system by telling potential entrants, "Yes, I should enter the GM's refrigerator market, but not their car market." Those kinds of signals are submerged now because of an undue corporate secrecy which I think should be penetrated.

Mr. SEIBERLING. Well, I agree completely with that statement, but what I am trying to do is to develop a distinction between a disclosure requirement that applies equally to all forms in an industry, and one that singles out one or two, and makes them disclose information that their competitors do not have to disclose, which, it seems to me, can put them at a disadvantage, competitively.

Mr. GREEN. I couldn't agree more. And to the extent that there should be new rules requiring disclosure of materials which are not trade secrets, they should apply uniformly and industrywide, so that no firm could possibly claim competitive disadvanage.

Mr. SEIBERLING. So, when you get down to the beefing up of the CID's, it seems to me that we do have to concern ourselves with protecting the rights of corporations not to reveal trade secrets that their competitors are not under a similar obligation to reveal; that is the point I'm getting at.

Mr. GREEN. I agree with that, except to the extent that the trade secret is part of the alleged bundle of activity that may violate the antitrust laws.

Mr. SEIBERLING. All I'm saying is, I think while the right of privacy may not apply to corporations, there is an equivalent in terms of protecting the competitive system and elementary fairness, which I think is almost equivalent to the right of privacy; but it doesn't extend to a right that is quite as strong in terms of making everybody disclose, which I think we can do, and probably should do.

I have no further questions, Mr. Chairman.

Mr. MAZZOLI. I thank the gentleman. The gentleman from Illinois, Mr. Railsback?

Mr. RAILSBACK. Mr. Green, I wonder if you had a chance to hear the previous witness' testimony. Did you happen to hear her?

Mr. GREEN. No; I was airborne as she was testifying.

Mr. RAILSBACK. I see. She was testifying on behalf of the New York City Bar, and expressed some serious reservations about the lack of protective safeguards for the individual witnesses. I wonder what your feeling is about that.

Mr. GREEN. The one way I would be sympathetic to altering H.R. 39 to better protect affected parties would be to make more specific the language on page 2, lines 1 and 2, which now permits the use of CID's being exempt as far as being engaged in antitrust violations, or in any activities which may lead to antitrust violation; that is somewhat general and there could be an additional clause, saying, "preparatory to a merger acquisition or joint venture," to make it more specific.

I believe the association may have made a comment about that, although I did not hear it. Otherwise, I think, the bill and the law it would define would have adequate protection.

Mr. RAILSBACK. Let me be a little bit more specific and just suggest to you that she said, "If you favor the use of the CID to compel oral testimony, we have strong recommendation for the addition of protection." And she started off by saying, "As the bill stands now, all persons under investigation, but not testifying, and their counsel, may be excluded from the examination." That is one of her concerns.

Second, the bill now gives the deponent only a limited right to obtain a copy of his testimony. "For good cause he may be limited to inspection of his transcript. There is no right now given to any person under investigation to obtain a copy of a transcript unless he was the deponent"; that is another concern.

Third, the bill provides that "the deponent shall not refuse to answer any questions, nor by himself or through counsel interrupt the examination, or make an objection or statements on the record."

And then, there is no right to review. And then, fifth, no protections under rule 30.

I'm just wondering: I'm inclined to agree with her that we have perhaps gone too far, you know, giving access without providing any individual safeguards, or rights. Would you care to comment?

Mr. GREEN. Mr. Railsback, I commented earlier that if grand jury proceedings do not permit most of these so-called safeguards, in what are terribly serious cases where individuals go to jail, I think it even less persuasive that they must attach to these civil proceedings.

And I made the second point that we are here dealing with antitrust cases, which, more than any other law enforcement area I can think of, require collaboration or conspiracy, with the proof of intent to conspire. Given that, there is a tendency on the part of deposed witnesses to provide a joint defense, to circulate the first deposed witness' testimony to subsequent witnesses so as to orchestrate their reply and frustrate the very purpose of pre-complaint discovery.

I am sympathetic to the notion that a defendant in a case against the government should have available to him materials to make the best defense possible, and that would include a precise transcript of what he or she told antitrust investigators.

My conclusion, and this is a tentative one, is that perhaps such a transcript could be provided 90 days after the hearing, to permit the Antitrust Division to pursue vigorously the investigation. And of course, in section 3(b), the Antitrust Division must state the nature of the conduct constituting the alleged violation. It must be relevant; they can't be frivolous or harassing in their effort. And then, 90 days later, the deposed witness would have that statement, and it would reduce the likelihood of witnesses thwarting the purpose of the pre-complaint discovery.

Mr. RAILSBACK. Let me just say in response to your first analogy, concerning the grand jury, I think that many of us feel that something has got to be done about the grand jury system. We don't think it affords enough safeguards. That just by way of comment, that's all.

Mr. MAZZOLI. I thank the gentleman from Illinois.

Mr. Green, you have heard the bells again, this is a vote, and we will have to go. Does counsel have questions of Mr. Green? If so, we could recess and come back.

Mr. Green, in view of the awkwardness of the day, in the event that counsel were to serve you questions, you would provide written answers, and we could make these part of the record?

Mr. GREEN. Certainly, Mr. Chairman.

Mr. MAZZOLI. So, we might be able to use that.

[The prepared statement of Mark J. Green follows:]

STATEMENT OF MARK J. GREEN, DIRECTOR, CORPORATE ACCOUNTABILITY RESEARCH GROUP

Mr. Chairman, I appreciate this opportunity to comment on the Antitrust Civil Process Act, which can help do for the antitrust enforcement process what the Freedom of Information Act did for federal agencies generally—increase information flow and, hence, efficiency. During my research for *The Closed Enterprise System: Ralph Nader's Study Group Report on Antitrust Enforcement*, Antitrust Division attorneys frequently conveyed the image of being not so much prosecutors as dentists, straining to pull teeth from uncooperative business patients. Inadequate information about business practices, however, strikes at the heart of the antitrust process. For developing a complex antitrust case is a chore and an art. It often requires the search for a pattern of economic events rather than the sudden production of an incriminating memorandum which makes Perry Mason's hostile witnesses dissolve into confessions.

Yet in the early 1960's, Antitrust Division attorneys conducted this search wearing blinders. Prior to 1962 there were four logically possible, but actually unproductive, ways to obtain information in civil cases: one could ask the firms to disclose information voluntarily, but, to no one's surprise, violators did not confess; the use of FTC investigatory powers for the benefit of the Attorney General, permitted by statute, was never attempted, "presumably because of the budgetary problems involved in making the FTC the investigative arm of the Department of Justice" said one Antitrust Division official; a grand jury could be impaneled with the articulated goal of a criminal case but the actual goal of a civil suit, a procedure the Supreme Court found to be an abuse of process in 1958 (*United States* v. *Procter & Gamble*, 356 U.S. 677 (1958)); or, lacking the necessary evidence, a suit could be filed in the hope that discovery proceedings would later turn it up—a form of prosecutorial brinksmanship.

H.R. 39 appropriately strengthens its 1962 predecessor in the ways it is weakest: First and most importantly, it amends 2(f) and 3(a) to allow civil investigative demands (CIDs) to compel answers from "natural persons" either in written interrogatories or in oral testimony. It is self-defeating to permit only the discovery of documentary materials when a) antitrust violators often do not commit their illegal schemes to paper and b) even if they do, such documents can be periodically destroyed in what is known among antitrust lawyers, quite euphemistically, as a "document retention policy." What purpose is served by forcing the Antitrust Division to grope around in the dark prior to filing a complaint? Instead, pre-complaint interrogatories or oral testimony gives antitrust enforcers direct access to the best evidence, *viz.* those potentially culpable. As talking can be more interactive and informative than writing, so too can "oral" CIDs be more informative than the mere production of documentary materials.

The benefits of this revision are apparent. First, to the extent that deposed individuals are persuasive about their innocence and can provide reasonable arguments, cases which should *not* be brought will now be less likely to be brought—sparing potential defendants the expense and travail of trial. To the extent that Antitrust Division attorneys are more knowledgeable about the relevant facts, those cases which *are* filed will be better framed and more precisely argued, which can save both Antitrust Division and judicial resources after a complaint is brought. Second, committing potential defendants on the record prior to a complaint can be subsequently used; if necessary, to impeach contradictory assertions by actual defendants at trial. Third, these additional tools will also better equip the Division to overcome the kind of delays which corporate counsel inflict on antitrust cases. This defect in the antitrust process is not imaginary. In a representative interview, a New York City defense counsel, who was once in the Antitrust Division, said:

"Defense counsel tell their clients: if the Antitrust Division sues, you will lose, but you can still gain three to five years to make your profit or acquire know-how from the illegal merger. Delaying a government prosecution is justified on the theory of maybe getting a better deal next year. In private treble-damage suits the philosophy is consciously or semi-consciously to wear out the plaintiff."

The sooner the government possesses the pertinent facts, the less able will defense counsel be to obstruct a speedy resolution.

In the effort to deny these specific benefits of expanded CIDs, the U.S. Chamber of Commerce offers the generalized rebuttal that, in the words of the Chamber, "experience has proved—time and time again—that broad powers breed abuse." It is perhaps fatal to this assertion that not one antitrust example is cited as support. The fact of the matter is that it is impossible to make the case that the antitrust authorities have actively abused their powers. An antitrust case is hardly ever dismissed on summary motion; the Division's won-lost record between 1945 and 1967 was a very unabusive 86 percent (according to data compiled by Chicago law Professor Richard Posner); of the 1626 CIDs sent out since the 1962 act, no more than a small handful has ever been voided as beyond their authority; in fact, 17 state attorneys general already possess authority comparable to H.R. 39, without leading to harassment. H.R. 39 itself, with its painstaking provisions on custody of materials and rights of deposed parties, is very careful to guarantee that its authority not be abused. Indeed, if there is any antitrust prosecutorial abuse at the Justice Department it is to *thwart* cases that should be brought (see pages 30–114, *The Closed Enterprise System*) rather than to harass putative defendants. As if the Chamber needs to be told, the ITT scandal of 1972 was hardly about government harassment of business.

Second, H.R. 39 would amend 2(c) of the 1962 act to permit CIDs for "activities which may lead to any antitrust violation." It is an anomaly to be able to bring

an antitrust case against "incipient" anticompetitive activity under Section 7 of the Clayton Act or to enjoin a potentially anti-competitive merger but not to be able to adequately investigate such activities with CIDs. This disharmony is the result of *United States* v. *Union Oil of California*, 343 F. 2d 29 (9th Cir. 1965), which H.R. 39 does, and should, revise. It is far preferable that the Antitrust Division has ample and early knowledge about a possibly anticompetitive activity, rather than have to investigate a *fait accompli*. The well-documented difficulty of challenging and divesting anticompetitive mergers is especially instructive here.

While I strongly support the above mentioned provisions of H.R. 39, I do not believe they go far enough to facilitate the flow of pre-complaint information to the Antitrust Division. Four additional provisions seem advisable:

CIDs should be able to be sent to natural persons and corporations not "under investigation." Often, the most expeditious way to understand the purpose and effect of a potentially anticompetitive activity is to interview suppliers, retailers or competitors of the target firm; CIDs to competitors can be the best way to quickly and accurately assemble market share data. Groups like suppliers, retailers and competitors, however, are frequently reluctant to volunteer information—either because they fear it may be used against them or because they fear retaliation from their business brethren. Yet while voluntary cooperation is often not forthcoming, the 1962 Antitrust Civil Process Act does not allow CIDs to be sent to such ancillary groups. The National Association of Manufacturers oppose such a proposal because it could "traumatize" innocent individuals and tarnish them with "guilt-by-association." So could grand jury questioning, but that hardly means we should do without that fact-finding authority. To diminish any trauma, the Antitrust Division could make clear in CIDs to individuals not under investigation their non-suspect status. Otherwise, we are all citizens subject to civic obligations—ranging from tax audits, red lights and jury duty. Cooperation with *bona fide* antitrust inquiries can be an important contribution to corporate law enforcement.

I think the Subcommittee should reconsider § j(3), which allows a deposed party to obtain a copy of his own testimony. In an industry wide investigation, there is the serious risk that an early witness will circulate his testimony to other potential witnesses in order to choreograph their replies. When dealing with crimes so inherently conspiratorial as antitrust, and in the era of the Xerox machine, this anxiety is not merely some unlikely conspiracy thereof. If individuals subpoenaed by grand juries, which probe far more serious offenses than CIDs, are not entitled to a copy of their testimony, it is not clear why business entities, perhaps culpable of less serious offenses, are entitled to transcripts.

The amendment on page 8, line 20 of H.R. 39, relating to the use of CIDs in administrative or regulatory proceedings, seems unduly restrictive. The negative pregnant of this provision is that the Division can employ CIDs if the discovery permitted by the relevant proceeding is inadequate. This back-door concession may predictably lead to numerous challenges to CIDs in regulatory proceedings on the grounds that other discovery methods are "adequate." Instead, H.R. 39 should very simply provide that "The Antitrust Division may use the authority granted by this Act in any administrative or regulatory proceeding in which it participates."

Administrative and regulatory proceedings comprise an important and growing part of the Antitrust Division's responsibility. At least ten percent of its resources are devoted to this area—although up to 20 percent of our GNP is directly regulated by various federal agencies. Since Antitrust Division intervention before the FCC, CAB and ICC is necessary because these agencies are often indifferent to the needs of antitrust policy, it is unrealistic to depend on discovery by those agencies. Using the FCC as an example, an Antitrust Division with regulatory CID authority could have, or can a) discover the extent and location of cross-media ownership; b) document the prevalence of network domination of programming in the "prime time access" proceedings; c) trace the likely reciprocity and anti-competitive potential of ITTs proposed acquisition of ABC. Without CID authority here, the Antitrust Division is reduced to theoretical rather than factual arguments before these agencies, which in turn can then retreat to their statutory defense that *they* are the experts and *they* shall decide. To challenge this historically abused expertise—see, for example, *United States* v. *Philadelphia National Bank*, *Silver* v. *New York Stock Exchange*, *Federal Maritime Commission* v. *Svenska Amerika Linien*, and the *Northern Natural Gas* case [1]—requires the Antitrust Division to develop its own expertise, which in turn requires the use of CIDs authority, as amended by H.R. 39.

[1] 374 U.S. 321 (1963) ; 373 U.S. 371 (1963) ; 390 U.S. 328 (1968) ; 399 F.2d 953 (1968).

Finally if one views H.R. 39 broadly as a bill to encourage pre-complaint information flow and hence efficiency, two other provisions could be added to make it a more comprehensive contribution to the facilitation of antitrust complaints.

Often the very best industrial data for antitrust purposes are contained in line-of-business reports kept by the Bureau of the Census (and more recently the Federal Trade Commission). Yet the antitrust agencies are precluded by statute (which reversed the Supreme Court's *St. Regis* decision) from obtaining census data by firm name, and the announced intention of the FTC is to keep its line-of-business reports away from the antitrust authorities. Why in this case should the right hand of the government not know what the left hand is doing? "Artificial bodies such as corporations depending upon statutory law for their existence or privileges," said Theodore Roosevelt in his first Inaugural Address, "should be subject to proper governmental supervision, and full and accurate information as to their operations should be made public at reasonable levels." These words are especially true today, as our corporate-conglomerate complexes appear throughout society in increasingly complicated patterns. For the antitrust agencies to work effectively, they should have easy access to Census and FTC classifications—up to seven digit SIC classifications where they exist. Then the agencies could easily come to prudent enforcement judgments within 60 days of an announced merger. To somehow say that corporations are entitled to "privacy" about such data—corporations which, like GM or IBM, are larger and more influential than most states—is an abuse of language and common sense. It sacrifices effective antitrust enforcement to a legal fiction.

And second, pre-merger notification by major companies to the antitrust agencies can, like H.R. 39, make these agencies more knowledgeable in their mission. If, say, all mergers which would result in a $10 million consolidation would have to notify either the Antitrust Division or the Federal Trade Commission 90 days prior to consummation, the existing incentive to merge quickly to avoid an early antitrust challenge would dissolve. (For example, the merger of the *Washington Post* and the old *Times-Herald* occurred literally overnight. It went unreported beforehand by, yes, the *Washington Post*. "Within a day there was almost nothing left of the *Hearld*," recalled Robert Wright, formerly the Deputy Assistant Attorney General in Charge of Antitrust; "they obviously tried to sneak it by the Division because it's harder to overturn a *fait accompli*.") Although there is a lack of current data available, one Justice Department study found that the Antitrust Division was unaware of, prior to their consummation, 30 percent of all large business mergers between 1953 and 1957. It is far more difficult to undo a merger and recreate the original entities than to enjoin its occurrence in the first instance—or as one court put it, "After the saber thrust, the wound is still there" (*Crane Co.* v. *Briggs Manufacturing Co.*, 280 F.2d 747, 750 (6th Cir. 1969)).

Also, while a company may initially move with alacrity to complete a merger, it is then in its interest to delay an antitrust investigation and case as long as possible. For until there is an adverse settlement or adjudication, the defendant firm (assuming no preliminary injunction or hold separate order) may retain the fruit of a possibly illegal merger. And the firm realizes that any profits earned as a result of the illicit marriage will not have to be subsequently disgorged.

These problems and tactics can be swept away not merely by improved CIDs, but by a program of pre-merger notification. There are, in fact, precedents for pre-merger notification which indicate that this process can lead to more efficient and certain antitrust enforcement. Amendments to the AEC Act (84 Stat. 1473) passed in 1970 gave the Attorney General prior authority to review any application for a nuclear power plant license to "make a finding as to whether activities under the license would create or maintain a situation inconsistent with the antitrust problems." As another example, the 1966 Bank Merger Act requires merging banks to provide the three federal banking agencies with data pertinent to their proposed merger. Once a federal banking agency approves a merger, the Antitrust Division has 30 days within which to file suit, or waive an antitrust challenge. The reason this process works so expeditiously is that the Antitrust Division has the information, needed to make a determination, readily available from the federal banking agencies. To insure that merging firms have the incentive to give the antitrust agencies all necessary information, rather than to delay, requires that a merger could be consummated 90 days after its announcement *or* within 30 days of fully replying to an Antitrust Division CID or FTC §6 inquiry, whichever takes longer. Firms which want to merge would then realize it would be in their interest to expedite the antitrust investigation, rather than to protract it.

In conclusion Mr. Chairman, I strongly support the major provisions of H.R. 39 as a long overdue improvement of the limited subpoena authority of the Antitrust Division. I view the arguments raised against the bill to be woven out of a defense lawyer's fertile imagination, for they are speculative and have little relation to reality. The pending legislation, however, can be amended and expanded somewhat in ways I describe to better promote the antitrust law enforcement process.

With an economic crisis in some measure attributable to market power—monopoly power works to raise price and reduce output, and hence employment—and with the chairmen of the two relevant antitrust subcommittees and the President of the United States on record as committed to making antitrust enforcement more vigorous, now is the time to press for the passage of H.R. 39.

Mr. MAZZOLI. At this point, I will adjourn the subcommittee until July 25, 1975, at 9 a.m., when we will continue hearings on H.R. 39. We stand adjourned.

[Whereupon, at 11:30 a.m. the subcommittee adjourned, to reconvene Friday, July 25, 1975, at 9 a.m.]

ANTITRUST CIVIL PROCESS ACT AMENDMENT

FRIDAY, JULY 25, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON MONOPOLIES AND COMMERCIAL LAW
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 9:15 a.m. in room 2141, Rayburn House Office Building, Hon. Peter W. Rodino, Jr. [chairman] presiding.

Present: Representatives Rodino, Brooks, Flowers, Mazzoli, Hutchinson, and Railsback.

Also present: Earl C. Dudley, Jr., general counsel; James F. Falco, counsel; and Franklin G. Polk, associate counsel.

Chairman RODINO. The committee will come to order and we will continue with our hearing on H.R. 39. Our witness this morning is Arnold M. Lerman of Wilmer, Cutler & Pickering, appearing on behalf of the Business Roundtable.

Mr. Lerman, you may proceed in accordance with the policy we have laid down; we hope that whatever oral statement you present may not be beyond 15 or 20 minutes; and, if you have a prepared statement we will insert it in the record in its entirety.

[The prepared statement of Mr. Lerman follows:]

STATEMENT ON H.R. 39, SUBMITTED FOR THE BUSINESS ROUNDTABLE BY ARNOLD M. LERMAN

Mr. Chairman and members of the subcommittee, my name is Arnold Lerman. I am an attorney and member of the firm of Wilmer, Cutler & Pickering. I am appearing today on behalf of the Business Roundtable. The Roundtable is an organization of approximately 160 leading business corporations. Its basic purpose is to provide a forum in which the business leadership of the nation can exchange ideas and develop policy recommendations on major business, economic and social issues. We very much appreciate the opportunity to testify on H.R. 39.

Because H.R. 39 is similar to Title II of S. 1284, my comments here are quite close to the testimony we were privileged to offer before Senator Hart's Committee. We have some new thoughts as well.

H.R. 39 would amend the Antitrust Civil Process Act of 1962, P.L. 87-664, 15 U.S.C. §§ 1311-1314. Under the present statute the Department of Justice may serve a pre-complaint civil investigative demand for documents upon any business entity for the purpose of determining whether the recipient is or was engaged in illegal activities under the antitrust laws. The present law permits the demand only upon companies under investigation, protects the confidentiality of the documents by forbidding transmission outside the Department, and limits use of the documents to cases arising from the investigation. H.R. 39 would extensively expand the authority of the Department to demand information and to use the fruits of its demands.

Let me illustrate the reach of the new bill by describing the inquisitorial process it proposes.

