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House - Agriculture

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AGRICULTURAL ACT OF 1961
TITLE IV, PROVISIONS

GOVERNMENT
Storage

961/PT. 8 HEARINGS

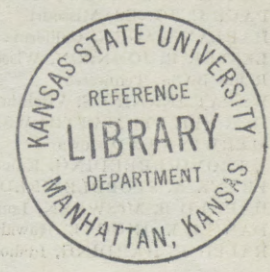
COMMITTEE ON AGRICULTURE
HOUSE OF REPRESENTATIVES
EIGHTY-SEVENTH CONGRESS

FIRST SESSION
ON

H.R. 6400

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AGRICULTURAL ACT OF 1961

Title IV

1. Cooperative Merger and Acquisition
2. Extension of Great Plains Conservation Program to 1981
3. Special Milk Program for Children

THURSDAY, MAY 25, 1961

HOUSE OF REPRESENTATIVES,
COMMITTEE ON AGRICULTURE,
Washington, D.C.

The committee met, pursuant to recess, at 10:10 a.m., in room 1310, New House Office Building, Hon. W. R. Poage, presiding.

Present: Representatives Poage, Gathings, Thompson of Texas, Hagen of California, Jennings, Matthews, Harding, Inouye, Hoeven, Dague, McIntire, Teague of California, Findley, Dole, Beermann, and Reifel.

Also present: Christine S. Gallagher, clerk; Hyde H. Murray, assistant clerk; and John Heimbarger, counsel.

Mr. POAGE. The committee will please come to order.

We will proceed this morning with title IV of H.R. 6400. Our first witness is Mr. John Bagwell, General Counsel of the U.S. Department of Agriculture.

We will be glad to hear from you now.

STATEMENT OF JOHN BAGWELL, GENERAL COUNSEL, U.S. DEPARTMENT OF AGRICULTURE; ACCOMPANIED BY GLADWIN E. YOUNG, DEPUTY ADMINISTRATOR, SOIL CONSERVATION SERVICE, USDA; HERBERT D. ROREX, DIRECTOR, SCHOOL BRANCH, FOOD DISTRIBUTION DIVISION, AGRICULTURAL MARKETING SERVICE, USDA; AND NATHAN KOENIG, SPECIAL ASSISTANT TO THE ADMINISTRATOR, AGRICULTURAL MARKETING SERVICE, USDA

Mr. BAGWELL. I have with me Mr. Gladwin E. Young, who is the Deputy Administrator of the Soil Conservation Service; Mr. Herbert D. Rorex, who is Director of the School Branch, Food Distribution Division, AMS; and Mr. Nathan Koenig, who is a Special Assistant to the Administrator of AMS.

These gentlemen will be glad to answer any questions regarding those provisions of title IV relating to the Great Plains conservation program and the special milk program.

Mr. Chairman, the first section of title IV relates to farmer cooperatives.

Subsection (a) of section 401, does not amend, directly or indirectly, any present statutes but is intended merely to consolidate into one statement and reaffirm a broad national policy, variously expressed over some 50 years in the four basic statutes cited and other related legislation that Congress favors aiding and encouraging farmer cooperatives as a "self-help" tool for farmers.

Subsection (b) is in effect an amendment to the Capper-Volstead Act.

Section 1 of the Capper-Volstead Act covers farmer cooperatives that are collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, the products of "persons engaged in the production of agricultural products as farmers," and so forth.

It does not expressly mention federations of such cooperatives. Moreover, it has generally been interpreted to exclude farmer cooperatives which purchase farm supplies or perform farm business services.

Since a 1930 ruling of the Attorney General (36 Op. A.G. 326), the act has been considered to include federations of marketing cooperatives. However, in *Sunkist Growers, Inc. v. Winckler and Smith Citrus Producers Co.*, 284 F. 2d 1 (1960), the Court said:

We do not now understand (since the *Milk Producers* decision) that different agricultural cooperatives, combining together, are entitled to claim a total immunity for acts which they may lawfully do unilaterally, any more than individuals may claim for certain of their joint actions the same immunity under antitrust laws which would exist as to their several independent acts.

This language seems definitely to cast doubt on the right of two or more cooperatives to do through a federation all things which they may lawfully do unilaterally, without indicating possible areas of illegality. In order to remove the uncertainties created by this language as to the rights of farmer cooperatives acting through federations or agencies in common, subsection (b) states affirmatively that two or more cooperatives, as defined in the Agricultural Marketing Act of 1929, as amended—

may act jointly in a federation of such cooperative associations, or through agencies in common in performing those acts which farmers acting together in one association may lawfully perform.

This language is broad enough to cover not only marketing cooperatives (covered by the Capper-Volstead Act) but also cooperatives purchasing farm supplies or rendering farm business services. This is the result of the language since the definition of a "cooperative association" contained in the Agricultural Marketing Act of 1929, as amended (12 U.S.C. 1141j) covers all three types of cooperatives.

Mr. POAGE. Do you mean that a marketing cooperative can combine with a purchasing cooperative?

Mr. BAGWELL. That is correct. They can join in a federation, Mr. Chairman.

As I just indicated, there has been some doubt as to the extent cooperatives could act in a federation.

Mr. POAGE. Is not the effect of that then they could form a cooperative to sell cotton and then they can form a federation with a marketing cooperative, and they can sell gasoline and oil and farm implements and anything else?

Mr. BAGWELL. That is right. There are some of these federations, of course, that are made of all three types of cooperatives.

