RECENT LEGISLATION

ANTITRUST—CONGRESS ENACTS ANTITRUST CIVIL PROCESS ACT

The recently enacted Antitrust Civil Process Act[1] authorizes the Attorney General to serve a "civil investigative demand" upon "any corporation, association, partnership, or other legal entity not a natural person"[2] whenever he "has reason to believe" that such entities "may be in possession, custody, or control of any [non-privileged] documentary material relevant to a civil antitrust investigation."[3] This demand requires the material to be produced for inspection and reproduction by the Department of Justice.[4] It must describe the classes of material to be produced "with such definiteness and certainty" that the material can be "fairly identified."[5] It must also "state the nature of the conduct constituting the alleged antitrust violation" and specify the applicable statutory provision.[6] The documents so obtained may be used in both criminal and civil prosecutions.[7] A party served with a demand may obtain judicial review either by failing to comply and then defending against the Attorney General's petition for a court of enforcement order,[8] or by petitioning a district court to modify or set aside the demand.[9] Any final order of a district court may be challenged in the court of appeals.[10]

I. PURPOSE OF THE ACT

In creating the Antitrust Civil Process Act, Congress was primarily concerned with equipping the Department of Justice with a proper and effective means of obtaining evidence of past antitrust violations.[11] The two authorized methods of investigation previously available to the Department were unsatisfactory. The first, voluntary cooperation, was obviously ineffective, since violators could not be expected voluntarily to pave the way for their own detection.[12] The other method—use of the Federal

[1] 76 Stat. 548 (1962).
[2] Section 2(f).
[3] Section 3(a). A demand for documents can only be made upon an entity "under investigation." *Ibid.*; see H.R. REP. No. 1386, 87th Cong., 2d Sess. 3-4 (1962).
[4] Section 3(a) (inspection); § 4(c) (reproduction).
[5] Section 3(b)(2).
[6] Section 3(b)(1).
[7] See § 4(d); 108 CONG. REC. 3666 (daily ed. March 13, 1962) (remarks of Representative McCulloch).
[8] Section 5(a).
[9] Section 5(b).
[10] See § 5(d).
[11] See H.R. REP. No. 1386, 87th Cong., 2d Sess. 3-4 (1962) [hereinafter cited as HOUSE REPORT]; *Hearings on S. 716 & S. 1003 Before a Subcommittee of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. 2-3 (1959) [hereinafter cited as *Senate Hearings*].
[12] See remarks of Assistant Att'y Gen. Victor R. Hansen, in *Senate Hearings* 10-12.

Trade Commission's investigatory powers for the benefit of the Attorney General [13]—was never attempted,[14] presumably because of the budgetary problems involved in making the FTC the investigative arm of the Department of Justice.[15] Moreover, evidence obtained by the FTC apparently could be used by the Attorney General only to prevent future violations and not to prosecute past violations.[16] Consequently, it is doubtful that use of FTC processes, even if administratively feasible, would enable the Attorney General adequately to enforce the antitrust laws.

As a result of these inadequacies, the Department of Justice frequently employed the criminal investigations of the grand jury as a discovery instrumentality in civil antitrust suits.[17] Clearly, evidence obtained by the Department in a grand jury investigation can incidentally be used for civil prosecutions,[18] but resort to the grand jury when there is no thought of criminal action perverts its function,[19] conflicts with the Department of Justice's policy of instituting criminal suits only against the most flagrant violators of the antitrust laws,[20] and stigmatizes the companies investigated.[21] Consequently, in *United States v. Procter & Gamble Co.*,[22] the Supreme Court indicated that if the Government used grand jury proceedings solely to aid civil antitrust prosecutions, civil defendants would be allowed discovery of the grand jury transcript.[23] In concurring, Mr. Justice Whittaker maintained that in order to discourage such abuse of the grand jury, transcripts should be impounded in all cases in which a "no true bill" is voted so that neither party would have access to them except on

---

[13] See 38 Stat. 721 (1914), 15 U.S.C. § 46(e) (1958).

[14] 107 CONG. REC. 20661 (1961) (remarks of Senator Kefauver).

[15] See HOUSE REPORT 4.

[16] The statute gives the FTC power to investigate for the Attorney General "in order that the corporation *may thereafter* . . . conduct . . . [its] business in accordance with law." 38 Stat. 721 (1914), 15 U.S.C. § 46(e) (1958). (Emphasis added.)