Under the bill, the Department of Justice may compel a private person or business to produce documents, respond to interrogatories or give oral testimony. The demand may be addressed to any person whether or not he is the subject of an investigation. It may be made for the purpose of ascertaining any information which relates to any subject of any Department inquiry about a past or present antitrust violation or any activity which may lead to a violation. Beyond this, it may even extend to business acts or practices which offend public policy, or which are immoral or unethical whether or not they involve violations of the Sherman or Clayton Acts. The demand may also be made to elicit any information which the Department may wish to have in connection with any matter in any proceeding before any regulatory or administrative agency of the United States if the available discovery procedures are "inadequate." The Department may elect to use any information obtained in criminal or civil trials, before grand juries, or before a regulatory or administrative agency.

The oral examinations may be conducted in secret. If ordered to appear at a location other than his residence, the witness may be compelled to travel at his own expense. The examination will be under oath. There will be no hearing officer or other arbiter present to prevent overbearing or otherwise improper interrogation. It is not clear whether the witness has a right to suspend the examination to seek a court order protecting against abuse. The witness may, however, have counsel present. The witness will be advised of the nature of the investigation, but has no right to know whether he is a potential criminal or civil defendant in any action, nor any additional substantive information at all.

The witness will be compelled to respond to the questions addressed to him. He may object upon grounds of privilege or other lawful grounds (but, as a practical matter, issues of relevance are largely meaningless). If the witness elects to invoke a privilege against self-incrimination, the privilege may be overridden by a grant of use immunity. Such immunity will not necessarily shield the witness from prosecution for transactions that may ultimately prove to be an issue in a criminal case.

The witness may be entitled to a copy of the transcript of his own testimony, either during or after the examination, except that he can be limited to an inspection of the transcript "for good cause." He will not be entitled to copies of transcripts of testimony of others, even though those transcripts may be used against him in his own interrogation. Denial of access to transcripts may occur despite the fact that the Department may elect to use them in criminal or civil trials or before grand juries or agencies.

Demands may also be made for production of documents or responses to written interrogatories. The recipient of a demand for written materials may raise objections to the demand. The basic objections available are those which may be raised in the face of grand jury subpoena. To raise an objection, the recipient must file a civil action in the district court within 20 days.

The judicial review available to a recipient or to a witness is extremely narrow in scope. There is no provision for objection based on undue or oppressive burden short of constitutional requirements. And, as a practical matter, standards of relevancy and materiality do not apply because the breadth of authority for permissible inquiry is so broad and the inquiry so vaguely defined, there is no basis against which such standards may work. In general terms, judicial review will principally serve to guarantee only that bare constitutional protections will be followed.

H.R. 39 would lodge in the Department an extraordinary degree of power. I will let the description of the inquisitorial process speak for itself. However, I would raise with you three questions:

1. Can you conceive of any subject which could not be inquired into under this bill?

2. Can you conceive of any person whom the power of inquisition might not touch?

3. Can you conceive of any realistic way to oversee what the Department may in fact be doing, or to protect against abuses either of the process or of the persons whom the inquisition may affect?

As you evaluate these questions, you may wonder why this marvelous engine of investigation is being proposed at all or why those concerns which prompted deliberate and careful limitations in the 1962 Act are not equally valid today. Indeed, you may inquire whether we are not, in fact, being asked to arm our prosecutors with weapons that create jeopardy to ourselves and our society. These are the subjects to which I now turn.

Over a period of seven years leading up to 1962, previous Congresses gave exhaustive consideration to enactment of the Antitrust Civil Process Act. Numerous bills were submitted, hearings were held, statements were received, and reports were prepared.[1] Extensive floor debates and amendments occurred, in both houses.[2] The operative bills were managed by two respected members of Congress in the antitrust field, Senator Kefauver and Congressman Celler. The result was a carefully drawn, fully considered Act.

In light of this recent and intensive Congressional scrutiny, it is relevant to ask why there is presently before this Subcommittee a proposal to revise the Act for the purpose of enlarging the Department of Justice's investigative powers. The case for enlargement has been put by the Department of Justice itself in its testimony in connection with H.R. 39.[3] In the Department's view, the amendments are needed for two reasons: to increase the "investigative effectiveness" of the Department in conducting civil antitrust investigations, and to assist the Department when it appears before federal regulatory agencies as an advocate for competitive policies.

Antitrust cases can be complex and collection of information is a task of considerable magnitude. I do not for one moment question the Department's view that the authority to demand responses to interrogatories and compel oral testimony or the production of information from individuals may be a useful investigatory tool that enhances the Department's enforcement capability. The real issue, however, is to determine the genuine depth of that enforcement need so that it may be balanced against the social costs of new authority sought.

Here, from the vantage point of a private citizen, the external facts suggest that the new powers are hardly essential. The catalogue of resources which the Department can muster to meet its tasks appears literally awesome. There is a whole world of public data, access to vast banks of information contained in the Departments, Bureaus and Agencies throughout the entire government, information offered by complainants or numerous volunteers, and information from others which the Department may actively seek out through its own personnel or that of the Federal Bureau of Investigation. Compulsory process is available not only directly through the grand jury proceeding or civil investigative demand, but also through the process and data gathering capabilities of regulatory agencies and other government bodies. It is available as well when the Department participates in judicial or regulatory proceedings.

Nor did the new powers appear essential to the Department just 13 years ago when the Antitrust Civil Process Act was passed. In the hearings that led to the passage of the Act, the Department's position was quite clear. It was the absence of authority to demand documents in civil antitrust investigations which seriously affected the Department's ability to enforce the law and the Antitrust Civil Process Act responded to this need.

We must, of course, respect the Department's own appraisal of the adequacy of its investigatory tools for the mission it performs. The Department has testified that the limited scope of the Antitrust Civil Process Act "substantially impairs" its "investigative effectiveness."[4] But I am not quite sure whether this testimony means that the absence of Title II powers is seriously undermining effective antitrust enforcement itself. In any event, the Department has not yet told us how it is even inhibited except in the broadest generality. Yet it alone is privy to its internal problems and it alone has the capacity of addressing in detail, as it did in 1962,[5] the precise ways in which antitrust enforcement may suffer from the absence of the power it would like to obtain.

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[1] *See, e.g.*, H.R. 7309, 84th Cong.; S. 3425, 84th Cong.; S. 212, 85th Cong.; H.R. 4792, 86th Cong.; S. 716, 86th Cong. (passed Senate July 29, 1959); S. 1003, 86th Cong.; H.R. 6689, 87th Cong.; S. 167, 87th Cong. (became P.L. 87–664, September 19, 1962). *See* Hearings on S. 716 and S. 1003 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. (1959); Hearings on S. 167 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. (1961); Hearings on H.R. 6689 Before the Antitrust Subcommittee of the House Comm. on the Judiciary, 87th Cong., 1st Sess. (1961). *See* S. Rept. No. 451, 86th Cong., 1st Sess. (1959); S. Rep. No. 1090, 87th Cong., 1st Sess. (1961); H.R. Rep. No. 1386, 87th Cong., 2d Sess. (1962); Conf. Rep. No. 1884, 87th Cong., 2d Sess. (1962); Conf. Rep. No. 2291, 87th Cong., 2d Sess. (1962).

[2] *See, e.g.*, 105 Cong. Rec. 14608 *et seq.* (1959); 107 Cong. Rec. 20659–62 (1961); 108 Cong. Rec. 3995 *et seq.*, 4566, 13985 *et seq.*, 18407–08, 18849 (1962).

[3] Testimony of Assistant Attorney General Kauper on H.R. 39 Before the Subcommittee on Monopolies and Commercial Law, House Committee on the Judiciary (May 8, 1975), p. 2.

[4] Testimony of Assistant Attorney General Kauper on H.R. 39, *supra*, at pp. 1–2.

[5] Senate Subcomm. Hearings on S. 167, *supra*, at 55–56; House Subcomm. Hearings on H.R. 6689, *supra*, at 17–28.

On the other hand, the Department's testimony may mean simply that it will be able to proceed with much greater efficiency were H.R. 39 enacted. That may be true. It is equally true that investigative efficiency can be a worthwhile goal. But, apart from any question about whether that goal is in fact thwarted under today's laws, it cannot be the only goal under our system of government. We could, if we desired, maximize "investigative effectiveness" by permitting unlimited wiretapping, or abolishing testimonial privileges, or rescinding the Fourth Amendment, or abolishing Congressional oversight of the activities of the Department of Justice. We have not done so, for obvious reasons. Nor can we endorse H.R. 39 for the sake of prosecutorial efficiency with blindness to the damage that might be done.

The Department has also attempted to justify H.R. 39 by contending that it would be "advantageous" to the Department to have the proposed amendments to assist it in performing its mission as "one of the prime advocates of competition policy before federal regulatory agencies."[6] H.R. 39 does in fact authorize the Department to use its inquisitorial powers in aid of administrative agency proceedings throughout the government. That authorization cannot be taken lightly. Standing alone, it may provide for whole new areas of subject matter into which compulsory investigative process may reach.

The Department's role and the new authority raise significant questions. Is the Antitrust Division, historically a prosecutor, the appropriate entity to oversee the policies of other federal agencies? How does such a role alter the Department's traditional status as the government's lawyer for such agencies? In any event, should the Department have independent investigatory authority for the performance of this role? Will its use of existing or new compulsory inquisitorial power affect the agencies' own proceedings and their ability to treat evenly all who appear before them? Whatever the response to those questions, one basic issue will always remain. Is there any need so compelling to the Department's competitive policy advocacy role to warrant authorization or use of the type of inquisitorial power set forth in the bill? The Department itself provided the obvious answer when it acknowledged that it would "undoubtedly not use this authority in many agency proceedings."[7] In short, while it may be true that the bill would be "advantageous" to the Department as a policy advocate before agencies, it is quite clear that the advantage is not worth the price.

There is indeed a dangerous price we pay and it is time to address that issue here. Throughout the proceedings leading to enactment of the Antitrust Civil Process Act, concerns were expressed about the dangers of granting the Department of Justice excessive investigative powers beyond those already available via the grand jury, the Federal Rules of Civil Procedure, and other mechanisms. Careful steps were taken to give the Department what was thought necessary yet to eliminate those dangers. There is nothing in our experience in the intervening 13 years to indicate that the dangers now are any less than they were then.

A major impetus for the Antitrust Civil Process Act came 20 years ago in the Report of the Attorney General's National Committee to Study the Antitrust Laws. The Report recommended creation of a pre-complaint civil discovery process for use where civil proceedings are initially contemplated and voluntary cooperation is not forthcoming.[8] Its recommendations bore a striking resemblance to the Act ultimately enacted in 1962. While the Report espoused, successfully, the enactment of a civil investigative demand authority,[9] it emphasized the safeguards that should be built into such an authority.

For example, the Report recommended legislation applicable only to relevant documents (not private persons) and then only to documents possessed by parties under investigation.[10] It further specified that the documents must "be relevant to particular antitrust offenses stated to be under investigation."[11] The documents were to be available *only* to the Antitrust Division and the Federal Trade Commission, not to anyone else.[12] And, in a passage of peculiar import to H.R. 39, the Report stated:

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[6] Testimony of Assistant Attorney General Kauper on S. 1284 Before the Subcommittee on Antitrust and Monopoly, Senate Judiciary Committee (May 7, 1975), pp. 9–10.
[7] Testimony of Assistant Attorney General Kauper on S. 1284, *supra*, at p. 10.
[8] Report of Attorney General's National Committee to Study the Antitrust Laws, 345 (1955).
[9] *Id.* at 346.
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*

"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.*[13]

The concerns expressed in the 1955 Report about the needs for appropriate safeguards in lodging inquisitorial powers in prosecutors [14] surfaced repeatedly in the legislative process leading up to the Antitrust Civil Process Act. For example, in the debates on the Act, Congressman McCulloch declared:

"The grant of a civil process to the Attorney General does not mean . . . that he shall now be permitted to engage in fishing expeditions. Far from it. The fact that the Attorney General is the chief prosecuting officer of the Federal Government and the fact that the untrammeled right to obtain information could severely harm the rights of the individual have led the Committee on the Judiciary to strictly circumscribe the extent to which [CIDs] may be used." 108 Cong. Rec. 3999 (1962).

Congressman Celler, floor manager of legislation in the House of Representatives, emphasized the same point and also made clear that Congressional concern for unacceptable intrusions extended to business entities, not solely private persons.[15] And, many other members of Congress similarly referred to the need to structure the statute to avoid the possibilities of unacceptable intrusions or undue burdens.[16]

Congressional concern in 1962 about the dangers of lodging excessive powers in the Department of Justice did not reflect a mistrust of those holding office in the Department. Nor, of course, are there grounds to fear the motives and actions of those holding office today. But the potential for abuse does not relate to individuals: it relates to the laws within which they operate. As Congressman MacGregor put it in explaining why limitations on the Department were an integral part of the Antitrust Civil Process Act:

"I do not suggest that this Attorney General or, perhaps, any Attorney General or his assistants would abuse this tremendous grant of authority but I think we should concern ourselves with the possibilities of its abuse rather than with the prospects and possibilities of its proper exercise." 108 Cong. Rec. 4004 (1962).

In response to the concerns outlined above—such as protection of citizens and companies from unwarranted intrusions and burdens, protection of documents from unwarranted circulation not required by the Department's traditional enforcement powers, and guarantee of ready and full access to judicial review—the Congress insisted on precisely those limitations that H.R. 39 would now discard. Perhaps the most important was treatment of private citizens, who were in Con-

[13] *Id.* at 45–46 (emphasis added; footnote omitted).

[14] Even with the limitations built into the recommendations of the Attorney General's Committee, one member of the Committee was unable to accept the notion of granting the Department of Justice—as distinct from the courts—the equivalent of a subpoena power. In his words: "One of the plainest lessons taught by the history of Government in any place and at any time is that freedom of the individual disappears with the growth of executive power." *Id.* at 348.

[15] There is every appropriate safeguard in this bill to protect the citizenry." *Id.* at 3998. "The bill, as amended, provides every conceivable safeguard for the company to which a civil investigative demand is addressed."

[16] In introducing a predecessor bill (S. 716, 86th Cong.), Senator Kefauver, who managed the legislation in the Senate, noted that it "protects the public against an unreasonable demand . . ." and "safeguards the confidentiality of the documents furnished. . . ." 105 Cong. Rec. 1876 (1959). Senator Carroll declared that "In the bill we tried to provide every safeguard." *Id.* at 14615. Congressmen Rogers, Lindsay, Patman, and MacGregor, in addition to McCulloch and Celler, repeated this point. 108 Cong. Rec. 3995–4004 (1962). The sentiments were reflected in the reports as well. As the Senate Report indicates:

"The rights of those who produce documents pursuant to such demands and the preservation of their material are fully protected by the provisions of the bill and the enforcement of those rights is assured through proper court action." S. Rep. No. 1090, *supra*, at 9.

See also H.R. Rep. No. 1386, *supra* at 5 ("many safeguards").

After reviewing that legislative history, one court observed:

"The tremendous concern shared by the committees, and others concerned with the bill, that it be surrounded by adequate safeguards and proper limitations on its scope." A real fear was expressed as to the danger of improper use of investigative power. These fears were manifested in the many protective provisions put into the act at various stages. *United States* v. *Union Oil Co. of California*, 343 F.2d 29, 35 (9th Cir. 1965) (footnotes omitted).

gressman Celler's words "carefully excluded". 108 Cong. Rec. 13986. It was an exclusion which the Department of Justice itself specifically endorsed.[17]

Other limitations considered fundamental to the 1962 Act were implemented as a result of the so-called Dirksen and MacGregor amendments. The former forbids the Department from turning over documents produced by CIDs even to Congress. *See* 105 Cong. Rec. 14608 *et seq.* (1959). The latter permits the Department to use CIDs solely against business entities "under investigation" and not against those entities "who were not themselves suspected of any antitrust violations." 108 Cong. Rec. 4004–09, 18408 (1962). As to the MacGregor amendment, Senator Hruska declared:

"Otherwise, there would have been vested in the Department of Justice a power to ramble virtually at will into the confidential records of any business corporation. That would not have served the purpose for which the bill is designed." 108 Cong. Rec. 18849.

As to both the Dirksen and MacGregor amendments, Congressman MacGregor stated:

"The power which would have been granted by [the bill in the absence of the two amendments] would not properly safeguard the innocent third party witness from bureaucratic harassment; books and records could have been demanded from anybody and everybody in business, and the Justice Department could have distributed the information obtained indiscriminately throughout various Government agencies. The basic individual rights to privacy and to protection against unreasonable search and seizure would have been trampled." 108 Cong. Rec. 18408 (1962).

These and other limitations [18] were inserted in the 1962 Act to insure that the Department was granted a tool but not a weapon. They were carefully drawn by men of foresight who acted before the lessons of Watergate taught us that if the potential for abuse exists, it can ultimately be fulfilled. One has only to think of the 1969 memorandum from Mr. Magruder to Mr. Haldeman urging use of the Antitrust Division and threats of antitrust actions to change the views of the news media or of John Dean's memorandum on the use of federal machinery to deal with political enemies to realize that the concerns underlying the deliberate balancing in the 1962 Act are justified.

It is no answer to these obvious concerns to say that some federal agencies have similar powers or that some States have given pre-complaint, antitrust investigative powers to their attorneys general. Similar arguments were considered by Congress in 1962; they did not lead to a rejection of safeguards then. They should not today. Nor does the example of regulatory commissions serve here. It is one thing to permit extensive investigatory powers to agencies whose delegated function is to determine policy and to make laws by drafting regulations to flush out the particulars of broad Congressional grants of authority. It is quite another to grant such powers to a Department whose appropriate role is to prosecute violations of existing law.

The analogy to the powers of grand juries, which appears to be the central theme of H.R. 39, is equally inapt. Sweeping inquisitorial powers are granted to grand juries to assist them in determining whether there is probable cause to believe that the laws have been violated. To that extent, grand juries and the Department share a common purpose—enforcement of the law. But there are a number of highly critical differences.

Grand jurors are permitted broad powers in part because, unlike Department officials, they are supposed to be a man's "fellow citizens acting independently of either prosecuting attorney or judge," *Stirone v. United States*, 361 U.S. 212, 218 (1958), and, as such, have historically acted as "a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 343 (1974). H.R. 39 is not an analog—it is a reversal. It would place equivalent power in the attorneys' offices of the Antitrust Division despite the fact that:

"The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory dis-

[17] In hearings on a predecessor bill of the 1962 Act, Senator Kefauver asked then Assistant Attorney General Hansen why the Department had not sought the inclusion of private citizens. Judge Hansen replied:

"We have had very few instances where we have need for such powers where individuals were included, and, frankly, we felt that it might be burdensome to an individual and that the need was not so great that we ought to place that burden on the individual."

Hearings on S. 176 and S. 1003 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. (1959).

[18] *See* the statements of Congressmen Celler and McCulloch listing the specific limitations. 108 Cong. Rec. 3998–3999, 13986 (1962).

closure. They do not recognize the United States Attorney's office as a proper substitute for the grand jury room and they do not recognize the use of a grand jury subpoena, a process of the District Court, as a compulsory administrative process of the United States Attorney's office. *Durbin v. United States*, 221 F. 2d 520, 522 (D.C. Cir. 1954).

At the same time, grand juries and prosecutors who present evidence to them are subject to a court's supervision, and the evidence they gather cannot be made public for use against someone not indicted. Examine, if you will, what H.R. 39 would do here. Information may be used at the Department's fiat virtually everywhere. Some may hopefully seek to protect its confidentiality, but the Department may spill it out at will so long as it can find a forum to do so. Some may seek to access their own personal data for correction—but those hopes may be ephemeral as well for the Department may deny access at its whim. At the very least, more consideration should be given to the relationship of this bill to the Freedom of Information Act, as amended last year, and to the recently enacted Privacy Act of 1974 (Pub. Law. 93–579).

Nor can we regard even the grand jury as a nonpareil procedure to protect against abuse. As the Committee knows, the grand jury process has come under severe criticism for failing to provide the protection it was historically designed to afford those accused of crime.[19] It is particularly ironic that possible misuse of grand juries by the Department of Justice constituted one of the major reasons for enactment of the 1962 Act.[20]

No reason exists today for rejecting the limitations contained in the 1962 Act. Even if some modifications in the existing law are in order, H.R. 39 is hardly an appropriate response. Do we, for example, realize that H.R. 39 goes far beyond the kind of civil investigative demand authorized to deal with infiltration of Mafia racketeers into legitimate business enterprises.[21] That does give some pause for what is proposed here.

A prosecutor's desire for inquisitorial powers often clashes with a citizen's rights against intrusion. Our society's traditional approach to this conflict is to strike an acceptable balance, as by permitting electronic surveillance but stringently limiting its use or as by enacting legislation such as the Antitrust Civil Process Act. The scales in such a balance normally are weighted in favor of the citizen. But not in H.R. 39. H.R. 39 represents a relentless promotion of the interests of prosecutors, to the disregard and jeopardy of everyone else.

TESTIMONY OF ARNOLD M. LERMAN, WILMER, CUTLER & PICKERING, APPEARING ON BEHALF OF THE BUSINESS ROUNDTABLE

Mr. LERMAN. I have planned to be only 15 or 20 minutes, Mr. Chairman.

Chairman RODINO. Fine.

Mr. LERMAN. Mr. Chairman, I have submitted a prepared statement. What I would like to do here is summarize some of the issues stated in the prepared statement and to amplify a few others.

Let me state my conclusions first. I really wish there were some simple way to communicate to you and the members of the committee the depth of my real concern about the grant of inquisitorial powers to the Department of Justice. It is coercive. It is uncontrolled. It extends everywhere. It touches every person. It incorporates all of the abuses that attach to grand jury powers without either the protection of the grand jury or the justification for grand jury process.

[19] It is widely believed today that grand juries have ceased acting as checks on prosecutors, and that prosecutors have converted them from shields to weapons. This has prompted Congressional concern. *See, e.g.*, Hearings on H. Res. 220, *et al.*, Before Subcommittee No. 1 of the House Committee on the Judiciary, 93d Cong., 1st Sess. (1973). It represents yet another reason why reliance in H.R. 39 on the model of the Grand Jury is unsound.