Mr. POAGE. Then what is the purpose of having this type of thing, if you are going to give every cooperative the right to do every kind of business? The corporation laws in my State set out specifically the purposes for which a corporation may be organized and you have got to be organized for some specific purpose. If you are organized to drill oil wells, you cannot sell perfume under the same charter.

Mr. BAGWELL. You understand, Mr. Chairman, that these cooperatives would continue to be organized under State law. And a marketing cooperative would be limited to the authority contained in its charter which, we will say, is the marketing farm products. A strictly purchasing cooperative which is a separate cooperative would be limited to activities authorized in its charter relating to the purchase of farm supplies.

All this says is that as far as the antitrust laws are concerned, cooperatives may act together in a federation the same as they may act separately.

Mr. POAGE. What I am trying to find out is, just what would be the purpose of these State laws under which these cooperatives are chartered? The State law says a cooperative may be organized for certain purposes. And it is organized to sell cotton, we will say. Then it seems to me that you say by this provision that all they have to do to engage in meatpacking is to form a federation with somebody who has already been organized for that purpose, and they can then both engage in meatpacking, for example.

Mr. BAGWELL. What we had in mind here is that a federation of cotton cooperatives could act together—that is, a federation composed of, let us say, 10 or 12 separate cooperatives, could act together in marketing their cotton without being charged with violating the antitrust laws.

Mr. POAGE. Well now, it seems to me that is quite a different thing. If you simply said that 12 cotton marketing cooperatives could federate and handle their cotton all with one overhead, I can see the desirability of doing that. That seems only to enlarge the efficiency of your cooperatives.

If you are going to say by simply forming a federation with somebody who is organized for entirely a different purpose that you can engage in this different purpose—that is quite different. Is it your intentions that a cotton cooperative, organized to sell cotton, can by simply forming a federation with a cooperative down in town that sells gasoline and everything else, can they then both sell gasoline?

Mr. BAGWELL. These federations, Mr. Chairman, as I understand it, are made up of member cooperatives, such as the American Cotton Cooperative Association, which is made up of a number of local cotton cooperatives.

Mr. POAGE. I appreciate the desirability of doing that. I fully appreciate that desirability. I understood you to say that this goes far beyond that. Does not this wording allow a federation between one co-op in Texas, which authorizes a cooperative for certain purposes, and one, say, in New York chartered for something else—cannot you federate the Texas and the New York cooperatives under the terms of this bill so that you can do in Texas what our laws would not allow and do in New York what their laws might not allow?

Mr. BAGWELL. This bill does not permit, Mr. Chairman, as I understand it, any corporation to undertake any operation contrary to the laws of the State in which it is incorporated.

Mr. POAGE. But if you say that they can each do anything that one of the cooperatives can do——

Mr. BAGWELL. No.

Mr. POAGE. The New York cooperative can do what New York law allows up there.

Mr. BAGWELL. That is correct.

Mr. POAGE. The Federal law comes along now and says that the Texas cooperative can do, if it federates with the New York cooperative, the Texas cooperative can do anything that the New York cooperative can do.

Mr. BAGWELL. This bill simply says that merely joining the federation is not in and of itself a violation of the antitrust laws.

Mr. POAGE. Is that all it says?

Mr. BAGWELL. It permits federations, of course, to have as members not only marketing cooperatives but, also, purchasing and service cooperatives.

Mr. POAGE. That is the point where I am stumbling.

Mr. BAGWELL. But those services——

Mr. POAGE. I can understand full well the desirability of saying, here are half a dozen cotton cooperatives, that they can form a federation, I can see the desirability of that, just as well as I can see the desirability of the farmers themselves forming a cooperative to do that sort of thing.

But can we say that simply because they form a federation with somebody, some other cooperative, that they can do everything that the other can do?

Mr. BAGWELL. No, indeed. No, sir.

Mr. POAGE. That is what I am trying to get clear.

Mr. BAGWELL. No, sir.

Mr. POAGE. Are you now telling us that you can only federate cooperatives that have the same corporate purpose?

Mr. BAGWELL. No, sir. We do not say that. Many of the federations today have purchasing cooperatives as members as well as marketing cooperatives.

Mr. POAGE. Yes.

Mr. BAGWELL. But they are limited in what they can do by the laws of the States under which they are incorporated.

Mr. POAGE. As I see it what you are doing is saying that the purchasing and selling cooperatives can federate and, therefore, the purchasing and selling cooperatives can both engage in both purchasing and selling.

Mr. BAGWELL. That is right.

Mr. POAGE. That extends the powers of both cooperatives. It does not simply mean that they can operate a more economical operation, but it means then that each one of them can engage in everything that the other one could engage in.

Mr. BAGWELL. The member of a federation, of course, could not engage in anything as a result of the enactment of this subsection which it is not permitted to engage in under the laws of the State in which it is incorporated.

Mr. POAGE. This institution across the street, in my opinion, and I do not want to be disrespectful to the Supreme Court of the United States, but I know that that institution is going to hold that any time that Congress uses any language on which they can hang anything that they are going to say that it destroys the power of the State. I know that. Everybody knows that. And if this Congress writes into law something where, by the most strained construction, it can be said there is a possibility of doing something in violation of the laws of the State, they can go out and find that it can be done.

Mr. BAGWELL. The law today is that farmer A and farmer B can get together in a cooperative and work together in their common interest without being guilty of violating antitrust laws.

Mr. POAGE. That is right.

Mr. BAGWELL. This bill—this provision, if passed, says co-op A and co-op B can get together and work in a federation or through an agency in common, toward their lawful objectives without that—

Mr. POAGE. No.

Mr. BAGWELL (continuing). Action being regarded as a violation of the antitrust laws.