[17] See United States v. Procter & Gamble Co., 187 F. Supp. 55, 56-57 (D.N.J. 1960) (discovery demand); Wadmond, *The Defense of an Antitrust Proceeding: Investigation*, in ABA SECTION OF ANTITRUST LAW, AN ANTITRUST HANDBOOK 435, 445 (1958). See generally *Senate Hearings* 2, 10; HOUSE REPORT 3-4; Rockefeller & Wald, *Antitrust Enforcement by the Federal Trade Commission and the Department of Justice: A Primer for Small Business*, 66 DICK. L. REV. 251, 254-56 (1962).

[18] FED. R. CRIM. P. 6(e); United States v. Procter & Gamble Co., 356 U.S. 677, 684 (1958); see United States v. General Elec. Co., Civil No. 29379, E.D. Pa., Aug. 22, 1962.

[19] See United States v. Procter & Gamble Co., 187 F. Supp. 55, 56-57 (D.N.J. 1960); United States v. Procter & Gamble Co., *supra* note 18, at 683-84 (dictum); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 343-48 (1955); Comment, 37 WASH. L. REV. 278, 279-80 (1962). *But see* the contrary view of Louis B. Schwartz. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 348-49 (1955).

[20] See *id.* at 345.

[21] The effect on a corporation may be more subtle than on an individual. Loss of retail business may be negligible, but the effect of the stigma may be felt in other ways, such as loss of credit in the financial community and a hesitancy of other companies to deal with it for fear that they would be suspected of violation and become targets for investigation.

[22] 356 U.S. 677 (1958). The case arose on defendant's motion for discovery of the grand jury transcripts upon which the Government based its civil case. The Court held that good cause had not been shown to justify discovery of the documents in light of the traditional secrecy of grand jury proceedings.

[23] *Id.* at 683-84.

order of a court for good cause.[24] On a subsequent motion by the defendant in this same case, the district court, after finding that the Department of Justice had misused the grand jury, allowed discovery of the transcript[25] and indicated that if the Department continued this practice, it would invoke a more coercive sanction—impounding the transcript and suppressing all evidence obtained directly or indirectly by means of the grand jury proceedings.[26] As a result, it is now clear that the use of the grand jury for civil investigation is not only improper, but will no longer be tolerated by the courts.

Another method of investigation employed by the Department of Justice was to initiate civil antitrust actions supported by little or no evidence in order to utilize the liberal discovery mechanisms of the Federal Rules of Civil Procedure[27] to acquire essential evidence.[28] This method of civil antitrust investigation placed on a defendant the costly and unfair burden of preparing a defense[29] when in fact the Government had little reason to believe that the case would be litigated beyond the preliminary stage.[30] It also represented an improper use of the discovery procedures, since discovery, like the grand jury investigation, was not intended to make the courts an investigating arm of the Department of Justice.[31]

The Antitrust Civil Process Act attempts not only to provide the Department of Justice with a legitimate and effective method of investigating past antitrust violations, but also to enable the Department to prevent corporate mergers that would result in an unlawful restraint of trade.[32] Previously, the Attorney General had no proper means, other than use of the FTC processes, to compel merging companies to produce documents relevant to possible antitrust violations. The usual modes of inquiry, except in the rare case in which documents were produced voluntarily, were the illegitimate use of the grand jury or the employment of discovery procedures after initiation of a bad faith civil suit.[33] These slow-moving processes prevented the Government from obtaining evidence

[24] *Id.* at 684 (concurring opinion).

[25] United States v. Procter & Gamble Co., 187 F. Supp. 55 (D.N.J. 1960).

[26] *Id.* at 63-64 (dictum). *But see* United States v. Procter & Gamble Co., 180 F. Supp. 195, 201-06 (D.N.J. 1959).

[27] FED. R. CIV. P. 26-37.

[28] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 344-45 (1955).

[29] See generally Wadmond, *op. cit. supra* note 17, at 435; Chadwell, *Pre-Trial*, in ABA SECTION OF ANTITRUST LAW, AN ANTITRUST HANDBOOK 455 (1958).

[30] It has also been said that incomplete prior investigation results in the institution of unjustified suits, but that "public retreat" by the prosecutor may be impossible. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 344 (1955).