[20] *See, e.g.*, 105 Cong. Rec. 14613 (1959) (Senator Kefauver); 108 Cong. Rec. 3997 (1962) (Congressman Celler).

[21] The Department of Justice did not seek, and Title IX of the Organized Crime Control Act of 1970 did not authorize, oral interrogations, depositions of individual persons, or interrogatories, and three members of the House Judiciary Committee strenuously objected even to the provision adopted as giving the Attorney General "carte blanche to engage in fishing expeditions, unfettered even by the controls of a grand jury's proceeding" and making "every business subject to harassment and abuse." H. Rep. No. 91–1549, U.S. Code, Cong. and Adm. News (1969), p. 4084.

The bill incorporates all that was rejected after 7 years of deliberation leading to the original Antitrust Civil Process Act. Rejected, I should add, because of deep concerns about intrusions upon individual rights, harassment, and abuse. I know of nothing in the short time since those deliberations that would lead us to conclude that the dangers are any less present today. And I have seen little that warrants even consideration of the type of changes here proposed.

Now, let me explain. H.R. 39 would authorize the Department to demand by compulsion any information relating to any inquiry about whether any person is or has engaged in any violation of the antitrust laws. Even if this referred simply to violations of the Sherman or Clayton Antitrust Acts, the power of inquisition is vast and there is little that cannot be asked. But the power to inquire does not stop here. The inquisition may also be conducted about whether acts or practices simply offend public policy or are immoral or unethical.

It may—although this is not clear—reach facts addressed simply to competitive issues and administrative or regulatory proceedings throughout the Government. It may also deal with facts that relate to any activity which, and I quote, "may lead" to a violation of the antitrust laws, whatever that means. Or which may lead, I suppose, to unethical acts. The Department can demand that information of anyone, whether or not he is the person under investigation, anywhere in the country. It can pursue the inquiry by oral interrogation under oath and in secret if it chooses, by demands for written answers to questions, or by subpenas for documents.

If responses are not forthcoming, the Department can ultimately seek contempt sanctions to put people in jail. The Department can use the information in civil proceedings, criminal cases, grand jury proceedings, or before agencies of the Government.

If a witness is invited to respond to a secret oral interrogation, what can he do? There is no impartial person to protect against abuse or harassment. He may not know whether he is a potential civil or criminal defendant. In fact, he knows little at all except the description of the general subject matter of the inquiry. If he is fortunate enough to have an attorney present, he may object to questions but hardly upon grounds of relevance. The scope of the power is so broad and his knowledge is so sparse that there is little to which that constraint would apply. If he invokes the fifth amendment privilege, he may nevertheless be compelled to respond by a grant of use immunity, a form of immunity which many claim leaves little to the privilege against self-incrimination. He is, in short, under compulsion to reply and he is largely at the mercy of the scruples or sensitivity of his interrogator.

If the demand is a fish net for documents, what constraints apply here? Again, relevance as a practical matter means precious little. There is no express prohibition against oppressive demands. Even if there is some theoretical right—and this is not clear either—to raise claims of undue burden, neither the witness nor the court will know enough about the subject to balance realistically the burdens against the need. The act does refer to some customary protections available in grand jury proceedings. Here, if we have learned anything from grand jury subpenas, it is that there is virtually no constraint at all except for privilege and the grossest types of abuse.

These are a few illustrations of the application of H.R. 39. But I think they suffice. Do they not at least lead you to ask what personal intrusions it visits or how much it inflicts? Who will watch how the power is used or how far it can reach? Who will, or can, even know? How can it be controlled and why should we confer it upon a prosecutor at all? I do want you to understand that my comments do not reflect upon particular persons who now serve us in the Department. Congressman MacGregor put it well when he expressed the same concerns in rejecting similar proposals at the time the original Antitrust Civil Process Act was passed.

He said:

> I do not suggest that this Attorney General or perhaps any Attorney General or his assistants would abuse this tremendous grant of authority, but I think we should concern ourselves with the possibilities of its abuse rather than with the prospects and possibilities of its proper exercise.

Let me make a few observations here.

First, these powers appear to be modeled upon grand jury powers. The abuses of grand jury powers have gravely concerned many of us. I hope you have the opportunity to read again the remarks of Senator Kennedy before your committee in testimony upon grand jury abuse. You will find there an explicit catalog of some of the vices of H.R. 39. To the extent that we tolerate the threats of abuse of grand jury proceedings, we do so because we have a need to have criminal process. The Department already has criminal grand jury proceedings for antitrust violations. How can we possibly want to extend those techniques to civil regulatory laws?

Second, whatever abuse may occur with grand jury authority, the powers conferred under H.R. 39 are far worse. The grand jury itself sits as a constraint upon the prosecutor's arbitrary or oppressive action. The court participates in its control. I would ask that you compare carefully what H.R. 39 would do in these respects. There is no constraint upon the circumstances under which the department may institute its inquisition. All it need do is recite that it is conducting an investigation about whether somebody has violated the antitrust laws. There is no limitation upon whom it may pursue. There is no meaningful way to challenge or even know its motivation. And as a practical matter, there is virtually no limitation upon what it may ask and the burdens it may impose.

Third, all that you now consider in title II was explicitly rejected just 13 years ago when the Antitrust Civil Process Act was passed. In my prepared statement, I have detailed the legislative concerns expressed there. They are no different now. Our experience in the interim hardly suggests that we exercise less constraint upon uncontrolled powers of inquisition. It was just a short time ago that we all read, with great dismay, Mr. Dean's memorandum which spoke to the question of "how we can use the Federal machinery to screw our political enemies," or Mr. Magruder's proposal "to utilize the Antitrust Division to investigate various media relating to antitrust violations." Mr. Magruder noted that: "even the possible threat of antitrust action would be effective in changing views." Bear in mind that Mr. Magruder was talking about civil investigation and not some of the more excruciating forms of pressure that H.R. 39 would permit. I know these points are obvious and yet I think they really do have to be raised again when I see the provisions of H.R. 39.

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Fourth, I have carefully reviewed the Assistant Attorney General's remarks in support of H.R. 39 precisely to determine what special enforcement need could warrant what is here proposed. There are two basic reasons given: Investigative efficiency for antitrust cases and assistance in massing information for the Department's role as protector of competition in administrative agency proceedings.

I do not believe that the Department's role before agencies warrants any special inquisitory authority at all. The Department is not a regulatory agency; it has no genuine statutory basis to supervise other agencies. To the extent that it has assumed a self-appointed role in appearing before agencies, it addresses the need for the agency to take antitrust policy into account. This role does not clothe the Department in a mantle of sanctity, rather it makes the Department an advocate. I see no reason why its authority to gather information, already vastly greater than that possessed by other advocates who appear, need be enhanced still more. Nor do I wholly believe that the Department views its agency role as a serious basis compelling legislation such as H.R. 39, when, at the same time, it expresses the view that the powers of inquisition under the bill would be seldom used for this purpose.

As for efficiency, I would readily agree that H.R. 39 may contribute to efficiency. But how much do we really need it and is it any event worth the price? It may be that the Department could fruitfully use its present civil investigative demand authority for acquisitions not yet consummated, even though the FTC already requires systematic pre-acquisition reporting. I would suppose as well that something might be gained by some additional pre-complaint demand against defendants. But in light of the vast discovery permitted under the Federal rules, is it not fair to describe as perhaps the most significant gain, the license to avoid responsibility inherent in the filing of a complaint and supervision of the court? The same is true for third-party pre-complaint demands with the added license that comes from excluding the defendants and their counsel who would otherwise be present.

Here, I would ask you to pause for a moment and reflect with some particularity upon the need. The Department already has grand jury process for criminal violations of law. It has an incredible array of other investigatory authority, including many other ways to reach information through compulsory processes. It was a relatively short time ago that the Assistant Attorney General then in charge of the Antitrust Division explicitly stated that there were very few instances where it would be necessary to have compulsory process to interrogate individuals, and that it was not in any way worth the intrusion. It was just a short time ago that the Department expressed its view that what was required was the civil investigative demand authority it now possesses under the act. What then is really the depth of any enforcement need? I do not find any answer, let alone a convincing demonstration in the justifications we have seen thus far.

Finally, I would hope that you cannot be persuaded that investigative efficiency is itself a warrant for the proposals of H.R. 39, or that your expectation that the Department may use the extraordinary powers with discretion will color your judgment. We can have more investigative efficiency were we to abolish constraints against wiretapping or to revoke the fourth amendment prohibitions against

unreasonable search and seizure. We do not choose to do so and the question to my mind is no different here.

I am reminded of Senator Kennedy's testimony on grand jury questions when he commented on the Organized Crime Control Act of 1970 and I would like to leave the subject with the thought that he expressed there. He said, and I quote:

> In part, of course, Congress is to blame for the present crisis because Congress failed to recognize the sinister potential abuses lurking beneath the innocuous surface of the 1970 law. In part, the Department of Justice is to blame for lulling Congress, not only with excessive protestations of the need for this new Act as a law and order tool, but also with equally excessive and wholly unfulfilled promises of good behavior if only the Act would pass. Today, in consequence, the investigative Grand Jury has become a powerful new engine of political oppression.

Of course, our concern here is not for an investigative grand jury, it is for compulsory investigative authority for the Department of Justice. And it is not for political oppression alone. I sincerely hope that we will not be making the same tragic observations because H.R. 39 were permitted to become law.

Again, I do want to thank the committee for the opportunity to appear and I will be happy to try to answer any questions you may have.

Chairman RODINO. Thank you very much, Mr. Lerman.

It appears from your prepared statement that you have considerable knowledge of the current effort on the part of the Department of Justice and the Antitrust Division to secure new kinds of tools for enforcement processes and to be part of an investigative arm so that they might be able to enforce the laws. Now you say that in your 13 years of experience with the ACPA you see really nothing that would change the view you held some 13 years ago. Is this not quite a broad statement? Is there not anything at all that has developed within that period of time which would show that there are some restrictions on the ability of the Department to do its job responsibly and that there is a need, first of all, for some other investigatory tools? And are we not talking about this in particular and how far it goes as a basic premise on which we can proceed?

Mr. LERMAN. Mr. Chairman, I was not speaking particularly of my own experience, although I think I could speak from that as well, but rather the experience which the Department of Justice represents to us as having occurred during the intervening period. If we address first the need for these kinds of tools, with one exception which I will come to in a moment, I think that the Department itself has not presented to any of us any kind of persuasive statement of difficulties or substantial changes that have occurred since the passage of the Antitrust Civil Process Act.

I would compare, for example, the type of showing made by the Department when it came before Congress to make its request for the Antitrust Civil Process Act in the first instance. At that time, Attorney General Kennedy presented to the committee and to Congress, literally a detailed listing of the types of problems the Department had faced in specific cases. I have not seen anything like that here.

The one area where I think there may have been a possible surprise to the Department, or in any event there may have been change which may warrant attention, is where the courts have held that the civil investigative demand cannot be used with respect to pro-

posed acquisitions. It is true that when Attorney General Kennedy testified in 1962, one of the major reasons he cited for passage of the original Antitrust Civil Process Act was an inability to obtain information for that kind of transaction. To some extent that need is mitigated today because the FTC does systematically require premerger notifications. But I do think that the Department, as I indicated, could fruitfully use the civil investigative demand tool in the merger situation.

Chairman RODINO. Well, would you be able to say, Mr. Lerman, based on your experience and your expertise in this area, that there is an ability and a capacity in the Department to be able to proceed without these investigative tools and do its job effectively?

Mr. LERMAN. Do you mean the existing civil investigative demand?

Chairman RODINO. Yes.

Mr. LERMAN. I think the existing civil investigative demand is very valuable to the Department. I have no difficulty in reaching that conclusion. I think it gives to the Department access to documents in a manner which can be very helpful to the Department in providing it with sufficient information to prepare its cases.

Chairman RODINO. And you would not go beyond that?

Mr. LERMAN. I would consider first extending it to mergers if we think the Department really does have a need to use it there. I certainly would not consider extending it to oral interrogation of any sort. I believe that, whether or not we should be willing to extend it for interrogatories would depend largely upon the function interrogatories would serve and the kinds of limitations you would impose. I also would have considerable difficulty extending the demand generally to third parties. The burdens and risks imposed in an extension to third parties go well beyond any benefits that may be gained. I would agree with you, Mr. Chairman, that there may be circumstances where there could be some value to these investigative tools, but I think we are engaged in a balancing process and I think the balancing process requires drawing that line to keep the civil investigative demand pretty much in the same form as it now stands.

Chairman RODINO. Thank you, Mr. Lerman. Mr. Hutchinson?

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. Lerman, on page 3 of your prepared statement you point out that the oral examinations contemplated in this bill would be in secret. Do you think that they should be open rather than in secret?

Mr. LERMAN. I think there are two types of approaches, Mr. Hutchinson. I think there are problems with both. The problems with the secret interrogation are the intrusions and forms of pressure that can be visited upon an individual. One of the additional problems is the absence of the kind of constraint that presence of defendants with their counsel might provide.

I think it is quite true that if we have open interrogations we can avoid some of that. That may depend, in part, upon the rights which you would give to defense counsel in those open interrogations. On the other hand, the difficulty with the open oral interrogation at this stage is that the interrogation can then itself become a way by which the Department or Department staff, through publicity or pursuit, can seek to accomplish objectives or results which do not really relate to the bringing of an antitrust case itself. One additional

difficulty arises precisely because the Department has not, at that point in time, gone through the constraint and exercise of decisionmaking involved in the filing of a complaint and its inquiry is not then delimited by the requirements of the complaint itself.

Of the two options, I would certainly prefer the latter. But I do not think we need face even that risk of abuse for the purpose of the Department's information gathering. It can file that complaint and discover it under the Federal rules.

Mr. HUTCHINSON. I had a concern for the proprietary privacies of businesses and so on which I think would certainly be violated if you opened them up to the public.

Mr. LERMAN. I think that is right. You have added a third consideration. Whatever procedure is involved, to the extent that the Department is seeking information of a confidential or proprietary character and you open up the proceedings without the protection of the court, you have a very serious problem in disclosure. I think that is absolutely right.

In this connection, there is one other area I do not think the text of the bill addresses. This is more in the nature of a technical, but nevertheless, significant point. As I read your present bill, the only time the Department returns materials to the person from whom it obtains them, is when documentary materials are obtained in response to a documentary civil investigative demand. Thus the Department will hold many other types of materials like answers to written interrogatories or transcripts of oral testimony. Once an investigation closes, and perhaps even while an investigation is pending, we should ask about the effect of the provisions of the Freedom of Information Act. We should also ask whether we have considered seriously enough, from the standpoint of persons who want to get access to information about themselves, whether there is any way in which the new Privacy Act relates to data the Department will hold.

Mr. HUTCHINSON. I thank you.

I think maybe in view of the fact that there are only 15 minutes before the session starts, I had better stop asking questions so the other members may have time.

Chairman RODINO. Mr. Flowers.

Mr. FLOWERS. Thank you, Mr. Chairman.

I think the witness has well stated the potential problems with this additional authority here. Maybe, however, in some instances he has fallen into the trap that all of us do from time to time in overstating the potential problems. I would call your attention, sir, to the bill itself.

On page 2 of the bill, which states that "Each such demand shall, (1) state the nature of the conduct constituting the alleged antitrust violation which is under investigation and the provision of law applicable thereto." I think that this very clear provision would give any person who testified or replied to written interrogatories or produced documents, good notice of what is the issue that the investigator is concerned with.

My concern really goes over to the next stage of the process, and I really do not know how you can answer that concern: there is no judicial officer available under this procedure to determine the relevance of any questions and whatnot. I share your concern that a per-

son, a witness, any natural person who is called upon to answer after this statement that appears in the CID, will be called upon to answer whatever the investigator might ask. It does not even have to be relevant. Unless the person being inquired of chooses to invoke a privilege, he does not have the authority to turn to any judicial officer at that time and have the possibility of it to say, "Hey, can I get out of answering this question?"

Is that not really the basis of what you are stating as your concern?

Mr. LERMAN. Well, I would not describe it as the sole basis, because he can, I suppose, refuse to answer and compel the Department to take him to court, at which time he might raise an argument about the relevance of the question—that is, assuming he has counsel and he is able to do that.

Mr. FLOWERS. That, then, shoves it into the next strata that concerns me, and I think you mentioned it, too. Let me state first of all, I think that this legislation, given the proper safeguards, can be a useful tool and can help us and obviously help investigations of antitrust violations. I think it can be useful, too, for the Government and not harm private rights. I do not know what those safeguards are yet I am just kind of firming up my thinking on it. But I am concerned, Mr. Lerman, in this area as well as in some others that individuals—and I think companies, too—could be affected thereby. Looking back over the last couple of years, to a lawyer coming from the State of Alabama, for instance, I am shocked at the prices that Washington lawyers get for defending criminal cases. I daresay that a Washington lawyer who was hired to go even to such a hearing might charge $25,000. I do not know what the going rate is these days.

Mr. LERMAN. I think your estimate of the rate is quite high.

Mr. FLOWERS. Well, I daresay it would be relative to who the potential witness or defendant might be, and it would be somewhat relative to that gentleman's ability to pay.

However, I am concerned about that aspect of it, and I think you are, too, that a witness who might be a totally innocent party, but who an investigator might think is possessed of information or material that would be relevant to the investigation, could be put to all sorts of legal expense that could virtually wipe the gentleman out, and he could still end up being an innocent party to the ultimate proceedings.

Mr. LERMAN. This is one of the major problems of applying the compulsory process to a point that goes beyond the person under investigation. I think it is a genuine fact that you do expose people and companies precisely to this.

Mr. FLOWERS. Well, I tell you that I am not sure that such a situation would apply here, but we have provided attorneys for all sorts of people in other areas, under all sorts of conditions, and it may be that if we are going to move into this area that the Government ought to provide a competent legal counsel for such a person that is called in to testify.

Mr. LERMAN. I think that would be responsive to the issue of the possibility of abuse of some individual who appears on his own without sufficient funds or resources. It does not respond to the problems of the burden and scope of interrogation and response, without a carefully defined complaint, without the refinement of issues that occurs in the actual civil litigation, and with the difficulty of obtaining

protection under current theories of relevance. As a practical matter, I just find it very hard ever to prevail upon any contention with respect to relevance, particularly where you have a mandate dealing with the antitrust laws. As a result of these circumstances, you would have, nevertheless, very substantial burdens to which the provision of counsel would not really respond.

Mr. FLOWERS. Well, I thank you, Mr. Lerman.

Thank you, Mr. Chairman.

Chairman RODINO. Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman.

I thank the gentleman for his statement today. A week ago we had testimony from a gentleman representing one of the Ralph Nader groups that deals in this field, and I asked the gentleman, after hearing his statement, whether or not he was satisfied with the grand jury proceedings, because he cited as an example no counsel and secrecy, and recommended something similar in these civil antitrust matters. He was not satisfied that grand jury proceedings were correct, and yet he was using that as the basis for urging us to adopt in this Committee H.R. 39, and, as a matter of fact, urging us to delete from it the right to counsel and some other provisions of reasonable protection. So, this is the dilemma facing us. On the one hand, you have people who have studied the bill—and while I am not sure their reasoning is consistent, feel that 39 is not strong enough—and then we have other people—and you would represent articulately those that feel 39 is perhaps potentially too capricious.

I wonder, and perhaps you have answered the question this morning, and if so, I would ask you to do it again, is there anything that you believe we ought to do to enable the Justice Department to better handle its increasingly difficult burden of proceeding with antitrust matters in a society that is becoming so completely dominated by giants of industry, and where consumers have such a difficult time figuring out what their rights are?

Mr. LERMAN. That is a very difficult question to answer. We can have a very long philosophical discussion and it would be a broad ranging one, but let us take a stab at a few possibilities.

If the focus is basically upon refining the Department of Justice's tools and seeing whether or not we cannot identify some specific tools that may be more helpful to the Department, then I think we may approach the problem from different directions seeking to mitigate the same kinds of dilemmas you just described. I think you could consider, for example, the possible use of interrogatories, but for the purpose of assisting the Department, let us say, to make sure it has obtained the documents that it seeks. I think you might consider possible uses of other techniques for narrow purpose. Again, I would always rule out pre-complaint interrogation, because I really do not believe it appropriate nor do I believe it worth the problems it creates.

I think we might consider other possibilities if perhaps we approached the problems in a different way. I am not sure where this may lead. One of the difficulties here is the scope of the matters into which the Department may inquire. There is an enormous range of inquiry. I did not see an eyebrow raised when I mentioned the ability to probe morality. Yet that is involved, because the "antitrust laws" are defined in H.R. 39 and in the Antitrust Civil Process Act, to include the

Federal Trade Commission Act. You are talking then about authorizing the Department to embark on all kinds of expeditions to investigate "unfairness" or acts contrary to "public policy." Now, I think the same difficulty is present when you talk in generic terms about concepts like, "unreasonable restraints of trade." So, if there were some way to identify a highly precise type of area, and I mean a precise area, about which inquiry was particularly significant and require some kind of showing in that regard, it is conceivable that you might then construct a more refined tool to deal with that circumstance. That is a very different kind of approach, and you would have to hedge it with appropriate protections again. The vice is really the breadth of the law, the breadth of the discovery authority, and the inability to control it. When you deal with this subject generically you simply are not dealing with these difficulties.

Mr. MAZZOLI. Sir, you have practiced law for a number of years in this area and speak for an association of businesses that have had, I am sure, many cases involving antitrust laws. Have you found in your practice that there is a willingness on the part of companies to withhold documentation? That there is an intentional effort on their part to impede or to throw roadblocks in the path of the Justice Department or others in trying to determine whether or not a merger is correct or whether or not——

Mr. LERMAN. Let me speak from my own personal experience in the merger area for a moment, because that is one you have just mentioned. My own experience has generally been a witness to considerable readiness to furnish the Department with information. I suppose it is true—indeed, I am sure it is true—that there are cases where people do not cooperate voluntarily.