Mr. POAGE. I do not understand that is what happens at all. Under the existing law, farmers A, B, and C can get together for any purpose that is authorized by State laws.

Mr. BAGWELL. That is correct.

Mr. POAGE. And form a cooperative.

Mr. BAGWELL. Yes.

Mr. POAGE. And let that cooperative do for them those things within the limits of that State law, that they could legally do for themselves—not everything that they can legally do for themselves because every individual can both buy and sell.

Mr. BAGWELL. That is right.

Mr. POAGE. Certain cooperatives can only sell.

Mr. BAGWELL. That is correct.

Mr. POAGE. Certain other cooperatives can only buy.

Mr. BAGWELL. That is right.

Mr. POAGE. Consequently, can it be said that the existing cooperative law lets them get together and let the cooperatives do everything that the farmers could individually do? It lets those farmers do everything that the law of the State lets them do. Not everything that they had a right as individuals to do.

Mr. BAGWELL. That is correct.

Mr. POAGE. Now, as I understand it, that is the point that I do not understand, and I am trying to understand it, but if I understand what you are proposing here is that two or more cooperatives can get together and they can do not simply what this law spells out but they can do anything that either one of the cooperatives could lawfully do.

Mr. BAGWELL. Acting together in that manner, they would not be regarded, by virtue of that act of cooperation, as being in violation of the antitrust laws.

Mr. POAGE. I know that, but that is not answering my question. You are stating I think wrongly—I do not mean disrespectfully—

Mr. BAGWELL. That may very well be so.

Mr. POAGE. I think you stated wrongly that farmers can get together in a cooperative and do anything that any farmer could legally do. I do not believe that.

Mr. BAGWELL. Well, of course, that statement is subject to some limitation, also. What I meant is that cooperatives can do anything in the way of processing, preparing for market, or marketing farmers produce.

Mr. POAGE. They can get together and do anything that the State law authorizes a cooperative of that type to do?

Mr. BAGWELL. That is correct. Any corporation can do no more than it is chartered by State law to do, of course.

Mr. POAGE. That is right. Now then, it seems to me that you are chartering, by Federal law, a type of cooperation here that can do things far beyond what the State law authorizes.

Mr. BAGWELL. This bill would not authorize the chartering of any corporation.

Mr. POAGE. The effect of the bill is that, though, when you bring these two, or more than two, cooperatives together, any group together and form the federation—the effect of this is to charter that federation; is it not?

Mr. BAGWELL. No, sir; that is not correct, absolutely not. The federation would have to be chartered under State law. This bill does not charter a federation. I am glad that point came up so I understand what is bothering you.

Mr. POAGE. I recognize this does not actually issue a charter. It does, as I understand after repeating it many times, authorize each member thereof to do anything that any member could do legally.

Mr. BAGWELL. No, sir. No, sir.

Mr. POAGE. That is the whole point. That is the thing that you have repeated half a dozen times that it could do. I cannot believe that you mean that but that is exactly what you said we could do.

Mr. BAGWELL. I am sorry; I did not mean that. I said that all this subsection does is to let corporation A, which is organized under State law for a specific purpose, join a federation with corporation B, which is organized under State law for a specific purpose, and the federation could be for the same purposes or it could be for different purposes, according to the State charter of the federation.

Mr. POAGE. I raise no point if they are organized for the same purpose. I can see the desirability of such a federation. The only question in my mind relates to where they are organized for different purposes.

Mr. BAGWELL. It lets them use—and let me go on—it lets those two use a common selling agency or a common purchasing agency in marketing farm products or in purchasing farm supplies without that action being regarded as a violation of the antitrust laws.

Now, it would go further and let those same two form a third corporation, a federation under some State law, and that federation would be chartered and limited in the activities it could engage in by the laws of the State under which it is incorporated, but just the formation of that federation has been regarded as possibly a violation of Federal law, I means of the antitrust laws.

This bill would simply say that the use of the common agency, such as I have described, or the use of a federation, in and of itself would not be regarded as violating the antitrust laws.

It would not authorize the chartering of any corporation. It would not authorize any corporation to do a single act which it is prohibited from doing or not authorized to do under the law of the State of incorporation.

Mr. POAGE. Well now, as long as you confine it to that, I find no difficulty with it.

Mr. BAGWELL. If I have indicated otherwise—

Mr. POAGE. I think the clearest example of that lies in the field of electric cooperatives. We have the local co-ops, organized under State law, and recognized under REA laws. Then we have in many cases the so-called generation and transmission cooperatives which are actually composed of a number of local cooperatives.

In my State I have in my mind the Brazos Electric Cooperative composed of 20 local cooperatives.

The cooperative engages in the business of producing and transmitting power to its member cooperatives.

I cannot find any objection to that. And that has not been challenged; nobody, as far as I know, has challenged that right to form generating and transmitting cooperatives.

Is that the type of cooperatives you are talking about? That seems to be perfectly sound to me. But if you are talking of saying that those 20 electric cooperatives might consolidate with a rice-selling cooperative to engage in selling rice, then I think you are off on another ground.

Mr. BAGWELL. I am sorry if I conveyed that impression. I did not mean that at all. Each of these cooperatives would continue to do what it is chartered to do, but the mere fact that they use common marketing or purchasing agencies—and many of the federations do—or the mere fact that they combine into a federation is not in and of itself a violation of the antitrust laws, as has been indicated by some, or has been thought to be the implication in some of the court decisions.

Mr. McINTIRE. Is this language to further clarify, you might say, what is in the law or is it to amplify?