[31] *Procedures in Anti-Trust and Other Protracted Cases Adopted by the Judicial Conference of the United States*, reproduced in Yankwich, *"Short Cuts" in Long Cases*, 13 F.R.D. 41, 62, 67 (1951).

[32] See 108 CONG. REC. 3665 (daily ed. March 13, 1962) (remarks of Representative Celler); HOUSE REPORT 5-6; *Senate Hearings* 11; *Hearings Before the Subcommittee on Antitrust of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 11, pt. 2 passim (1956).

[33] See 108 CONG. REC., *op. cit. supra* note 32, at 3664; HOUSE REPORT 3-4; *Senate Hearings* 11.

prior to the completion of a merger.[34] The present statute seeks to remedy this by providing the Attorney General with an expeditious civil demand process that will enable him to act before the merger is an accomplished fact.

II. Possible Abuses

Although the statute is designed to facilitate civil prosecutions, the evidence which it procures can be used in criminal cases; otherwise, criminal acts uncovered by the investigation would be immunized from criminal prosecution[35]—an obviously undesirable result. The act, however, limits the scope of a demand to evidence that would be within the subpoena power of a grand jury.[36] Consequently, the Government cannot obtain evidence for criminal prosecutions by means of a civil process demand that it could not acquire by means of a grand jury, and conversely the defendant cannot be compelled to produce documents protected from discovery by a grand jury. Nevertheless, the Government might attempt to use the civil process demand to aid criminal prosecutions if it proves more expeditious or less costly than the grand jury, although from the legislative history of the present statute, it is clear that it would be an improper application of the civil process demand to seek documents solely for use in criminal prosecutions.[37] To effectuate the clear intent of Congress, evidence so obtained should be suppressed,[38] with the burden on the defendant to prove no Government intent to prosecute civilly. This will be a difficult burden to carry,[39] however, and it is apparent that further problems will arise when the Government is contemplating both civil and criminal prosecutions. The cases involving the use of the grand jury when the Government has such dual motives indicate that so long as there is some intention to bring a civil action, the courts will allow the Attorney General to employ the civil demand process even though his primary interest is criminal prosecution.[40]

Additional grounds for concern can be found in sections 4(e) and 4(f), which authorize the reproduction and retention of copies of documents obtained by means of civil demand,[41] and allow the Attorney General

[34] See 108 Cong. Rec., *op. cit. supra* note 32, at 3665; *Senate Hearings* 11.

[35] See 108 Cong. Rec. 3666 (daily ed. March 13, 1962) (remarks of Representative McCulloch).

[36] See § 3(c).

[37] 108 Cong. Rec., *op. cit. supra* note 35, at 3666. Significantly, a last-minute amendment to the bill deleted a provision allowing use of the civil demand for criminal prosecutions under the Robinson-Patman Act. 54 BNA Antitrust & Trade Reg. Rep. A-1 (July 24, 1962); 60 BNA Antitrust & Trade Reg. Rep. A-3, A-4 (Sept. 4, 1962); House Report 2. While it is clear that Congress intended to restrict the demand to civil prosecutions, its reasons for this limitation were not articulated and are not apparent.

[38] *Cf.* Abel v. United States, 362 U.S. 217 (1960).

[39] Although it may be difficult for a defendant to prove the Government's motives and intent at the time of the demand, it is not an impossible burden to meet. See United States v. Procter & Gamble Co., 187 F. Supp. 55 (D.N.J. 1960).

[40] See authorities cited in and text accompanying notes 18-19 *supra*.

[41] See Statement of Richard K. Decker, Chairman, Comm. on Practice and Procedure, ABA Antitrust Section, in *Senate Hearings* 38.

to accumulate a library of evidence against a potential defendant. The danger is that evidence once gathered and retained, though not used in any lawsuit, could be used as a club to force compliance with various mandates of the Justice Department,[42] and perhaps other executive departments as well.[43] An example of this kind of action occurred in the recent steel industry price dispute, when it was suggested that antitrust litigation was one of several Government measures available to force the steel producers to lower their prices in accordance with the President's wishes.[44] Even though a business might be able to resist these measures, it would have to balance the cost of compliance against the cost of defending a vindictive antitrust suit. Since a new demand can be made whenever there is reason to suspect a violation of the antitrust laws, retention of copies of documents produced pursuant to a demand appears to be a potent weapon [45] whose main justification is that the originals may be destroyed by the company when they are returned at the close of an investigation. The statute could adequately protect both the Government's and the company's interest by providing for return of all copies on condition that the originals be retained by the company for a specific period of time, subject to penalty for failure to produce the documents upon a subsequent demand within the statutory period.