Mr. MAZZOLI. Are you aware of any measures that might currently exist that could provide the Justice Department with a tool to obtain those documents?

Mr. LERMAN. Well, there is the present civil investigative demand. I think that might be extended to the merger area. But all the Department of Justice has to do is ask the Federal Trade Commission for its premerger notification report, and in fact, the Trade Commission has plenary authority to require all kinds of information.

I do want to return to complete one other thought. One of the real problems with most of the discovery that businesses face and the burdens that are imposed, even when they are imposed by administrative agencies, is the use of broad mandates authorizing investigations so that it is impossible to constrain the kind of burdens and problems the agency may freely impose upon everybody who might be faced with its demands. To some extent, at least, an administrative agency may have a regulatory mission and there may be some theoretical justification for the existence of the power. But this does not mean that the agency will control its use and employ it selectively. In most instances, in any event at least a collegial body is present and can exercise some kind of control. I do not mean to suggest that agencies do this wisely or well. But the collegial protection is at least there. The problem with this type of legislation, again generically applied, is that there is no meaningful control at all.

Mr. MAZZOLI. I thank you very much.

Chairman RODINO. Mr. Railsback?

Mr. RAILSBACK. Mr. Chairman, I just arrived and I do not feel prepared.

Chairman RODINO. Mr. Lerman, I would just like to comment, first of all, on your statement, which I think is a very reasoned statement. I feel that it probably is one that I think raises a lot of concern which all of us share, but at the same time, I think we have got to recognize our concerns which generally arise whenever new areas are attempted. We know that there is a job that needs to be done, and we are in a dilemma when a department entrusted with the responsibility for a period of time suggests that a necessary tool is lacking. Of course, we recognize, too, I think, generally, that enforcement has not been quite what it should be. And yet, whenever there is a presentation to support what may be a proposal or an additional tool, we find that generally there is this kind of response about the deep concerns which I can, again, appreciate, but with no positive effort to say, well, we do need to go into other areas.

Now, I do commend you for stating that—and again, I suppose without holding you to it—that in the area of mergers one may consider extensions of the civil investigative demands. Nonetheless, it seems to me that we have got to recognize that maybe this is not sufficient. Those who do represent business interests and who go before the executive departments come here, of course, with a position sometimes which is not quite neutral as we who are here looking to be protective of the public interest as well, and, therefore, may have to explore a little more. I am wondering whether or not, sometimes, it is not the fault of those who do come here and raise a lot of concerns and then leave us with the thought, "Well, we just cannot go beyond it" and leave it the way it is, which, therefore, makes us determined to go forward because we just do not believe that that is the case; namely, within 13 years of the ACPA that there is no experience or no data which shows that there is a need There are, also, concerns to guarantee that rights that you are concerned with are protected.

Mr. LERMAN. Mr. Chairman, let me agree with you first that there really can be differences of views. We see the world through different windows, perhaps, even though we both come from the same area in New Jersey originally.

Chairman RODINO. Well, that is interesting.

Mr. LERMAN. But, I really would question your first premise. It may be that we have a need to improve antitrust enforcement. However, I think it is fair to question whether that need really lies in the area of enhanced investigatory tools. And because the Department, as a prosecutor, has come and said we can use this does not mean that there is a social imperative. First, I put aside what the Department has said about regulatory agencies, because I really do not believe that the particular role that the Department envisions before agencies calls for the kind of bill we are talking about here. Beyond this, I would expect most prosecutors to come and say they would like to have more investigatory tools. Why not? In the pursuit of prosecution, that is always what you would like to have. The greater freedom you have from constraint, the more efficient you may be.

If your concern is, as I think it really is, with whether the antitrust laws themselves are accomplishing their mission, perhaps the problem is not the absence of some new investigatory tool. Perhaps the prob-

lem is in the appropriations. I realize the Department came before Congress and said that their appropriations were sufficient. But, you know, there may still be room to accomplish more with appropriations. There may be a problem in personnel—although I do not believe that is the case. There may be problems in the laws themselves. I think there are many ways in which the laws operate which make no sense, either from the standpoint of a businessman or from the standpoint of the public. There may be problems in other areas as well. All I am really saying is that because we have a concern for antitrust enforcement—and I share that same concern with you—that does not mean that we have to accept as given a view that investigatory tools are the cause for the inability of the antitrust laws to serve as we might hope.

Chairman RODINO. Well, I thank you. And I think, too, that some of the concerns that you expressed were expressed in 1962 when the legislation gave birth to the civil investigative process. I think at that time there was a good deal of anxiety as to whether or not there would be an overreach or an overrun. I think this was expressed by my predecessor, Mr. Celler, on the floor of the House, and the ranking minority member at that time. And I think you can see from that that we are aware of this and, however, we do have responsibility to try to develop the kind of legislation that will provide the tools that are necessary, if indeed they are.

Mr. RAILSBACK. Mr. Chairman, if you will yield, may I just add that I find it very interesting that your testimony, to a certain extent, parallels testimony that we have heard from a distinguished member of the New York City Bar, who raised many of the same objections as far as procedures or procedural safeguards. And I think we do have to perhaps take into account that maybe there are going to have to be some changes made to provide more safeguards.

Mr. LERMAN. I would urge that we start first with trying to identify where the real area of need is. I would think that if you can identify something highly specific as the merger area that you then can assess it and deal with it.

I think, second, that procedures cannot be the whole answer, because you will want to narrow the reach, substantively, for example, of various types of tools—even existing tools—that you may use for discovery purposes.

Third, if you began to move in this direction and think of procedures, you have to find ways to put constraints on the manner in which the Department may use this information and what it does with the information when it stores it.

And perhaps if you start in this direction, you can fashion a highly refined, specific tool, useful for some purpose, and build in the protections. But if it is going to be satisfactory you are going to have to do it in a way that really is highly refined and is more of a rifle than a shotgun.

Chairman RODINO. Mr. Dudley.

Mr. DUDLEY. Mr. Lerman, I would like to start a little bit with your kind of blanket opposition to the notion of oral examination prior to trial.

First of all, with respect to whether or not these procedures, which in many instances parallel the discovery procedures in the Federal rules,

whether they take place prior to the filing of complaint. I would think that there would be distinct advantages from a defendant's point of view in having a good deal of the discovery process—or a potential defendant's point of view—of having the discovery process take place prior to the public accusation, with the attendant publicity consequences and other kinds of consequences that attend the filing of a complaint.

I wonder if that is not really an advantage to a defendant in some instances.

Mr. LERMAN. I can answer the question in two ways, Mr. Dudley. First, I have never personally been in the situation where I would have viewed this as an advantage where I would not also conclude that the defendant should be as cooperative as possible in furnishing the Department information. From a defendant's perspective, if it is desirable to have the Department highly informed of a defendant's viewpoint, the defendant would certainly voluntarily cooperate.

Second, I think there is a difference created by the filing of a complaint. It lies not only in the supervision of the court. The filing of the complaint presupposes a process of decisionmaking with respect to an evaluation of the questioned conduct and its effect, and the commitment of the Department's resources to a significant undertaking. It imposes a discipline which tends to produce far more reasoned, careful judgment about what it is that the Department is doing. There is a significant difference in that discipline and the discipline that would apply simply to numerous decisions to investigate whether somebody is engaged in some interesting activity. There is a very different attitude and a very different quality of decisionmaking. For that reason, I think there is a far higher degree of responsibility that precedes the judgment that will lead to the incidence, scope, and forms of discovery that will subsequently occur.

Mr. DUDLEY. Well, going from there to look at specifically the question of whether oral testimony ought to be taken prior to trial as opposed to the interrogatories and production of documents, we are dealing in antitrust cases frequently with problems of conspiracy, problems of attempting to show whether courses of action, parallel courses of action, if you will, were concerted courses of action, and all too often, I suspect, that is not going to be reflected in documents and are not going to be flushed out by interrogatories. It may well be the kind of thing that you can either more conclusively establish did or did not happen through oral testimony. And in that regard, I wonder if we place some limitations on the use to which material can be put, whether that would handle some of the concerns that you have raised.

Mr. LERMAN. Let me answer the question in reverse. Certainly, putting limitations on use, just as refining the tool in other ways, would handle some of the concerns. There is no question about it. You always handle some concern when you try to introduce a greater measure of constraint. On the other hand, I am pondering your comment about whether oral testimony would not be particularly useful in conspiracy cases.

I think your question assumes a type of conspiracy case where the Department is attempting to ferret out, from parallel courses of conduct, some secret agreement where it may not find the magic key that

unlocks the conspiracy in a document that contains the agreement. I suppose you are thinking of conduct like price fixing or agreements to exclude competitors or divide markets in various ways. I would suggest to you, Mr. Dudley, that those are precisely the areas where grand juries are in fact used. If what you are suggesting is that we should go to this process rather than the grand jury process, then I would add an additional concern. If we start moving to this process for precisely those kinds of cases, the investigative tool really becomes a way to allow the Department to circumvent the grand jury process itself and avoid whatever protection and constraint the grand jury would impose. In short, when we treat the conspiracy area and speak of hidden conspiracies. I think we are talking about the kind of cases that really are taken to grand juries today, and with justification. On the other hand there is another form of agreement in restraint of trade, if you will, which is sometimes found from the behavior of people in the marketplace. The finding may even surprise some of the participants. It involves a kind of after-the-fact conclusion that the behavior itself—without underlying agreement—suggests some implied conspiracy. I think those are precisely the kinds of cases where the oral interrogation is not particularly required by the conspiracy nature of the circumstances.

I hope that is responsive to what you were saying.

Chairman RODINO. Mr. Polk.

Mr. POLK. Thank you, Mr. Chairman. Mr. Lerman, did I correctly understand that you took the position that you opposed the document retention practice in the current act?

Mr. LERMAN. I took the position that I am not certain what happens under the current act with respect to the copies of documents that the Department of Justice retains. I think the document retention situation under the current act is generally a good one. But I do have one question that may arise simply because I do not know the Department's practice and I did not have a chance to check before the hearings. Under the current act, the Department may make copies of documents for its official use. There does not appear to be a requirement that these copies be returned. The crucial legal question, of course, is how the term "official use" is construed. I wonder what happens to those documents in the files of the Department; how long they remain; what they really are; whether they are limited in number; and whether they may at some point become subject to the Freedom of Information Act.

Mr. POLK. Well, that was the purpose of my question. Is there any policy justification that you would see in the retention of those copies for an indefinite period of time?

Mr. LERMAN. If we assumed these copies are, in fact, being retained, my own view would be that they should, indeed, be returned when the purpose for which they have been obtained no longer exists. I think you will find, and I have sometimes run into this when I have asked for the return of confidential information even voluntarily submitted to agencies, claims by an agency staff stating that the agency would like to have the data for its official records. There is some policy justification for an agency or the Department wanting to have some documentation, perhaps, of the reasons for actions. In this type of circumstance, a reasonable time after a decision is made, even that

justification for retention may vanish. But again, I have simply assumed that the Department does, in fact, keep the copies. I do not really know.

Mr. POLK. Very well, thank you. On another point, in discussing the scope of H.R. 39, you suggest that, perhaps, a distinction might be made between the target of the investigation on the one hand and third parties on the other. I am sure if we asked the Department or suggested that to the Department, they would respond that at the beginning of an investigation they do not always know who is the third party and who is the target of the investigation. What response would you make to that?

Mr. LERMAN. I think that may be true. I certainly have been involved in enough investigations at the Federal Trade Commission where there are situations where the Commission, for example, may not know who is an actual target. I would suggest to you that the first problem created is that the discovery demands then become so vast that they are almost totally unmanageable. What you are dealing with is a sort of general court of inquiry. Perhaps that is an appropriate function for the Federal Trade Commission, although I have many reservations about the way such investigations are conducted by the Commission. But I do not think it an appropriate function for the Department of Justice. In other words, there is a line to be drawn delineating the broad gauge generic information-gathering functions that a regulatory or semi-regulatory agency may sometimes perform.

Properly, the Department of Justice inquiries fall outside of that line. The Department is a prosecutor investigating some specific forms of behavior or persons. It may not know all of the culprits, but it often has some of them in mind. It would, at least, have reason to believe that certain behavior—individual or industry—suggests a violation. If it does not, then I would suggest that the circumstances aren't the proper place for the use of compulsory process tools in the hands of a prosecutor. There are other places where inquiries are conducted to deal with these circumstances. For example, the Federal Trade Commission and the Congress of the United States.

Mr. POLK. Well, I think that to the argument, distinguishing the FTC from the Department of Justice, the Department has responded that the FTC also prosecutes violations of the law and, yet, they have these broad powers, so why not give those same powers to the Department.

Mr. LERMAN. I would urge with all my heart and soul, if we could ever find a way to do it, that we would be well advised to separate the prosecuting function of the Federal Trade Commission from its other functions, and I would respond to the question in that way.

Mr. POLK. I thought that, perhaps, that was the premise of your argument.

I think that the question has been asked before, but it is an important one. In your blanket opposition to the taking of oral depositions, even of the targets of investigation, you suggest certain abuses. Could you lay out for the record what exactly you envision those abuses to be?

Mr. LERMAN. I would divide the problem into several parts. First, it is a highly personal intrusion. Second, with respect to the

person who appears who is an individual who may be basically unsophisticated and who simply has a lack of knowledge and a lack of counsel, I think there is a whole ambience of pressure. He can be abused and not even know it.

A suggestion was made that, perhaps, such people should be provided with counsel. It is conceivable this would afford some protection. But the pressure upon individuals remains, even in those circumstances where you might have counsel and even where we have some sophistication on the part of the person being interrogated. It is not an easy matter for a person to feel comfortable in a situation where he is being interrogated and, particularly, a situation which is alien to him.

Third, entirely apart from that pressure, you have nobody at the proceeding itself who is exercising control over, not what the Attorney General may have said, but what the staff interrogator is, in fact, asking.

Mr. POLK. Of course, that cuts both ways. If the witness does not answer the question, the interrogator is frustrated.

Mr. LERMAN. The interrogator may then take him to court, and the problem there really arises from the inability to provide bases upon which the person who is refusing to respond can deal with the whole range of genuine concerns he should properly be able to raise in addressing a command that he answer questions.

Mr. POLK. Thank you, Mr. Chairman.

Chairman RODINO. Mr. Falco, and we will just go on until the next bell, because there is a record vote on.

Mr. FALCO. Mr. Lerman, the third question that you say you would like to raise with the subcommittee is "Can you conceive of any realistic way to oversee what the Department may, in fact, be doing or to protect against abuses, either of the process or of the persons whom the inquisition may affect?"

In both your prepared statement and oral presentation, you referred to Messrs. Dean and Magruder. Are you aware that in the petition of Emprise Corp. in 1972, a CID target was able to have a court rule on allegations that the CID had been issued for political purposes and thus constituted an abuse of process?

Mr. LERMAN. I was not aware of that particular case. I was aware of such charges being raised. But, Mr. Falco, the difficulty is first, in the recipient of the demand ever knowing or having even an inkling, that abuse is involved; second, in the ability, even if there is suspicion, to obtain the kind of information that would permit objection; and third, to obtain relief. There have been cases under the Antitrust Civil Process Act where some question has been raised about the basic purpose or propriety of the investigation. There, the basic response of the courts has been to let the matter rest if the Department will furnish an affidavit that the investigation deals with whether someone is violating the antitrust laws. That is apparently the beginning and end of the inquiry. I am aware of one case in which the Department refused to file an affidavit denying the charges of abuse, although that may have been a tactical decision to test the point of law.

Mr. FALCO. Is there anything in H.R. 39 that would prevent judicial review of similar claims of abuse of process under the amended act?

Mr. LERMAN. No. I think you would have to raise it by refusing to respond to an oral question, or by compelling the interrogator to take you to court. I am not at all certain that you could independently raise it by seeking an injunction but I think all of the difficulties are still there. I do not think, as a practical matter, it is an issue that anyone can customarily count on obtaining facts, or on prevailing, even if he has some suspicion.

Mr. FALCO. Well, that seems to lead to a constant theme that you have had of relating constant judicial supervision available in the course of discovery once a case is filed, to the absence thereof for an investigative deposition. Is that a fair statement?

Mr. LERMAN. That, plus the kinds of questions the court addresses when the case is filed and, second, the kind of constraint, internal constraints, and the different kinds of responsibility that, I think, the Department exercises in the decisionmaking process to file a complaint and pursue the inquiry.

Mr. FALCO. Well, I would like to pursue that, if I may, Mr. Chairman. I think you are making some distinctions without a difference. For example, in a discovery process, does not the deposer merely serve his notice of taking the deposition with the burden being on the other party to seek a protective order if they have some reason why that deposition should not be taken? Is not that exactly what happens and would be likely to happen if an investigative deposition is provided for?

Mr. LERMAN. I think that is basically what happens in the oral deposition. I think you also impose a burden on the recipient of a demand to raise those questions. However, there is a difference, Mr. Falco. Before you can take a deposition in a civil antitrust case, you have to file a complaint. The Department's complaints are considered at the highest levels, and, because they involve careful evaluation and a commitment of Department resources, they are carefully weighed and the quality of decisonmaking is different. Moreover, the detailed allegations of the complaint, to the extent that they are present, and the issues that are subsequently framed in the civil proceeding, form a framework to govern the taking of the deposition so that your ability to deal with a deposition within an appropriate framework is quite different.

Chairman RODINO. I regret that we have got to conclude at this time since there is a record vote. I want to thank you, Mr. Lerman. You have certainly been very helpful. This concludes the hearings by the Subcommittee on Monopolies and Commercial Law on H.R. 39. Our record will remain open for the receipt of additional statements until Monday, August 11, 1975. Thank you very much.

Mr. LERMAN. Thank you, Mr. Chairman.

[Whereupon, at 10:30 a.m., the subcommittee adjourned, subject to the call of the chair.]

AGENCY REPORTS

DEPARTMENT OF JUSTICE,
Washington, D.C., March 5, 1975.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 39, a bill "To amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations."

H.R. 39 is identical with a draft bill transmitted by this Department to the Speaker on April 4, 1974, and introduced by the Chairman as H.R. 13992 in the Ninety-third Congress. In the Ninety-fourth Congress, the same draft bill was transmitted to the Speaker on February 13, 1975.

The Antitrust Civil Process Act, 76 Stat. 548, 15 U.S.C. 1311, which presently applies solely to the production of documents by persons (other than natural persons) under investigation, would be extended by H.R. 39 to (1) include persons (including natural persons) in addition to those under investigation, who may have information relevant to a particular antitrust investigation, and to (2) permit the service of written interrogatories and the taking of oral testimony.

The bill would also clarify the Act by correcting the adverse effect of a Ninth Circuit Court of Appeals decision, which held that civil investigative demands may issue only to require the production of documents relating to current or past, but not incipient, violations. *United States* v. *Union Oil Company of California*, 343 F. 2d 29 (9th Cir., 1965). The Act would also be clarified by removing any doubt that it permits the use of evidence in investigations and cases in addition to the specific investigation to which the issued demand relates and any case resulting therefrom. Cf. *Upjohn* v. *Bernstein* (D.D.C. Civ. Action No. 1322-66, 1966).

H.R. 39 would specifically authorize the Department of Justice to extend the period in which persons served may judicially contest a demand, thereby protecting the rights of the latter while facilitating compliance with the demand and lessening the possibility of litigating the question of the legality of the demand. The bill would specifically sanction the Government's present practice of extending the time for production, thereby affording opportunity for partial production, possibly obviating the need for full production, and avoiding resort to the court by either the person served or the Government. The Department's existing practice of requiring certification of compliance would also be specifically sanctioned.

A major objective of the bill, the production of oral testimony, would be obtained by a somewhat modified Administrative Procedure Act process providing for the presence of the witness' counsel in a limited role with a restricted right to raise objections.

Broadening the Act to cover oral testimony would introduce no novel, untried concepts in antitrust enforcement. Arizona, Connecticut, Florida, Hawaii, Illinois, Kansas, Louisiana, Maine, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Texas, Virginia, Wisconsin, and Puerto Rico have given their Attorneys General (in the case of Puerto Rico, the Secretary of Justice) the power to seek the attendance of witnesses to give oral testimony in antitrust investigations prior to initiation of any suit or proceeding.[1]

[1] Ariz. Rev. Stats., Ann., title 44, chap. 10, sec. 44-1406; Conn. Gen. Stats. Ann., title 35, chap. 624, sec. 35-42; Fla. Stats. Ann., title XXXI, chap. 542, sec. 11; Hawaii Rev. Stats., title 26, chap. 480, sec. 480-18; Ill. Ann. Stats., chap. 38, sec. 60-7.2; Kan. Stats. Ann., chap. 50, sec. 50-153; La. Rev. Stats., title 51, secs. 143, 144; Me. Rev. Stats., title 10, chap. 201, sec. 1107 (criminal actions only); Rev. Stats. Mo., chap. 416, sec. 416-310; N.H. Rev. Stats. Ann., title XXXI, chap. 356, sec. 356.10; N.J. Stats. Ann., title 56, chap. 9, sec. 56:9-9; N.Y. Consol. Laws, chap. 20, art. 22, sec. 343; N.C. Gen. Stats., chap. 75, sec. 75-10; Okla. Stats. Ann., title 79, chap. 1, sec. 2.; Code of Laws of S.C., title 66, chap. 2, art. 6, sec. 66-111; Texas Codes Ann., Bus. and Commerce Code, title 2, chap. 15, sec. 15.14; Code of Va., title 59.1, chap. 1, sec. 59 1-9.10; Wisc. Stats. Ann., title 14, chap. 133, sec. 133.06; P.R. Laws Ann., title 10, chap. 13, sec. 271.