Mr. BAGWELL. I would say both, Mr. McIntire. It is to clarify what is going on, but it would be to protect the cooperatives in continuing to federate and to form—I mean to use common marketing and purchasing agencies in the conduct of their business if they see fit to do so.

Mr. McINTIRE. It is my mind that the question is whether these particular arrangements are operating strictly in conformity with the law or not; and an example would be cooperatives in New York State, running meat sales, almost fully by cooperative organizations essentially representing producers, the first one for consumers.

Would that be considered to be a questionable area under the strict interpretation of the law? What about the United Cooperatives in Ohio, the equipment manufacturers' organization owned by cooperatives where the organization gets many of its farm supplies and equipment in that field? Is this situation considered to be in the area that is contemplated here?

Mr. BAGWELL. Mr. McIntire, we are talking here only about farmer cooperatives. That is, the cooperatives that are owned by producers, by farmers, not consumer cooperatives and other types.

Mr. McINTIRE. You are talking here of ownership of these consumer cooperatives. Here I am not talking of that—

Mr. BAGWELL. I was not clear what you had in mind.

Mr. McINTIRE. I think Mr. Brinkley could straighten me out. I do not think that he concedes that to be the case in New York State.

Mr. BRINKLEY. I am not fully familiar with that. I think that the situation there is that they are not generally regarded as being farmer cooperative organizations, although some farmer cooperatives have come in it. They do it as a means of acquainting themselves with some of the distributive processes rather than some other question. It is an experimental operation.

Mr. McINTIRE. What about United?

Mr. BRINKLEY. United is owned by a group of purchasing cooperatives.

Mr. McINTIRE. But they are farmer cooperatives.

Mr. BRINKLEY. Yes, they are farmer cooperatives. It is entirely a different proposition. They secure their supplies, and in some cases the manufacturers of certain supplies, for individual farmers, used by the farmer members of the various cooperative organizations.

Mr. McINTIRE. The old American National Exchange was a brokerage cooperative owned by producers.

Mr. BRINKLEY. Producer cooperatives.

Mr. McINTIRE. Is it necessary to change the law so as to establish whether or not those organizations are legal in their activities?

Mr. BRINKLEY. We think there is—of course, I would not want to say—first of all, we do not agree with the provisions in this bill.

Mr. McINTIRE. My point is I am just wondering what the picture was here.

Mr. BRINKLEY. The picture is the development of the organization. And some things have happened in this field that cause great concern among farmer cooperatives as to the extent of the consolidating and merging.

Knowing under present conditions most of them are small, local organizations have got to merge or die.

Mr. McINTIRE. Thank you very much.

Mr. JENNINGS. Would it not help us to clear up this situation in the Maryland and Virginia Milk Producers Cooperative?

Mr. BAGWELL. I would say it would help some. That depends on what you mean "clear up." I am not sure that—

Mr. JENNINGS. Would this do that?

Mr. BAGWELL. I am not sure that the decision—I am sure that this would not correct the abuses that were condemned in that decision because it does not purport to do that.

Mr. JENNINGS. I am not talking about the abuses, but this would not clarify or give the authority to the producer cooperatives to cooperate, shall we say, with purchasing and distributing cooperatives in order to distribute their products.

Mr. BAGWELL. It would let them—of course, we have not gotten to that provision relating to the acquisition of the stock of other cooperatives, or the merger and consolidation of cooperatives. That is a

later section. We were talking at the moment about the federations and the use of joint agencies, by two or more cooperatives.

Mr. JENNINGS. Thank you.

Mr. BAGWELL. I had not finished, Mr. Chairman. Shall I go on or are there further questions?

Mr. HOEVEN. Is not this the first step in a gigantic merger proposal which might result in legalizing a monopoly?

Mr. BAGWELL. Well now, we have not gotten to the provision dealing with merger. I had not commented on that. That was the next subsection in here. But I would be glad to answer that now.

Mr. POAGE. Why not go on until you get to that?

Mr. BAGWELL. I would like to make one more statement. I do want to make clear if I have misstated, Mr. Chairman, that this subsection of the bill, this subsection (b), would not authorize one cooperative association joining with another in either the use of a common agency or in joining a federation to do a single act which it could not lawfully do under the laws of the State in which it was incorporated. And if I made any statement that indicated otherwise, I would like for the record to show that correction.

Mr. POAGE. Do you not think we ought to say that in so many words?

Mr. BAGWELL. May I just read this?

Subsection (b) says: "Two or more cooperatives as defined in the Agricultural Marketing Act of 1929, as amended"—and that includes the three types of cooperatives that we know as marketing, purchasing and services, all three—"may act jointly in a federation of such cooperative association or through agencies in common, in performing those acts which farmers, acting together in one association, may lawfully perform."

You see, "may lawfully perform." In other words, the mere fact they join a federation or use an agency in common to market their produce or to purchase their supplies would not empower the member to do a single thing that it was not lawfully authorized to do under the laws of the State where it was incorporated. All this says is that the mere act of federating, the act of using agencies in common, will not in and of themselves be regarded as violating the antitrust laws. Maybe the language needs changing, I do not want to argue that.

Mr. POAGE. I would suggest that it would not be thought about except across the street by those gentlemen, but if you would add there, "may lawfully perform under the laws of the State," that would not hurt much.

Mr. BAGWELL. I would not think so. But I would want to think about it. Perhaps the language could be improved.

Mr. POAGE. "Cannot lawfully operate except under the laws of the State."

Mr. BAGWELL. Certainly, that is right.

Mr. POAGE. But having the suspicion that I have of the distinguished gentlemen across the way, I do not believe that they can understand it. I am not trying to stop what you are describing there, but I do not want this agency over there to write something entirely different into our laws.

