

AUTHORIZING THE ATTORNEY GENERAL TO COMPEL PRODUCTION OF DOCUMENTARY EVIDENCE REQUIRED IN CIVIL INVESTIGATIONS FOR ENFORCEMENT OF THE ANTITRUST LAWS

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Mr. DIRKSEN, from the Committee on the Judiciary, submitted the following

MINORITY VIEWS

[To accompany S. 716]

I. We favor expanding the civil investigative powers of the Attorney General necessary to compel the production of documentary evidence required in civil investigations for the enforcement of the antitrust laws. However, we differ with the majority in the means by which the power is to be exercised by the Attorney General.

II. Any grant of subpoena powers should be so circumscribed as to prevent abuse of such power or the infringement of personal rights of individuals. It was in that framework that we opposed the inclusion of natural persons within the purview of the legislation. The purpose of this legislation is to make possible the enforcement of the antitrust laws through civil procedures. Every effort should be made to avoid the use of criminal sanctions. There was no evidence presented to the committee which would justify a provision authorizing the service of civil investigative demands upon natural persons in order to secure compliance by business firms with the antitrust laws. Accordingly, the committee excluded natural persons from the purview of the legislation.

While this modification of S. 716 was an improvement, other modifications pointed out hereafter in our minority views were in order to improve the bill and, had those been adopted, we could have supported this proposal and so would have voted to recommend the legislation favorably to the Senate.

III. We opposed the action of the full committee in adopting amendments which would permit the Attorney General to make available the subpoenaed material or copies thereof to the Judiciary Committees of the Congress without any authority to restrict the use of such subpoenaed material or copies thereof by those committees. Furthermore, the committee amendments contained no safeguards or

authority for requiring the return of copies of material made available to the Judiciary Committees. We submit that these amendments would place the Attorney General in a most awkward light in his prosecution of civil cases under the antitrust laws.

(a) Consider in this light the circumstances where there was found to be no violation of the antitrust laws after investigation and the Attorney General is unable to require the return of documents or copies thereof which have been made available to the Judiciary Committees. In such circumstances, since presumably the Attorney General has unearthed no probable violations of the antitrust laws, considerations of fairness would indicate that the Attorney General should not abet public disclosure of that company's records; but the possibilities exist, because copies are available, that some public disclosure could be made of the company's records in view of the fact that copies of that subpoenaed material are outstanding. Certainly there is a deficiency in this committee amendment by not including a specific provision for return not only of the subpoenaed material but also copies made thereof. The situation would be cast in a different light if such material or documents had been obtained by the Congress via its subpoena power. Then Congress or a committee thereof could, in its own discretion, disclose such information or records.

(b) Consider the situation where the Attorney General has secured damaging documents and violations of the antitrust laws were apparent, copies of this material made available to the Judiciary Committees might possibly prejudice the efforts of the Attorney General in entering a consent decree, for the prime motive for entering into a consent decree would be to avoid spreading those documents on a public court record. If the defendants knew such documents could, in any event, be available to a congressional committee without even the notice that they would come with a congressional subpoena, they would be less likely to enter a consent decree. Thus, this very valuable enforcement tool could be blunted by this committee amendment.

IV. During the consideration of this legislation in the full committee, the junior Senator from Illinois offered amendments to preserve due process for corporations made subject to the civil investigative demand and which would give such corporations their day in court before called upon to respond to the production of subpoenaed documents. These amendments were adopted by the full committee at that time, and it was our feeling that the amendments as adopted greatly improved the bill. The amendments were as follows:

(1) At page 8, line 2, after the word "Justice", add the following:

or, upon request, at the discretion of the Attorney General, after notice to the person who produced such material, to any antitrust agency or any committee of the Congress.

(2) At page 12, a new section 5(e):

Within twenty days after any person receives notice pursuant to section 4(c) that material produced by such person shall be made available for examination by any antitrust agency or any committee of the Congress, such person may file, in the district court of the United States for the judicial

district within which the office of the custodian is situated, and serve upon such custodian, a petition for an order of such court that secret processes, developments, research or any privileged material not be made available for examination, or be made available for examination on such terms and conditions as the court finds that justice requires to protect such person.

(3) At page 12, a new section 5(f):

To the extent that such rules may have application and are not inconsistent with the provisions of this Act, the Federal Rules of Civil Procedure shall apply to any petition under this Act, and nothing herein shall be deemed to be inconsistent with 30(b) of such rules.

These amendments would permit the production of documents and material to a committee of the Congress upon the discretion of the Attorney General and would further provide that 20 days after any person receives notice to produce such material, the person who is required to produce such may file a petition in the U.S. district court to prevent secret processes, developments, research, or any privileged material from being made available only under such terms and conditions as the court would so state in order to protect such person. And further, that the Federal Rules of Civil Procedure would apply to any such petition. We felt that with these amendments the rights of individuals would be adequately safeguarded before compelled to produce such documents and have them made available to committees of the Congress.

V. The committee, at a subsequent meeting, reconsidered its previous action and substituted the committee amendments reported to the Senate as a substitute for the day-in-court amendments, thereby completely nullifying the day-in-court amendments. In view of the subsequent action taken by the committee, we must oppose favorable consideration and disagree with the majority on the merits of S. 716, as reported to the Senate. We wholly agree with the majority that legislation is needed providing for civil investigative demands without which the Department of Justice is greatly handicapped in fulfilling the responsibilities which have been imposed upon it by the Congress. The enactment of S. 716, including the perfecting amendments which we sought to have adopted in committee, would provide all of the powers requested by the President and the Attorney General without imposing unnecessary burdens on the taxpayers interfering with the normal operation of business concerns or infringing upon the liberties of individuals. We, therefore, oppose the amendments adopted by the committee and would support this legislation if the modifications we have discussed above were adopted by the Senate.

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