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These jurisdictions also extend the civil investigative subpoena power in antitrust investigations to individuals as well as to artificial persons, and provide for service upon persons capable of providing testimony relevant to the investigation, whether or not they are the actual target of the investigation. H.R. 39 would utilize the provisions of the federal immunity statute to bring natural persons producing evidence within the reach of a civil investigative demand.

In the area of trade regulation at the federal level, section 9 of the Federal Trade Commission Act confers on the Commission power to compel oral testimony in the course of its investigations. Among departments and other agencies whose heads, members, or employees have statutory authority to compel attendance and testimony of witnesses in the course of investigations pertinent to laws which they administer are Agriculture, HEW, Labor, Treasury, AEC, CAB, FAA, FCC, FPC, FMC, ICC, NLRB, Railroad Retirement Board, Tariff Commission, and VA.[2]

Nor is precedent lacking for extending the investigatory power to incipient violations. The acts of Hawaii, Illinois, Missouri, New Jersey, New York, and Virginia for example, specifically authorize the use of civil investigative subpoenas in investigations of incipient violations.

No field of litigation involves facts more complex and records more extensive than are found in the Government's antitrust cases. The task of amassing the voluminous data essential to successful antitrust enforcement is of considerable magnitude. Insofar as it went, enactment in 1962 of the Antitrust Civil Process Act provided a signal benefit to the Government's civil investigations by authorizing production of relevant documents from corporations, associations, partnerships, or other legal entities not natural persons, under investigation. But the limitations on the scope of the demand have left the Act far from meeting essential investigatory needs of the Department's Antitrust Division.

The refusal of industry sometimes to cooperate voluntarily in antitrust investigations, which gave rise to the Antitrust Civil Process Act, is the reason today that more effective civil discovery means are needed. The same reasons that supported enactment of the Civil Process Act speak for the Act's expansion. Although the grand jury can be used in investigation of criminal violations under the Sherman Act, the Clayton Act is not a criminal statute, and the grand jury is unavailable where only a civil action is contemplated. Often it is not desirable to bring companion criminal and civil suits; the facts may not warrant criminal sanctions, or the urgency for civil relief may make it unfeasible to risk the delay that very likely would attend the bringing of both types of actions. In other situations it may appear at the outset that the evidence may not meet the test for a criminal case.

H.R. 39 would simply make available to the Attorney General the same antitrust investigatory powers in civil investigations that he now has in criminal investigations, and provide him with authority similar to that of the Federal Trade Commission.

The Office of Management and Budget has advised this Department that enactment of this bill would be in accord with the program of the President.

Sincerely,

A. Mitchell McConnell, Jr.,
Acting Assistant Attorney General.

Administrative Office of the U.S. Courts,
Supreme Court Building,
Washington, D.C., September 30, 1975.

Re H.R. 39, to amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations, and for other purposes.

Hon. Peter W. Rodino, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

Dear Mr. Chairman: I am replying further to your letter of February 6, 1975 transmitting for an expression of views H.R. 39, 94th Congress, to amend the

[2] There are over three dozen provisions in the United States Code authorizing the taking of compulsory testimony. Among them are: 7 U.S.C. 15, 22, 499m, 610, 855, 2115 (Agriculture); 12 U.S.C. 1820 (banking agencies); 15 U.S.C. 49 (FTC); 15 U.S.C. 77s, 78u, 79r, 80a–41, 80b–9 (SEC); 15 U.S.C. 717m (FPC); 16 U.S.C. 825F (FPC); 18 U.S.C. 835 (ICC); 19 U.S.C. 1333 (Tariff Commission); 26 U.S.C. 7602 (Treasury); 27 U.S.C. 202(c) (Treasury); 29 U.S.C. 161 (NLRB); 29 U.S.C. 209, 308, 521 (Labor); 33 U.S.C. 506 (Transportation); 38 U.S.C. 3311 (VA); 42 U.S.C. 405 (HEW); 42 U.S.C. 2201 (AEC); 45 U.S.C. 362 (R.R. Retirement Board); 46 U.S.C. 826, 1124 (FMC); 47 U.S.C. 409 (FCC); 49 U.S.C. 12, 916, 1017 (ICC); and 49 U.S.C. 1484 (CAB).

Antitrust Civil Process Act, (76 Stat. 548; 15 U.S.C. 1311), to require the production of documents not only as to current and past, but also as to incipient violations. The bill would also clarify the Act regarding the use of these documents as evidence. The Ninth Circuit previously held that the Act did not apply to investigations of "incipient violations." See *United States* v. *Union Oil Co.*, 343 F. 2d 29 (9th Cir., 1965).

I am authorized to report to you that the Judicial Conference of the United States at its session on September 25th considered the bill and voted to take no position with respect to its provisions. The Conference views the bill as embodying a matter of policy for the determination of the Congress. It would have little impact on the workload of the United States district courts.

Respectfully submitted.

ROWLAND F. KIRKS, *Director.*

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D.C., October 3, 1975.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for the views of this Department concerning H.R. 39, a bill to amend the Antitrust Civil Process Act to increase the effectiveness of discovery in civil antitrust investigations, and for other purposes.

H.R. 39 would broaden the scope of civil investigative demands under the Antitrust Civil Process Act and extend the authority of investigators with respect to discovery under that Act.

The Department of Commerce has no objection to the Administration's position in support of H.R. 39, with certain amendments, as expressed in the Justice Department testimony of May 8, 1975 before the Subcommittee on Monopolies and Commercial Law. The Administration's position with respect to amendments to the Antitrust Civil Process Act is further expressed in the Justice Department's testimony on S. 1284 before the Senate Judiciary Subcommittee on Antitrust and Monopoly.

We have been advised by the Office of Management and Budget that there would be no objection to the submission of our report to the Congress from the standpoint of the Administration's program.

Sincerely,

BERNARD V. PARRETTE,
Acting General Counsel.

APPENDIX

DEPARTMENT OF JUSTICE,
Washington, D.C., October 3, 1975.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives,
Washington, D.C.

DEAR Mr. CHAIRMAN: During the hearings before the Subcommittee on Monopolies and Commercial Law on H.R. 39, a number of questions were raised about the Antitrust Division's participation in Federal administrative or regulatory agency proceedings. In conjunction with your request that the Division work closely with the Subcommittee staff to supply information pertinent to this important proposed legislation, this letter and attachment are submitted.

The Antitrust Division participates before a variety of Federal regulatory agencies, including all major economic regulatory bodies. In these proceedings, we seek to promote competition policy as an important factor in regulatory decisionmaking, and to show how the statutory mandates with which the agencies are charged can be reconciled with competitive principles.

This activity is a relatively new one for the Division, but in the last several years it has become extremely important as the impact of regulated industries and agency policy upon the economy has become a focus of public and governmental attention. Our participation before Federal regulatory agencies has increased dramatically during this period, as the enclosed listing of our regulatory filings demonstrates. Illustrative of our efforts are the following examples:

Securities and Exchange Commission

During fiscal year 1974 the Antitrust Division filed comments in a number of proceedings before the SEC, the most significant of which are herein noted:

In several proceedings the Division urged the SEC to prohibit the various stock exchanges from fixing public and intra-member brokerage commission rates.

In a proceeding involving the authorization of exchanges for the trading of options in securities, the Division urged the Commission to foster inter-exchange competition in the trading of the same class of options.

The Division also filed comments urging the Commission not to prohibit banks from offering investment services that had proven beneficial to small investors solely because such bank activities were competitive with services offered by securities brokers.

Federal Reserve Board

During fiscal year 1974, the Antitrust Division filed two major submissions with the Federal Reserve Board. In one, the Division suggested to the Board a set of criteria which the Board should use in order to allow bank holding companies to engage in savings and loan activities in the most pro-competitive manner. In the other filing, the Division urged the Board to refrain from attempting to provide electronic funds transfer services itself and instead adopt policies which would promote private sector competition in the emerging electronic funds transfer market.

Federal Communications Commission

The Antitrust Division participated in a proceeding before the FCC in which the Division urged the Commission to adopt rules which would prohibit the same parties from owning a daily newspaper and a television station or CATV (community antenna, or "cable" television) system in the same local market.

The Division filed comments urging the Commission to continue its policy of requiring the telephone companies to interconnect their facilities with equipment supplied by their customers and to resist efforts by state regulatory commissions to prohibit such interconnection. In addition, the Division urged the Commission to adopt policies which would promote competition between various types of providers of land mobile communication services.

Other Agencies

In addition, through our Public Counsel and Legislative Section, the Division has brought antitrust policy to bear in the federally-regulated sectors of the economy by representations in rule-making or adjudicatory proceedings before the Civil Aeronautics Board, the Atomic Energy Commission, the Interstate Commerce Commission, the Federal Maritime Commission, the Securities and Exchange Commission, and the Federal Power Commission. In the past fiscal year the Division participated in 16 proceedings before the CAB; seven before the AEC (six on applications for licenses to construct and operate nuclear power plauts, and one on rule-making); five before the ICC; four before the FMC; three before the SEC; and one before the FPC. Activities involved in these proceedings (other than the AEC license application proceedings) included oral arguments before the CAB on what rules and regulations should apply to the chartering of aircraft by air freight-forwarders and in the Board's investigation of the Air Traffic Conference By-Laws; oral argument before the ICC in the Union Pacific-Rock Island railway merger; and participation in seven hearings before administrative law judges in four agencies—three CAB hearings, two ICC, and one each at the FMC and SEC. In proceedings before AEC Hearing Boards, a full hearing (Consumers Power) on the merits was completed and a schedule for final briefs was set; two other proceedings (Duke Power and Georgia Power), which were well advanced toward hearing, were concluded when the Department and the applicants reached a settlement involving the imposition of license conditions designed to eliminate antitrust objections; two other proceedings (Louisiana Power & Light and Alabama Power) progressed through a number of pre-hearing conferences and discovery; and a new proceeding got underway with respect to an application (Cleveland Electric Illuminating) more recently set for hearing. The Division presented written comments in three of the CAB proceedings and one ICC proceeding, and filed advance testimony in one FMC proceeding.

In addition to the subject indicated above, matters involved in these various regulatory agency proceedings included air carrier applications relative to reduction of capacity in the Chicago-Los Angeles and Hawaiian markets; air coach lounge tariffs; the domestic air passenger fare structure and extent of competition or freedom to be allowed; the International Air Transport Association Agreement on North Atlantic Passenger Fares; proposed regulation of air charter rates between the United States and Europe; an application to the FMC by four ocean carriers to allow consultation and agreement on rates and practices in the Hawaii-West Coast United States trade; a Pan American-American Airlines route exchange agreement; an acquisition involving Airborne Freight Corporation and IU International Corporation; a pool agreement among North Atlantic ocean carriers; the ICC application of American Delivery Systems to compete in the small package handling business; an acquisition involving Navajo Freight Lines and Garrett Freight Lines; the elimination of gateways for certain irregular motor carriers; and proceedings under the Public Utilities Holding Company Act involving the acquisition of Columbus and Southern Ohio Electric Company by American Power Company, and a proposed merger involving the Eastern Electric Energy System.

These examples and the enclosed index of filings demonstrate the diversity and significance of the Division's efforts to represent, in Federal regulatory and administrative agency proceedings, the social and economic policies embodied in the antitrust laws. Precisely because many of these tribunals have not generally been sensitive to antitrust considerations in the past, it is important that the Division be able to utilize the broadened investigatory authority contained in H.R. 39, without dependence on the rules of practice and procedure of a particular agency.

The Department continues to believe firmly that H.R. 39, with the amendments suggested by the Department, should be enacted to facilitate better and more informed enforcement of the antitrust laws, while at the same time protecting the legitimate business interests in freedom from unreasonable governmental oversight.

Sincerely,

THOMAS E. KAUPER,
Assistant Attorney General,
Antitrust Division.

Enclosure.

Filings by the Antitrust Division in Regulatory Agency Proceedings

CONTENTS

I. Communications (FCC)

A. COMMON CARRIER COMMUNICATIONS

Docket No. 16495 (Domestic Communications Satellites):
May 19, 1971—Comments of the U.S. Department of Justice.
July 12, 1971—Reply Comments of the U.S. Department of Justice.
April 19, 1972—Comments of the U.S. Department of Justice.

Docket No. 16942, 17073 (Interconnection of Customer Supplied Equipment) (*Carter Electronics* v. *A T & T*):
October 13, 1967—Motion for limited intervention.
August 13, 1968—Response of the United States to petitions for reconsideration.
October 18, 1968—Petition of the United States for partial rejection and partial suspension of tariff.
December 2, 1968—Memorandum of the United States modifying its prior petition for partial rejection and partial suspension of tariff.
January 23, 1969—Petition for reconsideration.
Docket No. 18262 (Frequency Band between 806–960 MHZ): August 7, 1970—Memorandum of the Department of Justice in support of petitions for reconsideration and requests for stay.
Docket No. 18920 (Domestic Public Point-to-Point Microwave Radio Service):
October 10, 1970—Response of the U.S. Department of Justice.
December 29, 1970—Reply comments of the U.S. Department of Justice.
February 2, 1971—Supplemental comments of the U.S. Department of Justice.
Proposed General Order No. 98 (Public Service Commission of the State of Utah):
March 12, 1974—Comments of the U.S. Department of Justice.

B. BROADCASTING

1. License Renewals and Transfers

Beaumont, Tex. (KFDM–TV): No date—Memorandum of the Department of Justice in opposition to the application for transfer.
Birmingham, Ala. (WAPI–TV): February 4, 1974—Supplement to petition to deny.
Cheyenne, Wyo. (KFBC–TV):
December 30, 1968—Petition for a hearing.
August 28, 1969—Letter.
March 4, 1970—Notice of appearance of the Department of Justice.
October 13, 1970—Motion for extension of time.
October 22, 1970—Opposition of the Department of Justice to petition for reconsideration, conditional grant, and other relief.
December 9, 1970—Motion of the Department of Justice for permission to file a response to Frontier Broadcasting Co.'s reply to Departments opposition to Frontier's petition for reconsideration.
April 1, 1971—Response of the Department of Justice to the response of Frontier Broadcasting Co. to memorandum opinion and order.
Des Moines, Iowa (KRNT–TV and KRNT–FM):
January 2, 1974—Petition of the Department of Justice to deny renewal applications.
February 22, 1974—Petitioner's opposition to applicant's motion to strike.
District of Columbia (WDCA–TV): No date—Petition for institution of inquiry.
Festus, Mo. (KJCF):
May 19, 1972—Petition of Department of Justice for reconisderation of grant of consent to transfer.
June 1, 1972—Opposition to petition of Department of Justice for reconsideration of grant of consent to transfer of control.
Fresno, Calif. (KMJ–TV and KMJ–FM):
November 1, 1974—Petition of the Department of Justice to deny renewal applications.
November 29, 1974—Letter requesting more time to file responses.
February 14, 1975—Opposition of McClatchy Newspapers to petition of Department of Justice to deny renewal application.
March 31, 1975—Reply of Department of Justice to opposition of McClatchy Newspapers, Inc., to petition to deny renewal application.
Milwaukee, Wis. (WTMJ–TV and WTMJ–FM):
January 10, 1974—Response of WTMJ, Inc., to informal comments of U.S. Department of Justice.
January 24, 1974—Motion to strike reply of the Department of Justice.
No date—Department of Justice opposition to WTMJ, Inc., motion to strike reply.
Minneapolis, Minn. (WCCO):
March 1, 1974—Petition of the Department of Justice to deny renewal applications.

April 15, 1974—Opposition to petition of Department of Justice to deny renewal applications.
May 15, 1974—Reply of Department of Justice to opposition of Midwest Radio-Television, Inc., to petition to deny renewal applications.

Salt Lake City, Utah (KSL–TV and KSL–FM):
September 3, 1974—Petition of the Department of Justice to deny renewal applications.
September 27, 1974—Motion for extension of time to file opposition to Justice Department petition to deny.
October 24, 1974—Motion for extension of time to file opposition to Justice Department petition to deny.
November 15, 1974—Motion for extension of time to file opposition to Justice Department petition to deny.
December 6, 1974—Petition of Kearne-Tribune Corp. to Intervene and opposition to the Department of Justice's petition to deny renewal of KSL licenses.
January 10, 1975—Motion for extension of time to file opposition to Justice Department petition to deny.
March 31, 1975—Reply of Department of Justice to oppositions of KSL, Inc., and Kearns-Tribune Corp. to petition to deny renewal applications.
April 7, 1975—Notice of erratum in reply of Department of Justice to oppositions of KSL, Inc., and Kearns-Tribune Corp. to petition to deny renewal applications.
April 7, 1975—Notice of errata appearing in reply of Department of Justice to opposition of McClatchy Newspapers, Inc., to petition to deny renewal application.
June 6, 1975—Memorandum on late filing of Department of Justice surrebuttal.
June 6, 1975—Department of Justice's surrebuttal and opposition to Kearns-Tribune's rebuttal and renewed motion to strike.

St. Louis, Mo. (KSD/KSD–TV and KTVI–TV):
January 2, 1974—Petition of the Department of Justice to deny renewal applications.
January 11, 1974—Petition for extension of time to file oppositions to petitions to deny.
January 28, 1974—Amendment to St. Louis Broadcast coalition petitions to deny and request for waiver of commission multiple ownership rules.
February 8, 1974—Motion to strike "amendment" to petition to deny and "request for waiver of commission mutliple ownership rules."
March 11, 1974—Motion for extension of time.
April 15, 1974—Opposition of KSD/KSD–TV, Inc, to petition of the Department of Justice to deny renewal applications.
April 15, 1974—Opposition to petition to deny of the Department of Justice and amendment to petition to deny of the St. Louis Broadcast Coalition.
May 8, 1974—Opposition to motion to strike.
May 16, 1974—Reply to Newhouse and Pulitizer concentration of control arguments in opposition to petition to deny filed by the St. Louis Broadcast Coalition and the Department of Justice.
May 20, 1974—Reply of the Department of Justice to applicants oppositions to petition to deny renewal applications.

San Francisco, Calif. (KRON–TV and KRON–FM) (Chroicle Broadcasting):
June 10, 1974—Brief for the United States as amicus curiae.
June 12, 1974—Memorandum for the Solicitor General.
June 19, 1974—Order granting filing of reply brief in excess of page limitation.
June 19, 1974—United States motion for permission belatedly to file brief as amicus curiae.
June 24, 1974—Consent motion for enlargement of time for filing of joint appendix.
June 25, 1974—Response to "USA's Motion for Permission Belatedly to File Biref as Amicus Curia."
July 11, 1974—Order for filing joint appendix is extended for a period of 30 days.
October 3, 1974—Order that the clerk is directed to file the lodged amicus curiae brief.
October 24, 1974—Consent motion for extension of time to file joint appendix.
November 4, 1974—Response of appellee FCC to amicus curiae brief of the United States.
November 4, 1974—Supplemental bierf for intervenor.

November 6, 1974—Letter.
November 21, 1974—Application for extension of time to file a reply brief for the United States as amicus curiae.
November 25, 1974—Reply brief for the United States as amicus curiae.
November 26, 1974—Motion to accept reply brief of the United States, amicus curaie.
November 27, 1974—Response to motion for leave to file three Xeroxed copies of the joint appendix.
December 19, 1974—Motion for leave to file memorandum.
January 16, 1975—Order that appellants' aforesaid motion for leave to file memorandum in lieu of a reply brief to appellee's and intervenor's supplementary briefs is granted and the clerk is directed to file appellant's lodged memorandum dated November 21, 1974.
February 27, 1975—Consent motion to accept printed briefs time having expired.

Spokane, Wash. (KHQ–FM and KHQ–TV):
January 2, 1975—Petition of the Department of Justice to deny renewal applications.
May 30, 1975—Reply of Department of Justice to opposition of KHQ, Inc. to petition to deny renewal applications.

Topeka, Kans. (WIBW–FM and WIBW–TV):
May 1, 1974—Petition of the Department of Justice to deny renewal applications.
June 5, 1974—Opposition of Stauffer Publications to informal objections of Department of Justice.
June 24, 1974—Reply of Department of Justice to opposition of Stauffer to petition to deny renewal applications.

2. *General Proceedings*

Docket No. 18110 (Multiple Ownership):
August 1, 1968—Comments of the U.S. Department of Justice.
May 18, 1971—Comments of the U.S. Department of Justice.
May 15, 1974—Supplemental comments of the U.S. Department of Justice.
June 17, 1974—Reply comments of the Post Co.
August 30, 1974—Memorandum for the Attorney General.

Docket No. 18179 (Exclusivity Agreements): August 4, 1972—Reply comments of the Department of Justice.

Docket No. 19154 (Broadcast Renewals): November 11, 1971—Comments of the U.S. Department of Justice.

Docket No. 19540 (FM Broadcast Stations—assignments): February 28, 1974—Comments of Pemigewasset Broadcasters, Inc.

Docket No. 20097 (Regulatory Treatment of Communications Brokerage): May 2, 1975—Reply comments of the U.S. Department of Justice.

3. *Waiver Proceedings*

File No. 340(X) (Valley Cablevision Corp.-Plymouth CATV Services, Inc.):
March 9, 1973—Petition for waiver.
May 11, 1973—Letter and opposition to waiver.
May 31, 1973—Reply to opposition.

Multiple listings petition for waiver of cross ownership rules: August 20, 1973—Motion for acceptance of comments of National Citizens Committee for Broadcasting, timely served on all parties but completed shortly after the FCC's close of business.

File No. CSR 341(X) (Uvalde Television Cable Co.):
May 18, 1973—Opposition of Department of Justice to petition for special relief for a waiver of section 76.501 of the Commission's rules.
June 20, 1973—Reply to "Opposition of Department of Justice to petition for special relief for a waiver of section 76.501 of the Commission's rules."
July 18, 1973—Letter granting time extension for filing comments and oppositions.
December 6, 1973—Memorandum opinion and order.