Mr. BAGWELL. I think this committee ought to be satisfied with the language. And I would be happy to work with them in trying to clarify this if you see fit to do so.

Mr. POAGE. All right.

Mr. BAGWELL. Subsection (c): This subsection puts into statutory language what is assumed to be the rule applicable to stock acquisitions, mergers, or consolidations in which a cooperative is involved, following the decision of the Supreme Court of the United States in *Maryland & Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458, 80 S. Ct. 847, 4 L. ed. 2d 880 (1960). The Court in that case did not state a positive rule. It held that a farmer cooperative coming within the terms of the Capper-Volstead Act was not exempt from the application of section 7 of the Clayton Act or sections 2 and 3 of the Sherman Act and that Maryland & Virginia's acquisition of Embassy Dairy was illegal under both section 7 of the Clayton Act and section 3 of the Sherman Act.

The holding of the Supreme Court on the section 7 act violation is reasonably clear. In discussing the violation of section 3 of the Sherman Act, the Court said, and if I may quote a brief excerpt from that opinion as follows:

The facts found by the Court show a classic combination or conspiracy to restrain trade, unless, as the association contends, "the transaction involving the acquisition of Embassy" upon which the judgment against it was based is protected against Sherman Act prosecutions by the Capper-Volstead Act's provisions that cooperatives can lawfully make "the necessary contracts and agreements" to process, handle, and market milk for their producer-members. The Embassy asserts the association acquired are useful in processing and marketing milk, and *we may assume*, as it is contended, that their purchase simply for business use, without more, *often* would be permitted and would be lawful under Capper-Volstead. But even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act. The contract of purchase here, viewed in the context of all the evidence and findings, was not one made merely to advance the association's own permissible processing and marketing business; it was entered into by both parties, according to the Court's findings as we understand them, because of its usefulness as a weapon to restrain and suppress competitors and competition in the Washington metropolitan area. *We hold that the privilege Capper-Volstead grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors.* [Italic added.]

In view of this decision, it has been urged that Congress affirmatively declare that farmer cooperatives may legally acquire the assets of other cooperative or noncooperative business firms and merge or consolidate with cooperatives and other corporations unless they violate the Clayton Act test, namely, that—

in any line of commerce in any section of the country, the effect of such acquisition, merger, or consolidation may be substantially to lessen competition, or to tend to create a monopoly.

Subsection (c) would provide this affirmative statutory rule. In other words, subsection (c) here does little more than to state that the acquisition of the stock of another corporation or cooperative or the merger or consolidation with another cooperative would not in and of itself be a violation of the antitrust laws, but it would be a violation, as section 7 of the Clayton Act says, if the result of the "acquisition, the merger, or consolidation may be substantially to lessen competition or to tend to create a monopoly."

Mr. JENNINGS. Does that permit you to so buy something other than a cooperative?

Mr. BAGWELL. Yes, it could be a cooperative or any other corporation.

Mr. JENNINGS. Where does it say that—in section (c)?

Mr. BAGWELL. In subsection (c), yes.

Now, Mr. Chairman, some co-op leaders have spoken to me—quite a few of them, in fact—about this section in the bill. They feel, as you doubtless have heard and as I am sure you will hear before this hearing is ended, that this section does not go far enough, especially, as it relates to mergers and consolidations. They feel that the Secretary of Agriculture should be given some authority and responsibility in advance of approving mergers of cooperatives, if the Secretary finds that such a merger does not unduly restrain trade and is in the public interest.

I am sure that this committee will want to consider very carefully the suggestion of these people for some additional step in this respect.

Mr. JENNINGS. Is there any precedent for that?

Mr. BAGWELL. Yes.

Mr. JENNINGS. Does the Secretary have that authority in any other case?

Mr. BAGWELL. The Secretary does not. But, Mr. Jennings, as you probably know, the ICC has the responsibility over mergers of railroads and other carriers. The Civil Aeronautics Board has responsibility and authority over mergers of airlines. And there are a number of regulatory agencies of that sort that have authority in this field where the function of the agency is to regulate the corporations involved.

Mr. POAGE. That is in the field of public utilities.

Mr. BAGWELL. It is largely in the area of public utilities, public service corporations, yes.

Mr. McINTIRE. Is the implication then that cooperatives are in this same area—is the implication that cooperatives are in the same area of public service?

Mr. BAGWELL. I believe that I would prefer to have Mr. Brinkley or Mr. Harmanson answer that because they are in the cooperative field, and I am not.

Mr. POAGE. So far as you are concerned, the Department is not asking for it?

Mr. BAGWELL. That is correct.

There are two other provisions of this section, Mr. Chairman. One is an amendment to the Soil Conservation and Domestic Allotment Act relating to the Great Plains conservation program, section 402 of the bill.

The Great Plains Conservation Program Act, which is in the form of an amendment to section 16 of the Soil Conservation and Domestic Allotment Act, provides that all contracts entered into thereunder with farmers and ranchers for soil and water conservation measures must terminate not later than December 31, 1971. While contracts are authorized by the statute to extend for a maximum of 10 years, and in practice vary from terms from 3 to 10 years, under the present restriction, all contracts must terminate by 1971.

Therefore, beginning with the year 1962, the limit of contracts will begin to decrease and the potential duration of contracts will substantially diminish as the expiration date of December 31, 1971, approaches. In other words, in 1965 you could enter into a contract but for only 6 years. In 1970 you could enter into a contract but only for 1 year.