III. Constitutional Problems

The Attorney General is now authorized to demand documents when he has "reason to believe" that a person under investigation has documentary material relevant to a civil antitrust investigation.[46] The statutory standard—"reason to believe"—could not mean the constitutional standard applicable to natural persons—probable cause to believe;[47] such a standard would be too strict to permit the probing contemplated by the statute.[48] Therefore, questions necessarily arise under the unreasonable search and seizure and self-incrimination clauses of the Constitution.[49]

---

[42] In its watchdog capacity of trying to prevent violations of the antitrust laws, it is not uncommon for the Justice Department to warn corporations that future acts, such as a contemplated merger, will result in the initiation of antitrust litigation by the Government.

[43] The statute forbids access to the evidence by any person outside the Justice Department without the consent of the person who produced the evidence. § 4(c). However, it seems fair to assume that at least the President, if not other high-ranking government officials, would have access to these materials.

[44] See N.Y. Times, Sept. 10, 1961, § 4, p. 8, cols. 4-5.

[45] See FTC v. Standard American, Inc., 306 F.2d 231, 235 (3d Cir. 1962) (dictum); *cf.* United States v. Wallace & Tiernan, 336 U.S. 793 (1949).

[46] Section 3(a).

[47] Mapp v. Ohio, 367 U.S. 643 (1961); Boyd v. United States, 116 U.S. 616 (1886).

[48] If the standard were the constitutional standard of "probable cause," the scope of the Justice Department's investigative power would be more restricted than the FTC's investigative power and the Justice Department's criminal investigative subpoena power through the grand jury. However, the purpose of this statute is to give the Attorney General civil investigative power equal to these powers. See House Report 2.

[49] Typically, one thinks of the constitutional search and seizure provision in terms of criminal prosecution. Whether it is so limited is immaterial since the evidence obtained by the civil demand may be used in a criminal proceeding. See text

As applied to corporations, the statute is on fairly safe ground. A corporation has no protection against self-incrimination,[50] and its protection against unreasonable searches and seizures, in the context of documents demanded under legal process, is limited to prohibition of demands or subpoenas that are so vague that the corporation cannot identify the documents and records demanded.[51] Thus, a corporation's rights in this latter regard appear to be safeguarded by the present act's requirement that a demand be made with definiteness and with reason to believe that the corporation has relevant evidence.[52] The constitutional question is not so clear when the statute is applied to partnerships and unincorporated associations. Exclusion of a corporation from protection against self-incrimination, and to some extent unreasonable search and seizure, is justified on the basis that these rights are personal and therefore not available to a fictitious person.[53] This reasoning is not applicable to unincorporated associations. However, in *United States v. White*,[54] the Supreme Court restricted the privilege against self-incrimination to those associations in which the scope of activities and size of membership are such that the association can be said to represent the personal interests of its members, and not merely common group interests.[55] The *White* test is also applicable to unincorporated associations in fourth amendment cases,[56] but the situation is more confused in the case of partnerships. Some cases hold that partnership books and records are always protected against searches and seizures made without probable cause;[57] others apply the *White*

---

accompanying note 7 *supra*. In any event, there is authority holding constitutional restraints on search and seizure applicable to civil suits. See United States v. Physic, 175 F.2d 338 (2d Cir. 1949) (forfeiture case); Rogers v. United States, 97 F.2d 691 (1st Cir. 1938), 6 U. CHI. L. REV. 113; United States v. One 1960 Lincoln Two-Door Hard-Top, 195 F. Supp. 205 (D. Mass. 1961) (forfeiture case); Schenck *ex rel.* Chow Fook Hong v. Ward, 24 F. Supp. 776 (D. Mass. 1938) (dictum). *Contra*, Camden County Beverage Co. v. Blair, 46 F.2d 648 (D.N.J. 1930); see United States v. One 1956 Ford 2-Door Sedan, 185 F. Supp. 76 (E.D. Ky. 1960) (forfeiture case); *cf.* Frank v. Maryland, 359 U.S. 360 (1959), which indicated that even if the search and seizure provisions apply to civil prosecutions, the Court is less likely to find violations in non-criminal cases. On the facts of *Frank*, however, the civil-criminal dichotomy is not controlling.