File No. CSR 343(X) (Fetzer Cablevision):
April 13, 1973—Petition of Fetzer Cablevision for waiver of section 76.501 of the rules and regulations.
July 16, 1973—Letter denying request for extension of time.
July 16, 1973—Opposition of Department of Justice to petition for a waiver of section 76.501 of the Commission's rules.

July 26, 1973—Letter extending time for filing comments and opposition.
October 1, 1973—Reply to "Comments of National Citizens Committee for Broadcasting."

File No. CSR-350(X) (Thomas Broadcasting Co., Inc.):
May 23, 1973—Request for imposition of time limitation in response to petition for waiver of CATV-TV divestiture.
July 9, 1973—Opposition of Department of Justice to petition for a waiver of section 76.501 of the Commission's rules.
July 9, 1973—Letter re: In the matter of 62 petitions for waiver of section 76.501 of the Commission's rules and regulation: Request for extension of time to comment under section 0.289(c)(5) of the rules.
July 17, 1973—Letter granting extension.
December 6, 1973—Memorandum opinion and order.

File No. CSR-359(X) (Eastern Oklahoma Television Co., Inc. KTEN Cablevision (a division)):
May 16, 1973—Petition for waiver.
July 16. 1973—Opposition of Department of Justice to petition for a waiver of section 76.501 of the Commission's rules.
July 20, 1973—Request for extension of time to reply to opposition of Department of Justice.
September 6, 1973—Reply by Eastern Oklahoma Television Co., Inc., to the opposition of the Department of Justice to petition for waiver of section 76.501 of the Commission's rules.

File No. CSR-360(X) (Bob Magness):
May 15, 1973—Petition for waiver.
June 25, 1973—Comments on petition for waiver.
July 10, 1973—Opposition of Department of Justice to petition for special relief for a waiver of section 76.501 of the Commission's rules.

File No. CSR-362(X) (Central All-Channel Cablevision Inc.); File No. CSR-363(X) (Hamilton County CATV, Inc.); File No. CSR-365(X) (Lebanon CATV, Inc.):
May 30, 1973—Petition for a waiver of section 76.501 (362).
May 30, 1973—Petition for a waiver of section 76.501 (363).
May 30, 1973—Petition for a waiver of section 76.501 (365).
July 16, 1973—Comments of Department of Justice on petitions for waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply.

File No. CSR-364(X) (Midessa Television Co., Inc.): October 1, 1973—Reply of Midessa Television Co., Inc.

File No. CSR-366(X) (Humboldt Bay Video Co.); File No. CSR-422(X):
August 31, 1973—Opposition of Department of Justice to petitions for waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply to opposition of Department of Justice.

File No. CSR-367(X) (Lawton Cablevision, Inc.):
May 30, 1973—Petition for waiver of section 76.501.
July 9, 1973—Opposition to petition for waiver.
July 10, 1973—Letters.
October 1, 1973—Reply of Lawton Cablevision, Inc.

File No. CSR-369(X) (Susquehanna Broadcasting Co.);
May 25, 1973—Petition for waiver.
July 31, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's Rules.

File No. CSR-370(X) (Gross Telecasting, Inc.):'
May 29, 1973—Petition for waiver.
July 9, 1973—Opposition to petition for waiver.
July 23, 1973—Letter requesting extension of time.
October 1, 1973—Reply to oppositions to petition for waiver.

File No. CSR-371(X) (Cable Associates, Inc.):
May 31, 1973—Petition for waiver.
July 16, 1973—Opposition of Department of Justice to petition for special relief for a waiver of section 76.501 of the Commission's rules.
August 14, 1973—Reply to opposition.
October 1, 1973—Reply to comments of NCCB.

File No. CSR-372(X) (South Dakota Cable, Inc.):
May 31, 1973—Petition for waiver.
July 31, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.

October 1, 1973—Reply to "opposition" to and "comments" on "petition for waiver."

File No. CSR–373(X) (Total Television of Amarillo):
May 31, 1973—Petition for waiver.
August—, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply of Total Television of Amarillo.

File No. CSR–374(C) (Quincy Cablevision, Inc.):
May 31, 1973—Petition for waiver of section 76.501 cross-ownership rules.
August 6, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.

File No. CSR–378(X) (Range Television Cable Co., Inc.—Northland Cable TV, Inc.):
May 17, 1973—Petition for waiver of section 76.501 of the rules.
August —, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply to opposition to petition for waiver of section 76.501 of the rules.

File No. CSR–379(X) (Midcontinent Broadcasting Co.):
May 29, 1973—Petition of Midcontinent for waiver of section 76.501 of the rules.
July 13, 1973—Opposition to petition for waiver.
August —, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
September 28, 1973—Reply to oppositions to petition for waiver.
November 9, 1973—Joint supplemental to petitions for waiver of section 76.501 of the rules.

File No. CSR–380(X) (Southern Oregon Cable TV):
May 31, 1973—Request for waiver of the mandatory divestiture requirement of section 76.501 of the Commission's rules and regulations.
August 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply to "Opposition of Department of Justice to Petition for waiver of section 76.501 of the Commission's rules" and "Comments of National Citizens Committee for Broadcasting."

File No. CSR–381(X) (Wolverine Cablevision, Inc.): August 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.

File No. CSR–386(X) (United Broadcasting Co., Inc.):
August 30, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply to comments and opposition.

File No. CSR–387(X) (Community Television of Utah, Inc.).

File No. CSR–404(X) (KUTV, Inc.):
August 31, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules (387 and 404).
October 1, 1973—Reply to opposition (404).
October 12, 1973—Reply to opposition to and comments on petition for waiver)(387).

File No. CSR–388(X) (Meyer Broadcasting Co. (Bismarck Cable TV Division) and Man Dan Cable TV, Inc.:
May 31, 1973—Petition for waiver.
August 15, 1973—Opposition to waiver.
October 1, 1973—Reply to comments of NCCB.

File No. CSR–389(X) (King Broadcasting Co.):
September 7, 1973—Modification of petition for waiver and reply to comments of NCCB.
December 14, 1973—Memorandum opinion and order.

File No. CSR–391(X) (Southern Cablevision, Inc.):
May 25, 1973—Request for waiver of the mandatory divestiture requirements of section 76.501 of the Commission's rules and regulations.
August 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
December 4, 1973—Supplemental to petition for waiver of section 76.501 of the Cable Television Rules.

File No. CSR–392(X) (Mid-New York Broadcasting Corp.):
August 10, 1973—Reply to the opposition of the Department of Justice.
October 1, 1973—Reply to comments of NCCB.

File No. CSR–394(X) (Anton Hulman, Jr. & Joseph R. Cloutier): August 31, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.

File No. CSR–395(X) (Gill Industries & Gill Cable, Inc.):
May 25, 1973—Petition for waiver of section 76.501 of the rules and regulations.
July 17, 1973—Letter requesting extension.
August 23, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
February 14, 1974—Letter withdrawing "opposition to petition to waiver."
No date—Affidavits and things.

File No. CSR–396(X) (Rock River Television Corp.):
August 10, 1973—Letter requesting for a waiver of the divestiture requirement of section 76.501 of FCC rules.
August 30, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply to opposition.

File No. CSR–398(X) (Georgia Cablevision Corp.):
May 31, 1973—Petition for waiver of section 76.501 of the Commission's rules.
July 1973—Opposition of Department of Justice to petition for special relief for a waiver of section 76.501 of the Commission's rules.
September 24, 1973—Preamendment reply to "Opposition of Department of Justice to petition for special relief for a waiver of section 76.501 of the Commission's rules."
November 9, 1973—Amendment to petition for waiver of section 76.501 of the Commission's rules.
February 1974—Petition in opposition to the granting of waiver.

File No. CSR–400(X) (Central California Communications Corp.):
August 31, 1973—Opposition of Department of Justice to petition for special relief for a waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply to objections to petition for waiver of section 76.501, cross-ownership rules.

Files Nos. CSR–401(X), CSR–425(X) (Upper Valley Telecable Co., Inc.):
August 31, 1973—Petition of Department of Justice to petition for a waiver of section 76.501 of the Commission's rules (401 and 425).
September 19, 1973—Letter applying for extension to file reply (401).
October 12, 1973—Reply to comments on and opposition to petition for waiver (401).

File No. CSR–403(X) (North Platte Multi-Vue TV Systems, Inc.):
August 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply of North Platte.

File No. CSR–405(X) (Cablevision of Augusta, Inc.):
August 30, 1973—Opposition to waiver.
October 1, 1973—Reply of Cablevision of Augusta, Inc., to comments of National Citizens Committee for Broadcasting and opposition of Department of Justice.

Files Nos. CSR–406(X), CSR–410(X), CSR–411(X), CSR–415(X) (Newchannels Corp):
July 6, 1973—Letter—Newchannels Corp. position paper on Syracuse Market Certificate applications and cross-ownership (406, 410, 415).
August 31, 1973—Opposition to waiver (415).
October 1, 1973—Reply of Newchannels to the opposition of the Department of Justice (415).
October 12, 1974—Reply of Newchannels to the opposition of the Civil Liberties Union of Alabama (411).
October 23, 1974—Reply to the motion to strike (411).
November 26, 1974—Supplemental reply to the motion to strike (411).
December 10, 1973—Comments of WNYS–TV, Inc., on the joint supplement to petitions for waiver of section 76.501 of the rules (406 and 410).

File No. CSR–407(X) (Southwestern Improvement and Investment Co. d/b/a Nevada Cablevision Co.):
August 31, 1974—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
October 1, 1973—Reply.

File No. CSR–409(X) (Concord TV Cable; County TV Cable; Western TV Cable):
August 31, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules.
October 15, 1974—Reply of Concord TV Cable, County TV Cable, and Western TV Cable.
File No. CSR–420(X) (Hays Cablevision Co.); File No. CSR–421(X) (KLOE–TV and Goodland Cable TV):
May 30, 1973—Petition of Hays for waiver of section 76.501 of the rules and regulations (420).
May 30, 1973—Petition of Goodland and KLOE for waiver of section 76.501 of the rules (421).
August 30, 1973—Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules (420 and 421).
September 25, 1974—Reply to "Opposition of Department of Justice to petition for waiver of section 76.501 of the Commission's rules" (420 and 421).

CABLE TELEVISION

Dockets Nos. 17441, 18525, 18620, 18623, 18624, 18750 (New York Telephone Co. applications to operate CATV channel distribution):
October 5, 1970—Motion for limited intervention by the Department of Justice.
December 10, 1970—Notice of appearance.
Dockets Nos. 18891, 18110 (Cross Ownership):
May 18, 1971—Comments of the U.S. Department of Justice (18891).
May 15, 1974—Supplemental comments of the U.S. Department of Justice (18891).
Docket No. 18397 (Amendment of FCC rules relative to CATV):
April 7, 1969—Comments of the U.S. Department of Justice.
September 5, 1969—Comments of the U.S. Department of Justice.
May 3, 1971—Memorandum of the Department of Justice in support of petitions for reconsideration.
Docket No. 18397–A (Distant signal importation; access and channel utilization):
December 7, 1970—Comments of the U.S. Department of Justice.
Docket No. 18509 (Telephone company operation of CATV facilities):
July 11, 1969—Comments of the U.S. Department of Justice.
Docket No. 18892 (State and local regulation): February 10, 1971—Reply comments of the U.S. Department of Justice.
Docket No. 19554 (Pay-cablecasting): November 1, 1972—Comments of the Department of Justice.
Docket No. 20423 (Amendment of FCC rules relative to cable television systems):
May 19, 1975—Comments of the U.S. Department of Justice.

II. Surface Transportation (ICC)

A. Mergers and acquisitions [also including ICC control investigations]

Chicago & North Western—Chicago, Milwaukee, St. Paul & Pacific Consolidation (Fin. Dockets Nos. 24182, 24183, 24184):
April 26, 1968—Memorandum of the U.S. Department of Justice.
April 1, 1969—Exceptions of the U.S. Department of Justice.
Denver & Rio Grande Western RR Co.—Rock Island & Pacific RR Co. (purchase of property Fin. Dockets Nos. 27,521: 27,522) June 20, 1974—Petition of U.S.A. for leave to intervene.
Greyhound—Oklahoma Trans. Co., et al. (Investigation of Control, Dockets Nos. MC–F–10455, MC–F–10526; MC–F–9281):
February 10, 1970—Petition of the U.S. Department of Justice for an order of the ICC providing for the issuance of subpoenas and interrogatories.
April 10, 1970—Petition of U.S. Department of Justice for reconsideration of Commission order of April 1, 1970, which denied department's petition of February 10, 1970, requesting issuance of subpoenas and interrogatories.
Illinois Central—Gulf, Mobile & Ohio Merger (Fin. Docket No. 25103, et al.):
November 4, 1968—Petition of United States for leave to intervene.
November 29, 1968—Reply of the United States to the motion to dismiss by the Columbus & Greenville Railway Co.

January 9, 1969—Reply of the United States to the petition for leave to file further pleading by applicant carriers.
March 3, 1969—Reply of United States to the motion of Chicago & North Western Railroad Co. for discovery.
December 5, 1969—Brief for the United States.
September 11, 1970—Exceptions of the U.S. Department of Justice to the examiner's recommended report.

Navajo Freight Lines—Garrett Freightlines (Investigation of Control; Dockets Nos. MC–F–11094; MC–F–11198):
November 15, 1971—Notice of appearance by the United States.
November 15, 1971—Petition of the U.S. Department of Justice for an order of the ICC providing for the issuance of subpoenas and interrogatories.
November 14, 1971—Request by U.S. Department of Justice for postponement of hearing.
November 23, 1971—Petition for reconsideration by full Commission of order denying requests for month's postponement of hearing, for issuance of subpoenas, and for order directing answering of interrogatories.
January 20, 1972—Memorandum of the U.S. Department of Justice in opposition to the motion of Navajo Freight Lines, Inc., et al., for clarification of the Commission's order dated November 9, 1971.
February 1, 1972—Motion to strike.
July 18, 1972—Memorandum of the Department of Justice in opposition to the motion of Navajo Freight Lines, Inc., et al., dated July 10, 1972.
September 12, 1972—Memorandum of the Department of Justice in opposition to the motion of Navajo Freight Lines, Inc., et al., dated September 6, 1972.
January 22, 1973—Motion to strike and to correct testimony.
March 19, 1973—Posthearing brief of the U.S. Department of Justice.
July 21, 1975—Reply of the Department of Justice to exceptions to the initial decision of the administrative law judge.

Norfolk & Western—Chesapeake & Ohio Merger (Fin. Docket No. 23832, et al.):
June 10, 1968—Memorandum of the United States.

Northern Pacific—Great Northern Merger (Fin. Docket No. 21478): February 5, 1968—Reply of U.S. Department of Justice to Petitions for reconsideration.

Union Barge Line—Mechling Barge Lines Merger into Union Mechling Corp. (Fin. Docket No. 26167):
October 19, 1970—Petition of U.S. Department of Justice for leave to intervene.
December 21, 1970—Brief of the U.S. Department of Justice.
May 30, 1972—Exceptions of the U.S. Department of Justice to the examiner's recommended report.

Union Pacific Acquisition of Chicago, Rock Island & Pacific (Fin. Docket 22688, et al.):
January 27, 1969—Brief of the U.S.A.
February 28, 1969—Reply of U.S.A. to Chicago & North Western's motion to strike and petition for leave to file a reply brief.
April 28, 1969—Reply of U.S.A. to Missouri Pacific's motion for leave to file a reply to the brief of the Department of Justice respecting anticompetitive effects.
May 21, 1969—Reply of U.S.A. to Chicago & North Western's petition for reconsideration of the Commission's order of April 1, 1969.
October 13, 1969—Reply of the U.S.A. to petition of North Western Railway Co. for order reopening hearings and requiring evidence by prospective applicant Union Pacific Co.
June 24, 1970—Reply of the United States to the motion to dismiss by the Chicago & North Western Railway Co.

B. APPLICATIONS TO ENGAGE IN COMMON OR CONTRACT CARRIER ACTIVITIES

American Delivery Systems, Inc. (Docket No. FF–376—Freight Forwarder Application): January 9, 1974—Reply of intervenor U.S. Department of Justice to exeeptions.

American Farm Lines (Docket No. MC–129908—Common Carrier Application):
April 30, 1971—Petition of U.S. Department of Justice for leave to intervene.
February 3, 1972—Reply of U.S. Department of Justice to petitions for reconsideration.

Southern Railway Co. (Fin Docket No. 26310—Contract Carrier Application):
December 6, 1971—U.S. Department of Justice reply to exceptions by protestants.
December 6, 1971—Petition of U.S. Department of Justice for leave to intervene.

C. TARIFFS

Chicago & North Western Railway Co. Freight Tariff 17177:
January 14, 1969—Petition of the United States for leave to file an amicus memorandum.
January 14, 1969—Memorandum for Department of Justice.

D. COOPERATIVE WORKING AGREEMENTS

Rate Bureau Investigation (ICC Ex Parte No. 297):
July 30, 1973—Notice of the U.S. Department of Justice of intention to intervene.
April 10, 1974—Initial statement of the U.S. Department of Justice.
July 19, 1974—Reply of Department of Justice to initial statements.
Western Railroad Traffic Association—Agreement (Section 5a Application No. 2, Amendment No. 17): January 22, 1973—Reply of U.S. Department of Justice to petition for reconsideration.

E. GENERAL PROCEEDINGS

Motor Common Carriers of Property, Routes and Services (Petition for the Elimination of Gateways by Rulemaking) Ex Parte No. 55 (Sub-No. 8):
December 11, 1973—Comments of the U.S. Department of Justice.

F. SECTION 5(A) REED-BULWINKLE RATE AGREEMENTS

Central States Motor Common Carriers Agreement Section 5a Application No. 33 (Amendment No. 8): April 14, 1975—Protest of the Department of Justice.

III. Air Transportation (CAB)

American—Western Merger (Docket No. 22916):
March 3, 1971—Objections of the U.S. Department of Justice to the examiner's prehearing conference report.
January 26, 1972—Brief of the U.S. Department of Justice to the CAB.
IU International Corp., IU Forwarding, Inc., and Airborne Freight Corp. (Docket No. 25204):
November 2, 1973—Motion of the Department of Justice for leave to file an untimely petition to intervene.
January 24, 1974—Answer to the U.S. Department of Justice to applicants' motion for confidential treatment of certain documents.
September 16, 1974—Brief of the U.S. Department of Justice to the CAB.
October 4, 1974—Answer of the U.S. Department of Justice to motion to strike brief.
November 18, 1974—Answer of Department of Justice to motion for vacation of order postponing discretionary review of initial decision.
February 24, 1975—Supplemental brief of the U.S. Department of Justice to the CAB.
Northwest—National Merger (Docket No. 23852):
October 21, 1971—Responses requested in the prehearing conference notice dated September 27, 1971.
October 21, 1971—Petition to intervene of the U.S. Department of Justice.
November 23, 1971—Objections of the Department of Justice to the examiner's report of prehearing conference.
March 15, 1972—Brief of the U.S. Department of Justice to the hearing examiner.
No date—Motion of the U.S. Department of Justice to strike II–C of applicants' joint brief.

B. AGREEMENTS [EXCEPT MERGERS]

Air Carrier Reorganization Investigation (Docket No. 24283, et al.):
April 20, 1973—Brief of the U.S. Department of Justice to the administrative law judge.

September 17, 1973—Exceptions of the U.S. Department of Justice to the initial decision of the administrative law judge.
August 26, 1974—Brief of the U.S. Department of Justice to the CAB.

Air Freight Forwarders (joint charters—Docket No. 23287): August 30, 1972—Statement of issues and request for evidence of the U.S. Department of Justice.

Air Traffic Conference of America (Agents' Financial Responsibility Resolution—Docket No. 20650): September 1, 1971—Comments of the U.S. Department of Justice.

Investigation of Bylaws of Air Traffic Conference of America (Docket No. 23542):
April 16, 1973—Brief of the U.S. Department of Justice to the administrative law judge.
June 29, 1973—Supplemental brief of the U.S. Department of Justice to administrative law judge Henry Whitehouse.

American Airlines, Inc., et al. (sole source supplier joint negotiating and purchasing agreement—Docket No. 24971): June 15, 1973—Motion for leave to file an otherwise unauthorized document.

American Airlines, Inc. (Capacity agreements to implement the fuel allocation program—Docket No. 25990):
October 26, 1973—Answer of the U.S. Department of Justice to the joint application for approval of agreement.
November 27, 1973—Answer of the U.S. Department of Justice to the joint application of United, TWA and Western Air Lines for approval of agreements.
January 4, 1974—Answer of the U.S. Department of Justice to the joint application of Hughes Air Corp. d/b/a Hughes Airwest and United Air Lines, Inc., for prior board approval of agreement.
February 27, 1974—Answer of U.S. Department of Justice to the joint application of American Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., for approval of agreements.
April 26, 1974—Answer of the U.S. Department of Justice to the joint application of American Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., for approval of agreements.
October 8, 1974—Motion for leave to file an otherwise unauthorized document.
October 21, 1974—Consolidated answer of the U.S. Department of Justice to motions of Northwest Airlines, Inc., and Delta Air Lines, Inc., to terminate approval of agreements.
December 13, 1974—Answer of the U.S. Department of Justice to the joint application of American Airlines, Inc., Trans World Airlines, Inc., and United Air Lines, Inc., for approval of agreements.
February 6, 1975—Motion of the U.S. Department of Justice for a stay of order 75–1–140 pending judicial review.

American-Pan American (Route exchange agreement—Docket No. 26245): July 26, 1974—Brief of the U.S. Department of Justice to Administrative Law Judge William H. Dapper.