This situation is not fair to producers who enter into contracts in the later stages of the program. Therefore, unless this outer limit is altered, it will not be possible to continue the program in its present form after this year. It is therefore proposed to permit contracts to be made for a period not to exceed 10 years at any time prior to December 31, 1971.

Mr. POAGE. Just extend it?

Mr. BAGWELL. It should be extended.

Mr. JENNINGS. Actually, you will not extend the period under which they might be initiated but only the period under which they might be completed? You do not extend the first one?

Mr. BAGWELL. That is right. As I indicated, you can enter into contracts up until the expiration date. If you wanted a 1-year contract, you could enter into it as late as 1970. But the whole program has to terminate in 1971, and this would extend the period 10 more years on the same basis as the present law.

Mr. JENNINGS. Do you have need for that? Do you have a lot of pending applications?

Mr. BAGWELL. Mr. Gladwin Young, who is Deputy Administrator, is here and I will ask Mr. Young to respond to that, if he will.

Mr. YOUNG. Yes; there are at the present time a lot of applications that are yet to be made into contracts.

Mr. POAGE. May I ask Mr. Young; if I understand it, there is going to be a lot of land signed up that is not presently signed up, and it will take 10 years to complete the needed work on many of those ranches and farms that will be signed up within the next 10 years and even if you might sign up some of those larger operations in 1969, you would never get the work completed during that period of time?

Mr. YOUNG. That is right.

Mr. POAGE. And you have to have a longer period of time to carry out an effective program on many of these operations; isn't that correct?

Mr. YOUNG. That is correct.

Mr. JENNINGS. Why this special treatment for this Great Plains area?

Mr. POAGE. Because of the nature of the soil, wind, and climate, as I understand it. It is not like other parts of the country. They have problems that are not present in other parts of the country.

Mr. JENNINGS. Can we not pick out any region in the United States and say the same would be applicable?

Mr. POAGE. I think we can. I think the Congress has been doing that right straight along. I see no reason in the world why we cannot generate electricity in the Brazos Valley on exactly the same basis that you can in the Tennessee Valley or any other place, but we did not feel that we could cover the entire United States, so, we picked out certain areas for special treatment.

Mr. BAGWELL. The only other section in the bill, Mr. Chairman, relates to the special milk program. That is section 403. The Dairy

and Poultry Subcommittee of this committee held hearings on this provision, actually this amendment, on April 11, 1961.

At that time Mr. O. V. Wells, Administrator of the AMS, appeared and testified at some length. And I would ask, Mr. Chairman, that you incorporate his testimony in the record of this hearing. I will just make a brief statement for the record.

Mr. POAGE. Without objection that will be done.

We will have the report from that subcommittee on this.

(The statement follows:)

STATEMENT OF ORIS V. WELLS, ADMINISTRATOR, AGRICULTURAL MARKETING SERVICE, U.S. DEPARTMENT OF AGRICULTURE, BEFORE THE DAIRY AND POULTRY SUBCOMMITTEE OF THE HOUSE COMMITTEE ON AGRICULTURE CONCERNING BILLS TO EXTEND THE SPECIAL MILK PROGRAM, APRIL 11, 1961

We appreciate this opportunity to discuss the special milk program with the members of this subcommittee.

The special milk program grew out of a provision in the Agricultural Act of 1954 which authorized the use of funds of the Commodity Credit Corporation to increase fluid milk consumption by children in elementary and secondary schools. In that act CCC funds in the amount of \$50 million were made available annually for this purpose for a 2-year period ending June 30, 1956. Subsequent actions by Congress extended the life of the program—first, through fiscal 1958 and, later through fiscal 1961. Congress also increased the annual authorized use of CCC funds—up to \$95 million for 1961—and brought nonprofit summer camps, neighborhood houses, and other child-care institutions into the program.

Since its inception, the special milk program has been highly successful and popular. It has served to increase milk consumption by participating children and, thereby, to expand markets for fluid milk. Last year, almost 84,000 schools and child-care institutions were in the program, and we estimate that about 85,500 will participate this year. Expenditures under the program this year, excluding Federal administrative expenses, are expected to total \$85.2 million compared with \$80.5 million last year. Administrative costs will bring the total 1961 expenditure up to \$85.9 million.

The program provisions for schools—where milk is sold as a separately priced item—have continued unchanged since the second year of the program. Within maximum rates established by the Department, schools are reimbursed for reducing the selling price to children below the cost of the milk and for expenses they incur in distributing the milk within the school, such as straws, extra labor, or additional milk service equipment. The maximum rate of reimbursement has been 4 cents per half pint for schools participating in the national school lunch program, but these schools do not receive any payment for the half pint of milk that is served as part of a type A lunch. Schools not participating in the national school lunch program can receive up to 3 cents per half pint for the milk they serve to children.

Because camps and other institutions generally do not sell milk to children as a separate item, they participate on a different basis. The institution must develop a specific method to increase milk consumption by children, such as adding a new time of service or increasing the quantity served at mealtime. Once the plan is approved and put into effect, institutions are reimbursed at the rate of 2 cents per half pint to help cover the increased costs involved.

This year we estimate that about 2.5 billion half pints of milk will be consumed under the program. This volume represents more than 2 percent of all the fluid milk consumed by our nonfarm population and is over and above the 2.3 billion half pints of milk to be consumed under the national school lunch program.

While this is a remarkably good record, there is room for additional progress. We now estimate that, as a result of the school lunch and special milk programs, about three out of every four children have milk available during school hours. About one out of every two children—some 24 million—are actually drinking milk at school, on a daily average basis.