[50] Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1945); Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).

[51] See United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, *supra* note 50; FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924); Hale v. Henkel, *supra* note 50; Rockefeller & Wald, *supra* note 17, at 256; *cf.* St. Regis Paper Co. v. United States, 368 U.S. 208 (1961); FTC v. Standard American, Inc., 306 F.2d 231 (3d Cir. 1962).

[52] Sections 3(a), 3(b)(2).

[53] See Wilson v. United States, 221 U.S. 361 (1911); Hale v. Henkel, 201 U.S. 43 (1906).

[54] 322 U.S. 694 (1944).

[55] *Id.* at 701.

[56] McPhaul v. United States, 364 U.S. 372 (1960), 75 HARV. L. REV. 40, 123; Goldberg v. Truck Drivers Union, 293 F.2d 807 (6th Cir.), *cert. denied*, 368 U.S. 938 (1961).

[57] United States v. Linen Serv. Council, 141 F. Supp. 511 (D.N.J. 1956); United States v. Lawn, 115 F. Supp. 674 (S.D.N.Y. 1953). In the landmark search and seizure case, Boyd v. United States, 116 U.S. 616 (1886), the Court did not discuss the partnership aspect; if it was raised at all, the Court must have assumed that partnership books were personal to the partners.

test;[58] still others give no protection to partnerships.[59] In any event, it is apparent that there are many unincorporated associations and some, if not all, partnerships against which the statute cannot be constitutionally applied.[60] It might be said that unincorporated businesses are usually smaller units and therefore less likely to run afoul of the antitrust laws. Size, however, is not necessarily determinative of the probability of antitrust violations.[61]

IV. CAVEAT

The civil process statute grants the Attorney General necessary civil investigative powers. The statute, on its face, fairly protects corporations, if not unincorporated businesses, upon whom a demand can be served. However, in analogous situations, such as the issuance of search and arrest warrants upon a showing of probable cause,[62] courts have vitiated the causal standard through non-enforcement. It is possible that the "reason to believe" standard of the present statute will receive similar treatment. This standard is at best imprecise, but it should require more than a bare averment by the Attorney General. In addition, the Government should be held to its burden of showing some relevancy between the documents demanded and the alleged violation; otherwise, the civil demand process could become a ready vehicle for fishing expeditions into the files and records of corporations[63] incurring the disfavor of the Attorney General.

---

[58] United States v. Silverstein, 314 F.2d 789 (2d Cir. 1963), *affirming* 210 F. Supp. 401 (S.D.N.Y. 1962). United States v. Onassis, 125 F. Supp. 190 (D.D.C. 1954) (criminal prosecution); *In re* Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948).

[59] United States v. Goodman, 190 F. Supp. 847 (N.D. Ill. 1961); United States v. Onassis, 133 F. Supp. 327 (S.D.N.Y. 1955) (civil action).

[60] Congress appears to have anticipated these constitutional problems, for it provided in § 3(c) that no demand shall require the production of documents which would be privileged from disclosure if demanded by a grand jury subpoena or shall contain any demand which would be "unreasonable" if contained in a grand jury subpoena. Apparently, this section would protect privileged communications. *Cf.* Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Tobacco & Allied Stocks v. Transamerica Corp., 16 F.R.D. 534 (D. Del. 1954). It would also exempt documents "unreasonably" demanded because not relevant to the investigation. *Cf.* Moore Business Forms, Inc. v. FTC, 307 F.2d 188 (D.C. Cir. 1962).

[61] See *In re* Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Cal. 1948); Rockefeller & Wald, *Antitrust Enforcement by the Federal Trade Commission and the Department of Justice: A Primer for Small Business*, 66 DICK. L. REV. 251 (1962).

[62] See, *e.g.*, Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., C. & P.S. 386, 388 (1960).

[63] The extent to which noncorporate businesses would be protected depends upon their constitutional protection under the self-incrimination and search and seizure clauses. See text accompanying notes 53-60 *supra*.