Continental Airlines, Inc. (Application to engage in capacity reduction discussions—Docket No. 25595): October 23, 1973—Response of the U.S. Department of Justice to application.

Eastern Airlines (Capacity reduction discussions (Neward-San Juan)—Docket No. 22908, et al.):
February 9, 1973—Comments of the U.S. Department of Justice.
November 7, 1973—Reply to objections to the report of the prehearing conference.
February 7, 1975—Brief of the U.S. Department of Justice to CAB.
March 20, 1975—Motion of U.S. Department of Justice to correct transcript.
March 21, 1975—Motion of U.S. Department of Justice to fill an untimely document.

IATA Composite Currency Conference on Currency Adjustment Tariff Agreement (Docket No. 23333, Agreement CAB 23609, Docket 24488, Agreement CAB 23607, Dockets 25054, 25097, 25101, 25396, 23486): September 11, 1973—Comments of the U.S. Department of Justice.

International Air Transport Association Application for Approval of an Agreement (Docket No. 27756): May 23, 1975—Answer of U.S. Department of Justice in opposition to application.

Application of Pan American to Engage in Capacity Restraint Discussions (Docket No. 25680): July 23, 1973—Response of the U.S. Department of Justice to application.

56-900 O - 75 - 14

Pan American (emergency authorization of carriers discussions—Docket No. 26516):
April 2, 1974—Comments of the U.S. Department of Justice.
April 10, 1974—Answer of the U.S. Department of Justice in support of motion for hearing of the Institute for Public Interest Representation.
May 7, 1974—Answer of the U.S. Department of Justice in opposition to petition of Trans World Airlines, Inc., for modification of order 74–4–104.
May 24, 1974—Answer of the U.S. Department of Justice's to ALPA's motion for termination of discussion authority.
Pan Am-Trans World Airlines (for approval of agreement—Docket No. 27114):
April 19, 1974—Petition of the U.S. Department of Justice for leave to intervene.
Trans World Airlines, Inc. (capacity reduction agreement—Docket No. 22908):
June 9, 1972—Comments of the U.S. Department of Justice.
August 31, 1972—Comments of the U.S. Department of Justice.
June 8, 1973—Response of the U.S. Department of Justice to application.
Mar. 14, 1974—Letter of Department of Justice to Judge Seaver.
May 24, 1974—Rebuttal testimony of the U.S. Department of Justice.
June 10, 1974—Trial brief of the U.S. Department of Justice.
August 20, 1974—Brief for the Administrative Law Judge E. Robert Seaver of the U.S. Department of Justice.
September 3, 1974—Reply brief to the Administrative Law Judge E. Robert Seaver of the U.S. Department of Justice.
Trans World Airlines, Inc. (Capacity restraint discussions—Docket No. 27755):
May 5, 1975—Response of the Department of Justice in opposition to application of Trans World Airlines, Inc., for authority to engage in capacity restraint discussions.
United Air Lines (capacity reduction discussions—Fin. Docket No. 22496, et al.):
April 9, 1973—Response of the U.S. Department of Justice to application.
Universal Air Travel Plan (Membership restrictions—Docket No. 22333, et al.):
January 31, 1973—Petition of U.S. Department of Justice.
March 16, 1973—Motion for leave to file an otherwise unauthorized document.
March 16, 1973—Reply of the Department of Justice to the answer of the Universal Air Travel Plan.

C. GENERAL PROCEEDINGS

Docket No. 21866–6A (Domestic Passenger Fare Investigation Phase 6–A [Seating Configurations]):
June 20, 1972—Petition for reconsideration.
June 15, 1973—Answer of the U.S. Department of Justice to the motion of Continental Air Lines, Inc., for stay and reconsideration.
Docket No. 21866–9 (Domestic Passenger Fare Investigation—Fare Structure Phase 9):
November 12, 1971—Brief of the U.S. Department of Justice.
November 12, 1971—Motion for leave to intervene.
March 26, 1973—Comments of the U.S. Department of Justice regarding phase 9 rate setting and fare flexibility.
Docket No. 22973 (New England Service Investigation):
July 31, 1973—Motion of the U.S. Department of Justice for leave to intervene for a limited purpose.
September 7, 1973—Brief of the U.S. Department of Justice to the board.
Docket No. 23287 (Air Freight Forwarders' Charters): January 24, 1975—Brief of the U.S. Department of Justice to administrative Law Judge Richard M. Hartsock.
Docket No. 23542, et al. (ATC Bylaws Investigation): February 22, 1974—Brief of the U.S. Department of Justice to the CAB.
Docket No. 24283, et al. (Air Carrier Reorganization Investigation):
July 16, 1973—Supplemental Brief of the U.S. Department of Justice to the Administrative Law Judge.
October 16, 1973—Motion of the Department of Justice for leave to file a late filed answer.
August 26, 1974—Brief of the U.S. Department of Justice to the CAB.
Docket No. 24908 (Proposed Termination of "Prior Affinity" Charter Authority):
December 20, 1974—Comments of the U.S. Department of Justice.
Docket No. 25587 (Fare Reductions in Chicago-L.A. Market Proposed by Continental and United Airlines):
October 19, 1973—Brief of the U.S. Department of Justice to the Administrative Law Judge.

January 16, 1974—Petition of the U.S. Department of Justice for review of the initial decision of the Administrative Law Judge.

Docket No. 25795 (36 Household Goods Air Freight Forwarders Application to Amend Exemption): August 17, 1973—Motion of Department of Justice for extension of time.

Docket No. 25875 (Proposed Regulation 14 CFR § 399.45—Minimum charter rate levels):

November 2, 1973—Comments and alternative motion for hearing of the U.S. Department of Justice.

November 19, 1973—Reply Comments of the Department of Justice.

November 11, 1974—Motion of the Department of Justice for stay and petition for reconsideration of regulation PS–57.

February 26, 1975—Comments of U.S. Department of Justice in the matter of charter rates.

Docket No. 25908 (Transatlantic Route Proceedings):

November 19, 1974—Notice to all parties.

November 19, 1974—Motion of the U.S. Department of Justice for leave to file a document otherwise unauthorized by the board's rules.

November 19, 1974—Petition of the U.S. Department of Justice for leave to intervene.

December 23, 1974—Statement of position of the U.S. Department of Justice.

January 6, 1975—Brief of the U.S. Department of Justice to Associate Chief Administrative Law Judge Ross I. Newmann.

March 5, 1975—Brief of the U.S. Department of Justice to the CAB.

Docket No. 26245 (American-Pan American Route-Exchange Agreement): January 30, 1974—Petition to intervene of the U.S. Department of Justice.

Docket No. 27135 (Proposed Regulation 14 CFR § 378a Concerning One-stop-inclusive Tour Charters):

December 20, 1974—Comments of the U.S. Department of Justice.

January 6, 1975—Reply Comments of the U.S. Department of Justice.

May 16, 1975—Comments of U.S. Department of Justice.

Docket No. 27463 (Air carrier certificates): February 3, 1975—Petition pursuant to sections 204(a) and 401 of the Federal Aviation Act of 1958, as amended, for alteration, amendment, modification, or suspension in whole or in part of air carrier certificates of public convenience and necessity.

Docket Nos. 27607 and 27610 (National Airlines, Inc., "No Frill Class" Service): March 20, 1975—Motion of the U.S. Department of Justice to file a document after the expiration of the specified due date and answer.

Docket No. 27626 (Pan American World Airways): April 4, 1975—Answer of U.S. Department of Justice in opposition to application of Pan American World Airways, Inc., for an exemption.

Docket No. 27671 ("No Frill" Fares Investigation):

May 7, 1975—Petition of the U.S. Department of Justice for leave to intervene.

September 16, 1975—Brief of the U.S. Department of Justice to Administrative Law Judge William H. Dapper.

Docket No. 27693 (World Airways):

April 30, 1975—Answer of U.S. Department of Justice in support of motion for an expedited hearing.

July 31, 1975—Brief of the U.S. Department of Justice to the CAB.

September 18, 1975—Motion of the U.S. Department of Justice to correct transcript.

Docket No. 27702 (Braniff Airways): April 14, 1975—Answer of U.S. Department of Justice in opposition to application of Braniff Airways, Inc., for an exemption.

Docket No. 27918 (North Atlantic Fares Investigation): July 11, 1975—Petition of the U.S. Department of Justice for leave to intervene.

Docket No. 28036 (South Pacific Service Case): August 5, 1975—Petition of the U.S. Department of Justice for leave to intervene.

Docket No. 28048 (Evaluation of Economic Behavior and other Consequences of Civil Aviation System Operating with Limited or is Regulatory Constraints): September 15, 1975—Comments of the U.S. Department of Justice.

In Re Grand Jury Proceedings—Investigation of International Air Transportation: January 23, 1975—Application for order to impound documents.

IV. Ocean Transportation (FMC)

A. MERGERS

R. J. Reynolds, U.S. Lines, Sea-Land Service, et al. (Agreement No. 9827–1; Docket No. 70–51):
- March 16, 1972—U.S. Department of Justice reply to exceptions to the examiner's initial decision.
- July 26, 1972—Reply of the U.S. Department of Justice to comments filed pursuant to Commission order of June 7, 1972.

B. COOPERATIVE WORKING AGREEMENTS

American Export Isbrandtsen Lines, et al. (Agreement No. 9899—Docket No. ——): February 12, 1971—Petition of the Department of Justice.

Atlantic Steamship Energy Conservation Agreement (Agreement No. 10118—Docket No. ——): March 26, 1974—Comments of the Department of Justice.

Hawaii Rate Agreement (Agreement No. DC–57—Docket No. ——):
- July 11, 1973—Petition for intervention of the Department of Justice.
- November 15, 1973—Posthearing brief of the Department of Justice.
- December 17, 1973—Reply brief of the Department of Justice.

North Atlantic Pool (Agreement No. 10,000—Docket No. 72–17):
- July 11, 1972—Motion for order compelling respondents to answer the interrogatories of the Department of Justice, or in the alternative, an Order setting oral argument on respondents' objections.
- October 11, 1972—Petition of the Department of Justice for reconsideration of procedural order.
- October 31, 1972—Motion by the Department of Justice for leave to appeal from the Chief Administrative Law Judge's revised procedural schedule denying the Department's petition for reconsideration of the procedural order.
- October 31, 1972—Appeal from the Chief Administrative Law Judge's revised procedural schedule.
- November 8, 1972—Letter.
- December 4, 1972—Letter.
- May 4 1973—Brief and proposed findings of the Department of Justice.
- June 15, 1973—Reply brief of the Department of Justice.
- February 26, 1974—Exceptions and brief of the Department of Justice.
- May 29, 1974—Petition for intervention of the Department of Justice.

Transatlantic Freight Conference, American Export Isbrandtsen Lines, et al. (Agreement No. 9,813—Docket No. 69–58):
- October 9, 1969—Petition of Department of Justice.
- February 6 1970—Notice of motion and motion for production of documents.
- February 6, 1970—Memorandum in support of Departments motion for production of documents.
- March 9, 1970—Reply of the Department of Justice to respondents' objections to interrogatories.
- March 24, 1970—Notice of deposition.
- March 31, 1970—Application for prehearing schedule by the Department of Justice.
- April 10, 1970—Motion by the Department of Justice for leave to appeal from the presiding examiner's order that all discovery proceedings be deferred until after the respondents' initial case has been heard.
- April 27 1970—Brief of the Department of Justice in opposition to respondent's interlocutory appeal from examiner's discovery ruling and cross-appeal.
- January 8, 1971—Department of Justice motion for order compelling production of documents and answers to interrogatories and depositions from witnesses and evidence located in foreign countries.
- January 8, 1971—Department of Justice memorandum in support of its motion.
- January 8, 1971—Department of Justice written cross-examination of respondents concerning amendment to agreement article 7(e)(i) and 7(e)(ii) (Amendment No. 3).
- January 25 1971—Reply of Department of Justice to respondents' objections to discovery.
- February 2 1971—Supplementary interrogatories propounded by the Department of Justice to all respondents.

April 28, 1971—Reply of the Department of Justice to respondents' request for extraordinary relief.

United Stevedoring Corporation v. *Boston Shipping* (Docket No. 70–3): July 10, 1972—Opening brief for the U.S. Department of Justice.

In the Matter of Agreement No. DC–56 (Docket No. 73–75):

December 12, 1973—Petition for intervention of the Department of Justice.

April 22, 1974—Direct testimony of Henry A. Einhorn on behalf of Department of Justice.

V. Electric Power

A. NUCLEAR LICENSING PROCEEDINGS (AEC)

Alabama Power Co. (Dockets Nos. 50–348A, 50–364A):

September 8, 1972—Reply of the U.S. Department of Juctice to the applicant's answer to notice of antitrust hearing and motion to limit the scope of the hearing of July 31, 1972.

September 11, 1972—Statement of legal theory and supporting facts of the Department of Justice.

September 25, 1972—Motion to consolidate of the Department of Justice.

November 9, 1972—Reply brief of the U.S. Department of Justice to applicant's brief on the jurisdiction of the AEC pursuant to § 105c of the Atomic Energy Act and the scope of prelicense antitrust review.

December 19, 1972—Supplemental statement of common issues in support of the Department of Justice's motion to consolidate.

March 5, 1973—Reply of the Department of Justice to applicant's request for certification on the issues of jurisdiction and scope.

March 20, 1973—Reply of the Department of Justice to applicants' motion for reconsideration of order denying request for certification.

March 20, 1973—Department's proposed issues of fact to be inserted under board's subissues.

April 4, 1973—Department of Justice's response to Alabama Power Co.'s statement of proposed issues.

May 14, 1973—Report of the Department of Justice.

June 1, 1973—Report of the Department of Justice.

June 14, 1973—Motion of the parties for an extension of time.

July 16, 1973—Report of the Department of Justice and AEC regulatory staff.

August 2, 1973—Report of the Department of Justice and AEC regulatory staff.

August 13, 1973—First response of the Department of Justice to the applicant's interrogatories 1(a), 1(b), and 22(a).

August 31, 1973—Answer of the joint discoveries to applicant's objections to the second joint request of the Department of Justice, AEC regulatory staff, and intervenors for production of documents by the applicant.

August 18, 1973—Motion of the joint discoveries for leave to file a reply.

November 5, 1973—Report of the Department of Justice and AEC regulatory staff.

December 3, 1973—Report of the Department of Justice and AEC regulatory staff.

January 7, 1974—Report of the Department of Justice and AEC regulatory staff.

February 8, 1974—Report of the Department of Justice and AEC regulatory staff.

March 6, 1974—Report of the Department of Justice and AEC regulatory staff.

March 31, 1974—Interrogatory of the Department of Justice to applicant and request for production of a single document and all copies of that document.

April 3, 1974—Report of the Department of Justice and AEC regulatory staff

April 16, 1974—Motion of the Department of Justice, AEC regulatory staff and the intervenors for a modification of the prehearing schedule.

April 25, 1974—Reply of other parties to applicant's answer and motion relating to further modification of the prehearing schedule.

May 3, 1974—Response of the Department of Justice, AEC regulatory staff and the intervenors opposing applicant's motion to bifurcate the hearing.

May 9, 1974—Report of the Department of Justice and AEC regulatory staff.

July 8, 1974—Answer opposing applicant's motion for order modifying the procedure established in 1973 so as to require the Department to file an additional brief prior to its trial brief.

August 2, 1974—Answer of the Department of Justice and Commission staff opposing applicant's motion and modification of prehearing schedule.
September 25, 1974—Motion of the Department of Justice for a modification of the prehearing schedule due to injury of witness.
October 7, 1974—Motion for further extension of time for filing Dr. Wein's testimony and for other modification of procedural schedule.
July 1, 1975—Answer of the Department of Justice to applicant's interrogatory regarding evidence relied upon by Dr. Harold H. Wein.
September 3, 1975—Brief of the Department of Justice supporting the admission of evidence in this proceeding notwithstanding applicant's objections relaying upon the *Noerr* and *Pennington* cases.
September 10, 1975—Answer of the Department of Justice to Georgia Power Co.'s motion to quash subpoena duces tecum in part.

Alabama Power Co. (Alan R. Barton Nuclear Plant Units 1, 2, 3 and 4) (Dockets Nos. 50–524A; 50–525A; 50–526A; 50–527A): April 21, 1975—Notice of appearance of David A. Leckie; C. Kent Hatfield; John D. Whitler and Joseph J. Saunders.

Caroline Power & Light Co. (Dockets Nos. 50–400, 50–401, 50–402, 50–403): August 18, 1972—Letter from Department of Justice to Associate General Counsel, AEC.

Connecticut Light & Power Co. (Docket No. 50–423A); August 10, 1973—Letter from Department of Justice to Associate General Counsel, AEC.

Consumers Power Co. (Dockets Nos. 50–329A, 50–330A):
August 16, 1972—Letter from Department of Justice to Keith S. Watson, Esq.
August 16, 1972—Motion to compel the production of four categories of documents including those which may be dated prior to January 1, 1960.
August 30, 1972—Request for stay of motion to compel the production of four categories of documents.
September 25, 1972—Information and data desired from applicant.
November 2, 1972—Answer of the Department of Justice to applicant's objections to document requests and motion for protective orders.
December 13, 1972—Application for issuance of subpoenas duces tecum.
January 8, 1973—Answer of the Department of Justice to applicant's motion for order modifying procedural schedule.
February 12, 1973—Request for admissions and interrogatories as to proposed contentions.
March 2, 1973—First response of the Department of Justice to applicant's interrogatories.
March 2, 1973—Answer to applicant's motion to extend time to object to request for admissions and motion to compel applicant's response.
March 22, 1973—Reply of the Department of Justice to applicant's answer to motion to compel response.
April 2, 1973—Supplemental response of the Department of Justice to applicant's interrogatories.
April 17, 1973—Answer of the Department of Justice to applicant's motion to compel production of documents and motions of the dept. for protective orders and to compel production of documents by applicant.
June 28, 1973—Notice of appearance; answer of the Department of Justice to applicant's motion for leave to submit outside experts' direct testimony in written form.
July 12, 1973—Answer of the Department of Justice to intervenors' motions for reconsideration and to compel.
August 10, 1973—Motion to the Board for an order requiring applicant to state the facts expected to be proved by its outstanding requests to nonparties.
August 22, 1973—Further request for admissions and interrogatories.
September 6, 1973—Department of Justice petition to the Board for order establishing a Michigan location for hearing for taking testimony of Michigan witnesses.
September 20, 1973—Motion to compel production of Michigan Pool Committee minutes.
October 15, 1973—Motion of the Department of Justice to compel discovery regarding certain computer material.
October 15, 1975—Brief of the Department of Justice to assist Board in determining impact of Commission's memorandum and order (Docket 50–382A) upon this proceeding.
October 8, 1974—Brief and proposed findings of fact of the U.S. Department of Justice.

Duke Power Co. (Dockets Nos. 50-269A, 50-270A, 50-287A, 50-369A, 50-370A):
September 5, 1972—First joint request of Department of Justice, AEC regulatory staff and intervenors for production of documents by applicant for period since January 1, 1960.
October 25, 1972—Answer of the Department of Justice to applicant's objections to document requests and motion for protective orders.
November 16, 1972—Application for issuance of subpoenas duces tecum.
December 20, 1972—Answers of the Department of Justice to motions of Virginia Electric & Power Co., Carolina Power & Light Co., & South Carolina Electric & Gas Co.
February 2, 1973—New proposed list of subissues of fact submitted by the Department of Justice.
February 8, 1973—Affidavit of Wallace Edward Brand in support of motion for reconsideration of Board's order of January 8, 1973.
February 26, 1973—Reply brief of the Department of Justice on relationship between AEC's proceeding under section 105 of the Atomic Energy Act and FPC's proceeding under section 205 of the Federal Power Act; with Department's proposed issues of fact to be inserted under Board's subissues b. 1–4.
March 30, 1973—Revised interrogatory of the Department of Justice concerning applicant's filing system.
April 23, 1973—Answer of the Department of Justice to motion of VEPCO to quash or to limit subpoena duces tecum.
June 6, 1973—Answer of the Department of Justice to applicant's motion to amend paragraph G of prehearing order No. 6 and separate motion of the Department to amend paragraph G of prehearing order No. 6.
July 30, 1973—Answer of the Department of Justice to applicant's motion to amend prehearing order No. 2.
July 31, 1973—Answer of the Department of Justice to applicant's motion for protective orders.
September 17, 1973—Interrogatories and document request of joint discoverers and motion to compel response.
September 28, 1973—Request of the U.S. Department of Justice for additional time to reply to interrogatories and document production request of applicant.
October 3, 1973—Answers of joint discoverers to applicant's motion for protective order concerning commencement of depositions.
October 11, 1973—Answers of the Department of Justice to applicant's motion to stay depositions and request for expeditious ruling on that motion.
October 18, 1973—Answer of Department of Justice to applicant's motion to determine procedure for review of attorney-client privilege claims.
October 23, 1973—Brief of the Department of Justice to assist Board in determining impact of Commission's memorandum and order (Docket 50-382A) upon this proceeding.
November 8, 1973—Request of the U.S. Department of Justice for additional time to reply to interrogatories and document production request of applicant.
November 19, 1973—Memorandum of Department of Justice on the scope and application of attorney-client privilege.
November 28, 1973—Request of the U.S. Department of Justice for additional time to reply to interrogatories and document production request of applicant.
November 30, 1973—Answers of the Department of Justice to interrogatories of the applicant.
December 7, 1973—Supplemental memorandum of Department of Justice on attorney- client privilege.
December 20, 1973—Joint motion of all parties for a modification of the prehearing schedule.
January 4, 1974—Answer of the Department of Justice to applicant's motion for a protective order.
January 10, 1974—Supplementary answers of the Department of Justice to interrogatories of the applicant.
January 22, 1974—Answer of the Department of Justice to applicant's motion to compel.
January 28, 1974—Answers of the Department of Justice to applicant's motion for leave to reply.