It is against this background that the President recommended the extension and the improvement of the special milk program—and indicated that no lapse in authority should be permitted.

The Department believes that the special milk program should now be extended beyond its June 30, 1961, expiration date under permanent legislation on the basis of appropriated funds. The concept of the program is now one of a positive measure for the nutritional betterment of our children and the expansion of farm markets—rather than one of a temporary device for helping to support the prices of milk and dairy products. Permanent authority will provide States and localities with a sturdier base upon which to make their plans for the future and will permit Congress to review annually the status and needs of the program.

However, in view of the shortness of time before the June 30 expiration date of the special milk program, the Department proposes that the permanent legislation include a provision continuing the authorized use of CCC funds for an additional year until June 30, 1962, in an amount not to exceed \$105 million, with authorization for appropriated funds for the following years. These proposals for extending the special milk program are included in the legislation submitted in keeping with the President's recommendations in his agricultural message to Congress.

In June of last year, this subcommittee held hearings on several bills that would have extended the milk program beyond 1961 on the basis of appropriated funds. As a result of those hearings, the subcommittee deferred action on those bills to enable the Department to explore three policy issues with the States. This has been done.

The following questions were asked of the States:

1. If the special milk program is financed on an appropriation basis, what system of allocating funds among the States should be adopted?
2. What should be the role and responsibility of State and local governments in the special milk program?
3. What should be the relationship of the special milk program to the national school lunch program?

It was clear from the replies received from the States that most of them were well satisfied with the current operation of the program under CCC. Of those replying to the first question, most States favored the establishment of a rate of reimbursement by the Department each year which, based upon the appropriation, would assure that funds would be adequate to meet all claims. In other words, they wanted to avoid a situation where reimbursement rates would need to be reduced in the latter part of the school year.

Replies to the second question involved primarily a reaction to the use of Federal funds to finance the cost of distributing milk within the school. (The maximum amount of Federal funds now permitted to be used for such purposes was reduced from 1.9 cents to 1.5 cents per half pint at the beginning of this fiscal year.) Relatively few schools are using the maximum allowance—the national average is less than three-quarters of a cent—and most States felt that the maximum allowance could be further reduced—eventually to 1 cent per half pint.

State replies to the third question were mixed. Several flatly opposed any merger of the lunch and milk programs; some indicated it could be considered at a later date. Others proposed a merging of the programs and funds, if States were free to decide the relative emphasis to be given to the balanced lunch and to the extra servings of milk.

Based upon these replies, and upon our own review, the Department is recommending separate legislation to extend the program on the basis of appropriated funds. Rates of reimbursement will be established at the beginning of the year so as to insure that expenditures will be kept within available funds. Plans also will be made to achieve the eventual reduction of the allowable within-school distribution margin to a maximum of 1 cent per half pint.

In addition to continuing the present basic program of assistance, we feel that additional efforts should be undertaken to bring the benefits of this program to more needy schools and needy children in areas of greatest economic distress. As is the case in the school lunch program, we have found that the regular rate of assistance (4 or 3 cents per half pint) just isn't enough for those schools where so many of the children must be served free and where there is little, if any, likelihood of outside financing from public or private community resources. We believe the present legislative authority is broad enough for the Department to undertake such a program and we would want any new enabling legislation to continue that broad administrative flexibility. We have not yet worked out the details, but the essential features would be to authorize increased rates of reimbursement to especially needy schools where a large proportion of the children must receive free milk if they are to participate at all.

SPECIAL MILK PROGRAM

Number of schools and child-care institutions participating, half-pints of milk reimbursed, and Federal expenditures, fiscal years 1955-61

Fiscal years	Number of outlets participating	Number of half pints reimbursed	Federal expenditures	Average rate reimbursement per half pint
		<i>Thousands</i>	<i>Thousands of dollars</i>	<i>Cents</i>
1955 ¹	41,094	449,810	17,150	3.81
1956 ¹	62,266	1,394,224	45,854	3.29
1957.....	71,239	1,752,680	60,473	3.45
1958.....	76,478	1,918,170	66,321	3.46
1959.....	81,587	2,176,158	74,285	3.41
1960.....	83,922	2,384,700	80,480	3.37
1961 ²	83,500	2,525,000	85,200	3.37

¹ Represents schools only. Child-care institutions not authorized for participation until fiscal year 1957.

² Estimated.



Comparison of total Federal expenditures, July-January 1961 with July-January 1960