February 7, 1974—Joint motion of all parties requesting changes in the schedule of the proceeding.
March 7, 1974—Fourth response of the Department of Justice to applicant's interrogatories.
May 13, 1974—Answer of the Department of Justice to intervenors' motion for extension of time.
May 14, 1974—Motion of the AEC staff and the Department of Justice to amend licenses for Oconee Units 1, 2 and 3 and McGuire Units 1 and 2 by attaching license conditions.
No date—Joint recital of contested issues of fact and law.

Duke Power Co. (Dockets Nos. 50-413A and 50-414A):
September 12, 1973—Answer of Department of Justice to applicant's objection to consolidation and motion to determine issues for hearing.
May 10, 1974—Response of the Department of Justice to questions posed in board's April 25, 1974, notice of hearing and notice for special prehearing conference.
May 23, 1974—Motion of the Department of Justice to limit participation; answer to applicant's motion for full implementation of settlement; advice to Board concerning issues appropriate for hearing.

Georgia Power Co. (Docket No. 50-366):
September 25, 1972—Motion to consolidate of the Department of Justice.
December 19, 1972—Supplemental statement of common issues in support of the Department of Justice's motion to consolidate.
January 3, 1973—Notice of appearance.
January 16, 1973—Statement of the Department of Justice with regard to legal theory and supporting facts.
April 5, 1973—Response of the Department of Justice to Georgia Power Co.'s second recital of contested issues.
May 31, 1973—Second joint request of the Department of Justice, AEC regulatory staff, and intervenors for production of documents by the applicant.
June 14, 1973—Motion of the parties for an extension of time.
June 15, 1973—Report of the Department of Justice and AEC regulatory staff.
July 25, 1973—Answer of the joint discoverers to applicant's objections to the first joint request for the production of documents.
August 29, 1973—Answer of the joint discoverers to applicant's objections to the second joint request of the Department of Justice, AEC regulatory staff, and intervenors for production of documents by the applicant.
September 4, 1973—Answer of the joint discoverers to applicant's objections to the substitute questions for the second joint request for the production of documents by applicant.
October 12, 1973—Proposed schedule of the Department of Justice and AEC regulatory staff.
November 5, 1973—Report of the Department of Justice and AEC regulatory staff.
November 16, 1973—Joint discoverers' amendments to their second joint discovery request of the applicant and joint discoverers' amended motion to compel discovery of the applicant.
December 4, 1973—Report of the Department of Justice and AEC regulatory staff.
December 21, 1973—Motion of the parties for a postponement of procedural dates.
No date—Recital of contested issues of law and fact.

Louisiana Power & Light Co. (Docket No. 50-382A):
No date—Affidavit of Wallace Brand.
November 8, 1972—Statement of the Department of Justice concerning matters contained in Louisiana Power & Light Co.'s "motion for expeditious denial" filed October 30, 1972.
February 23, 1973—Memorandum and order.
March 21, 1973—Notice of appearance.
March 22, 1973—Notice of appearance.
March 29, 1973—Request for extension of time.
April 2, 1973—Answer of AEC regulatory staff to Louisiana Power & Light Co.'s answer to Commission's notice of antitrust hearing on application for construction permit for related motions.
April 3, 1973—Notice of receipt of supplemental antitrust advice from Department of Justice.

April 4, 1973—Order granting request of U.S. Department of Justice for additional time to reply to answer to notice of antitrust hearing on application for construction permit and related motions.
April 5, 1973—Reply and answer of Department of Justice to applicant's papers of March 20, 1973.
April 6, 1973—Notice of appearance.
April 9, 1973—Answer of cities of Lafayette and Plaquemine, La., to answer of Louisiana Power & Light Co. filed March 20, 1973, and related motions.
April 9, 1973—Motion of the Dow Chemical Co. for leave to file a reply to applicant's answer to notice of antitrust hearing on application for construction permit and related motions.
April 24, 1973—Memorandum and opinion of Board with respect to petitions to intervene in an antitrust hearing relating to application for construction permit.
April 27, 1973—Notice of Department of Justice advice.
May 4, 1973—Motion of the Dow Chemical for leave to amend and supplement its petition for leave to intervene and request for hearing.
October 30, 1973—Answer of Department of Justice to motion of applicant for clarification of the Commission's order of September 28, 1973.
November 12, 1973—Memorandum of the Department of Justice pursuant to notice and order of October 30, 1973.
Febraury 8, 1974—First joint request for the production of documents by application.
July 18, 1974—Department of Justice reply to applicant's motion that the AEC or the Atomic Safety and Licensing and Appeal Board direct certification of the record for appeal.
September 5, 1974—Post-show-cause-hearing brief of the Department of Justice.
November 13, 1974—Motion to modify board's memorandum with respect to appropriate license conditions.
December 6, 1974—Brief of Department of Justice on appeal from initial decision of hearing board.

Pacific Gas & Electric Co. (Dockets Nos. 50–358 and 50–359):
September 7, 1972—Notice of appearance by the Department of Justice.
September 20, 1972—Notice of appearance.

The Toledo Edison Co. and the Cleveland Electric Illuminating Co. Docket No. 50–346A; the Cleveland Electric Illuminating Co., et al. (Dockets Nos. 50–440A and 50–441A) (50–500A and 50–501A):
January 24, 1974—Notice of appearance by the Department of Justice.
June 19, 1974—Proposed expedited hearing schedule.
July 12, 1974—Response of Department of Justice to order requesting clarification.
July 15, 1974—Expedited hearing schedule proposed by the Department of Justice.
August 29, 1974—Notice of appearance by the Department of Justice.
September 9, 1974—Motion by the Department of Justice for a protective order.
October 10, 1974—Response by the Department of Justice to applicant's motion for summary disposition.
November 27, 1974—Response of Department of Justice to applicant's first request for production of documents and answers to interrogatories.
December 9, 1974—Motion by Department of Justice to compel discovery and to revise time schedule to take into account applicant's noncompliance.
December 12, 1974—Motion by the Department of Justice to quash or modify applicants' subpoenas and to enforce the sequence and timing of discovery ordered by the licensing board.
January 2, 1975—Memorandum of the Department of Justice in documents production submitted at the request of the Atomic Safety and Licensing Board.
January 7, 1975—Reply memorandum of the Department of Justice on document discovery.
February 14, 1975—Supplemental interrogatories by the Dept. of Justice to the Cleveland Electric Illuminating Co., Ohio Edison Co., Pennsylvania Power Co., and the Toledo Edison Co.
February 18, 1975—Department of Justice proposed transcript corrections.
March 24, 1975—Motion for extension of time and certificate of service.
April 7, 1975—Answer of the Department of Justice in opposition to applicants' motion entitled "Proposal for Expediting the Antitrust Hearing Process."

April 14, 1975—Notice of appearance by the Department of Justice.
April 23, 1975—Motion by the Department of Justice for order concerning discovery.
April 25, 1975—Memorandum of the Department of Justice in support of claims of privilege.
May 2, 1975—Reply memorandum of the Department of Justice on applicants' claims of privilege.
May 5, 1975—Motion for extension of time; Notice of appearance by the Department of Justice; and certificate of service.
May 12, 1975—Reply of the Department of Justice in opposition to applicant's argument in support of its proposal for expediting the antitrust hearing process.
May 23, 1975—Request of the Department of Justice for interrogatories and for production of documents by applicants.
May 23, 1975—Request of the Department of Justice for production of documents.
June 19, 1975—Answer of the Department of Justice in support of motion by NRC staff to authorize the Atomic Safety and Licensing Board to consider and rule on consolidation.
June 26, 1975—Minutes of conference call with Board Chairman on June 24, 1975.
June 27, 1975—Memorandum of points and authorities of Department of Justice with regard to the decision of the special master.
July 9, 1975—List of challenges to the special master's findings of privilege.
July 25, 1975—Application for reconsideration of the Board's ruling on the motion of the City of Cleveland to change procedural dates.
July 29, 1975—Minutes of conference call with Board Chairman on July 14, 1975.
August 21, 1975—Motion for extension of time.
September 5, 1975—Response of Department of Justice to applicant's interrogatories and requests for the production of documents.
September 12, 1975—Memorandum of the Department of Justice on exceptions to the ruling of the Atomic Safety and Licensing Board.
September 15, 1975—Motion by the Department of Justice to change procedural dates and affidavit.

Wisconsin Electric Power Co., et al. (Koshkonong Nuclear Plant Units 1 and 2) (Dockets Nos. 50–502A and 50–503A):
July 18, 1975—Notice of appearance by the Department of Justice.
July 21, 1975—Letter substituting a new corrected copy of response of Department of Justice to supplemental to petition to intervene dated July 18, 1975.

B. HOLDING COMPANY ACQUISITIONS (SEC)

American Electric Power Co., Inc. (SEC Adm. Proc. File No. 3–1476):
March 17, 1969—Application of the U.S. Department of Justice for leave to submit an amicus statement.
November 12, 1969—Response to American Electric Power Co., Inc.'s, motion to quash subpoena dated November 3, 1969.
March 13, 1970—Reply of Division of Corporate Regulation and Department of Justice to petition for review by American Electric Power Co., Inc. ("AEP"), of Examiner's Ruling denying AEP motion to terminate cross-examination.
April 24, 1970—Application for order requiring production of books, papers, and documents.
October 19, 1970—Response of Department of Justice to AEP's application of October 9, 1970.
November 6, 1970—Statement of the Department of Justice with respect to the application for review of the Division of corporate regulation.
February 19, 1971—Department of Justice motion for reconsideration of orders requiring production of documents.
February 8, 1972—Response of the Department of Justice to AEP's application for review, dated January 28, 1972.
April 11, 1972—Letter.
June 6, 1972—Answer of Department of Justice and Division of Corporate Regulation to application by AEP for interlocutory review of Examiner's order denying motion to omit initial decision.
September 18, 1972—Brief and proposed findings of fact of the U.S. Department of Justice.

October 24, 1972—Reply brief of the U.S. Department of Justice.
April 9, 1974—Brief of the U.S. Department of Justice.

New England Electric System, et al. (SEC Adm. Proc. File No. 3–1698):
June 1, 1971—Brief of the U.S. Department of Justice.
January 29, 1973—Reply Brief on exceptions of the Department of Justice.

C. RESTRICTIVE PRACTICES (FPC)

Docket No. R.345 (competitive bids in procurement): *See*, VI. Natural Gas (FPC) (Restrictive Practices).

VI. Natural Gas (FPC)

A. MERGERS AND ACQUISITIONS

American Natural 50 percent acq. of Great Lakes Transmission Company (Docket No. CP 66–110 et al.):
November 3, 1969—Brief of Department of Justice on remand.
December 5, 1969—Reply of Department of Justice to initial brief and motion of Michigan Wisconsin Pipe Line Co. and Michigan Consolidated Gas Co.
February 6, 1970—Exceptions of the Department of Justice to Examiner's initial decision on remand.
August 10, 1970—Application of the Department of Justice for rehearing of opinion No. 580 and accompanying order.

B. RATES

C. PIPELINE CERTIFICATES AND PERMITS

Great Lakes Transmission Co. (Dockets Nos. CP 70–19, CP 70–20); Michigan Wisconsin Pipeline Co. (Dockets Nos. CP 70–21, CP 70–22); Midwestern Gas Transmission Co. (Dockets Nos. CP 70–23, CP 70–24) (pipe line interconnection with Great Lakes); December 16, 1969—Petition of Department of Justice for leave to file a statement of position.

Northwest Pipeline Corp. (Dockets Nos. CP 73–331; CP 73–332; CP 73–333):
August 21, 1973—Joinder in motion for expedited proceedings.
October 23, 1973—Application of intervenors Arizona Public Service Co., Tucson Gas and Electric Co. for rehearing of Commission order issued without public hearing.

D. RESTRICTIVE PRACTICES

Docket No. R. 345 (competitive bids in procurement): March 17, 1969—Comments of the U.S. Department of Justice.

VII. Banking and Finance (FRB, FDIC, Comptroller, FHLLB)

A. BANK MERGERS AND ACQUISITIONS

Alabama Bancorporation: March 19, 1973—Memorandum of the U.S. Department of Justice on the competitive effects of the captioned applications.

American Fletcher Corp. (acq. voting shares of Southwest S & L Association): November 30, 1973—Comments of the Department of Justice.

Trust Co. of Georgia (acq. of Peachtree Bank & Trust, Chamblee, Ga.): March 2, 1971—Petition for reconsideration of order approving application for acquisition of assets and assumption of liabilities under Bank Merger Act.

B. BANK HOLDING COMPANY DIVERSIFICATION

Armored Car or Courier Services: May 11, 1972—Comments of the U.S. Department of Justice.

Factors, acquisition of: December 10, 1971—Petition for acceptance of late comments.

Finance Companies, Small, acq. of: December 1, 1972—Memorandum of the U.S. Department of Justice.

Investment advisors to investment companies: September 24, 1971—Comments of the U.S. Department of Justice.

Mortgage Companies, acq. of: December 3, 1971—Petition for acceptance of late comments.

Nonbanking activities, generally: February 26, 1971—Memorandum of the U.S. Department of Justice.

C. RESTRICTIVE PRACTICES

Intra Corporate conspiracy Doctrine: February 22, 1971—Letter to FRB.
Interlocking Relationships (under the Clayton Act): March 15, 1974—Comments of the U.S. Department of Justice.
Electric Funds Transfer (proposed amendment of Regulation J & related issues): May 14, 1974—Comments of the U.S. Department of Justice.
Truth in Lending-Fair Credit Billing (Proposed amendments to Regulation Z): June 20, 1975—Comments of the Department of Justice.

VIII. Securities Markets (SEC)

A. COMMISSION RATES

File No. 10–54–1 (Commission Rate Structure of the Chicago Board Options Exchange): January 15, 1973—Comments of the U.S. Department of Justice.
File No. 4–144 (Commission Rate Structure of Registered National Securities Exchanges)
January 17, 1969—Memorandum of the U.S. Department of Justice on fixed minimum commission rate structure.
March 20, 1970—Response of the U.S. Department of Justice to SEC release No. 8791.
File No. 4–164 (Repeal of section 22(d); distribution of mutual funds); February 2, 1973—Comments of the U.S. Department of Justice.
File No. 8239 (Commission Rate Structure of the File No. 4–176 NYSE):
April 1, 1968—Comments of the U.S. Department of Justice.
December 10, 1974—Comments of the U.S. Department of Justice.
Civ. 63–C–264 (Fixed brokerage commissions) (Thill):
January 13, 1972—Memorandum of the Department of Justice in opposition to defendent's motion for stay of this action pending reference of Issues to the Securities and Exchange Commission.
January 17, 1972—Errata sheet for above memorandum.
March 15, 1972—Memorandum of the Department of Justice on the issues to be decided at trial and the proposed procedure to be followed.
April 28, 1972—Response of the United States to defendent's reply to memorandum of the antitrust division on the issues to be tried and trial procedure to be followed and to memorandum of Securities and Exchange Commission in response to positions of plaintiff, defendent, and Department of Justice concerning issues to be tried.
April 28, 1972—Notice of motion and motion of the U.S.A. for leave to intervene.
June 30, 1972—Defendent's interrogatories to plaintiff Thill Securities Corp.
July 1972—First set of interrogatories propounded by U.S.A. to Securities and Exchange Commission.
No date—Affidavit and claim of privilege.
Release No. 10636; File No. S7–510 (proposed Rule 10B–20; Prohibition against additional consideration in securities offerings): April 15, 1974—Comments of the U.S. Department of Justice on proposed rule 10B–20.

B. EXCHANGE MEMBERSHIP

Release No. 8717 (NYSE proposals to permit public ownership of members): No date—Comments of the U.S. Department of Justice.
Release No. 9716 (proposed rule 196–2; membership for other than public purposes): October 3, 1972—Comments of the U.S. Department of Justice.
Release No. 10490 (intermarket competition between option exchanges): May 9, 1974—Comments of the U.S. Department of Justice on inter-market competition between option exchanges.

C. TRANSACTION DISCLOSURES

File No. 4–172 (NASD anti-reciprocal rule): September 9, 1974—Comments of the U.S. Department of Justice.
File No. S7–433 (Proposed Rule 17a–15): September 29, 1972—Comments of the U.S. Department of Justice.
File No. S7–522 (Commission inquiry): August 23, 1974—Comments of the U.S. Department of Justice.

File No. S7-529 (temporary suspension of competitive bid requirements): August 23, 1974—Statement of the U.S. Department of Justice on the proposal to temporarily suspend the competitive bidding requirements for the sale of common stock of regulated public utilities.

IX. Commodities Exchanges (Comm. Exch. Auth.)

A. COMMISSION RATES

Minimum Commission Rate Fixing by Commodities Exchanges (response to invitation in 37 F.R. 4970):
- April 14, 1972—Comments of the U.S. Department of Justice on minimum commission rate fixing by commodities exchanges.
- July 7, 1972—Additional comments of the Department of Justice on minimum rate fixing by commodities exchanges.

X. Import Restrictions (Treasury, Tariff, Sec. of Agric, et al.)

A. ANTIDUMPING

1. Particular Products

Aluminum Ingots from Canada (Invest No. AA 1921-121):
- July 17, 1973—Statement of Stephen Kilgriff, attorney, Antitrust Division, before the U.S. Tariff Commission in the matter of aluminum ingots from Canada, investigation No. AA1921-121 under the Antidumping Act of 1921, as amended.
- August 1, 1973—Brief of the Antitrust Division of the Department of Justice.

Bleached hardwood kraft pulp from Canada (Tar. Comm. Inv. No. AA1921-105):
- November 21, 1972—Statement of Stephen Kilgriff, attorney, Antitrust Division, before the U.S. Tariff Commission, concerning Northern Bleached hardwood kraft pulp from Canada (Inv. No. AA1921-105).
- December 12, 1972—Brief of the Antitrust Division of the Department of Justice.

Clear plate and clear float glass from Japan (Tar. Comm. Inv. No. AA1921, et al.): No date—Statement of the Department of Justice.

Elemental Sulphur from Canada: May 23, 1973—Submission of the Antitrust Division U.S. Department of Justice.

Potassium Chloride from Canada (Tar. Comm. Inv. No. AA1921-58160): March 3, 1970—Application to modify or revoke antidumping findings.

Power Transformers from France (Tar. Comm. Inv. No. AA1921-86/90): April 5, 1972—Brief of the Department of Justice.

Primary lead metal from Australia (Tar. Comm. Inv. No. AA1921-134): December 19, 1973—Brief of the Antitrust Division of the Department of Justice.

Primary lead metal from Canada (Tar. Comm. Inv. No. AA1921-135): December 21, 1973—Brief of the Antitrust Division of the Department of Justice.

Sheet glass from West Germany, France and Italy (Tar. Comm. Inv. No. AA1921-78/80): October 7, 1971—Statement of the U.S. Department of Justice.

2. General Proceedings

Customs, Commissioner of, 36 F.R. 7012 (suggested revisions to antidumping regulations): June 14, 1971—Letter.

Treasury, 37 F.R. 7698 (proposed rule making): June 19, 1972—Submission of the U.S. Department of Justice.

Treasury, 37 F.R. 9125, 11475 (Sales below cost of production): July 5, 1972—Submission of the U.S. Department of Justice.

B. § 337 TARIFF ACT

1. Particular Products

Ampicillin (Tar. Comm. Inv. No. 337-24):
- December 29, 1970—Memorandum to the special trade representative on whether the president should issue a temporary exclusion order on ampicillin.
- March 31, 1971—Statement of the U.S. Department of Justice.

Meprobamate (Tar. Comm. Inv. No. 337-27): September 20, 1971—Statement of the U.S. Department of Justice.

2. General Proceedings

Trade Staff Committee Section 337 Study: January 12, 1973—Statement of the Department of Justice.

C. ESCAPE CLAUSE ACTIONS

Flat Glass (Tea–I–23):
November 15, 1971—Testimony of Dudley H. Chapman, Assistant Chief Foreign Commerce Section, Antitrust Division, Department of Justice before the Tariff Commission concerning the consolidated petitions of ASG Industries, Inc., C–E Glass, Libbey-Owens-Ford Co., and PPG Industries, Inc., under sections 351(d)(3) and 301(a) of the Trade Expansion Act of 1962, and section 207.4 of part 207 and subpart B of part 206 of the rules of practice and procedure of the U.S. Tariff Commission.
December 8, 1971—Letter.

D. § 232 TRADE EXPANSION ACT

Power Circuit Breakers, etc. (Rept. to OEP on GE application for investigation):
October 30, 1972—Interim representative of the Department of Justice on the application of GE under section 232 of the Trade Expansion Act for an investigation of the effect on National Security of imports of EHV Power Circuit Breakers and EHV transformers and refactors.
April 27, 1973—Final representative of the Department of Justice on the application of GE under section 232 of the Trade Expansion Act for an investigation of the effect on National Security of imports of EHV Power Circuit Breakers and EHV transformers and refactors.

E. OTHER IMPORT RESTRICTIONS

Tomatoes grown in Florida (Department of AG Docket No. AO–265–A3): May 4, 1972—Application of Department of Justice for extension of time within which to file exceptions.

XI. Consumer Protection (FTC)

A. CONSUMER INSTALLMENT SALES

Preservation of buyers' claims and defenses in consumer installment sales (proposed trade regulation): September 13, 1971—Comments of the U.S. Department of Justice.

XII. NARCOTICS AND DANGEROUS DRUGS

A. REGISTRATION

Application procedures under the Drug Abuse Prevention and Control Act of 1970: May 17, 1974—Comments of the Antitrust Division of the Department of Justice.
Mallinckrodt Registration to produce Oxycodone (Docket No. 73–4): April 5, 1975—Memorandum of law relating to the simplification of issues of the Bureau's hearing counsel.

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