State	July-January expenditures, fiscal year 1960	July-January expenditures, fiscal year 1961	Percent in- crease 1961 over 1960
	<i>Dollars</i>	<i>Dollars</i>	
Alabama.....	718,159	710,236	-1.1
Alaska.....	15,324	13,152	-14.2
Arizona.....	272,089	293,011	7.7
Arkansas.....	388,095	398,988	2.8
California.....	4,040,453	4,142,195	2.5
Colorado.....	370,577	¹ 422,556	14.0
Connecticut.....	501,918	590,232	17.6
Delaware.....	125,657	135,587	7.9
District of Columbia.....	219,395	217,854	-0.7
Florida.....	725,472	754,947	4.1
Georgia.....	587,918	575,067	-2.2
Hawaii.....	98,850	100,570	1.7
Idaho.....	114,352	120,654	5.5
Illinois.....	3,121,228	3,281,136	5.1
Indiana.....	1,052,260	1,112,646	5.7
Iowa.....	945,834	994,050	5.1
Kansas.....	507,442	553,775	9.1
Kentucky.....	751,167	784,758	4.5
Louisiana.....	291,917	² 288,943	-1.0
Maine.....	190,000	213,068	12.1
Maryland.....	833,407	864,298	3.7
Massachusetts.....	1,549,453	1,487,915	-4.0
Michigan.....	2,492,210	2,690,971	8.0
Minnesota.....	1,242,065	1,322,699	6.5
Mississippi.....	696,321	795,361	14.2
Missouri.....	1,253,649	1,355,546	8.1
Montana.....	83,865	92,100	9.8
Nebraska.....	268,089	301,078	12.3
Nevada.....	44,749	47,469	6.1
New Hampshire.....	127,754	157,017	22.9
New Jersey.....	1,233,232	1,248,184	1.2
New Mexico.....	348,088	388,433	11.6
New York.....	4,694,175	4,764,728	1.5
North Carolina.....	834,918	886,093	6.1
North Dakota.....	160,569	172,755	8.2
Ohio.....	2,657,128	2,809,747	5.7
Oklahoma.....	512,382	525,092	2.5
Oregon.....	276,456	308,479	11.6
Pennsylvania.....	2,120,543	2,140,564	.9
Rhode Island.....	184,857	187,403	1.4
South Carolina.....	347,282	356,346	2.6
South Dakota.....	237,361	239,821	1.0
Tennessee.....	971,280	1,005,343	3.5
Texas.....	1,490,452	1,548,656	3.9
Utah.....	135,214	158,963	17.6
Vermont.....	87,324	92,115	5.5
Virginia.....	831,754	859,937	3.4
Washington.....	703,285	774,892	10.2
West Virginia.....	235,398	229,759	-2.4
Wisconsin.....	1,595,219	1,731,762	8.6
Wyoming.....	79,872	84,650	6.0
Total.....	43,366,458	45,331,601	4.5

¹ Excludes \$47,602 expenditures in 1961 for Boy Scout Jamboree for which State agency was advanced funds.

² In July-January 1961 total, January was estimated.

Mr. BAGWELL. I will make a brief statement to give you the gist of this provision.

There is currently in effect an authorization contained in the act of July 1, 1958, to carry out a special milk program for children in the interest of an improved nutrition by fostering the consumption of fluid milk, first, in nonprofit schools of high school, grade, and under; and, secondly, in nonprofit nursery schools, child care centers, settlement houses, summer camps and similar nonprofit institutions devoted to the care and training of children.

Commodity Credit Corporation is authorized to make available not to exceed \$95 million in carrying out this program during the fiscal year ending June 30 this year.

Section 403 of the bill would amend the act of July 1, 1958, so as to extend and expand this special milk program for children. The Commodity Credit Corporation would be authorized to spend \$105 million in carrying out the program during the fiscal year beginning July 1, 1961. That would be the fiscal year 1961 ending June 30, 1962.

Commencing with the fiscal year beginning July 1, 1962, the bill authorizes a direct appropriation for such funds as may be necessary to enable the Secretary to carry out the program. The \$10 million increase for the fiscal year beginning July 1, 1961, will allow for \$5 million for increased participation in the program and approximately \$5 million to take care of special needs in distressed areas.

The authorization for a permanent program will provide States and localities with a sturdier base upon which to make their plans for the future and will permit Congress to review annually the status and needs of the program.

In other words, this would extend the program for 1 year on the present basis of using CCC money and after 1 more year under this bill you would have to get an annual appropriation in the amount that the Congress felt was justified.

Mr. MATTHEWS. As I understand, you would still have to get the annual appropriation. It is not an open proposition.

Mr. BAGWELL. It is limited, Mr. Matthews—it is limited, not open. In that sense it is limited here to \$105 million, but for 1 more year it would come out of CCC funds rather than being appropriated directly.

Mr. MATTHEWS. After that year it would be appropriated in the regular way?

Mr. BAGWELL. That is correct.

I believe that is all I have, Mr. Chairman.

Mr. POAGE. All right.

Mr. REIFEL. This \$105 million is to cover the second year, too?

Mr. BAGWELL. The \$105 million would be for the year beginning this July 1 and extending to June 30 next year.

Mr. REIFEL. And then after that?

Mr. BAGWELL. After that it would be up to the Congress.

Mr. REIFEL. It would be up to the Congress and this is for the 1 year?

Mr. BAGWELL. That is correct.

Mr. HOEVEN. Do I understand that of this additional \$10 million, \$5 million of it is for nationwide distribution in the different States and the other \$5 million is limited to the depressed areas?

Mr. BAGWELL. That is true.

Mr. KOENIG. Mr. Chairman, the problem we have had with the special milk program is quite similar to that we have had in the school lunch program. In many of the States where economic conditions have been very bad, the schoolchildren, and some of the schools in those depressed areas, have been unable to make their contribution toward the payment of the milk, with the result that many of the children have been deprived of the milk they have been able to get under more favorable economic conditions.

We propose to use not to exceed \$5 million of that \$105 million to meet those special needs in the depressed areas, where the schools are obligated because of the necessity to serve milk free to children or at a very, very minimal cost.

Mr. HOEVEN. How many depressed areas are there at present?

Mr. KOENIG. Well, that would depend upon what the situation is during the next year.

Mr. HOEVEN. I know, but you have figured out a justification of \$5 million for the depressed areas. How many are there?

Mr. KOENIG. We have States, for example, like West Virginia, and some places in Pennsylvania, and there are trouble spots in many places throughout the whole country, Mr. Hoeven, where you have difficulties in certain communities insofar as individual schools are concerned. It is not a statewide distribution of those particular funds that is proposed.

Mr. HOEVEN. Your depressed areas are limited in scope—

Mr. KOENIG. Yes.

Mr. HOEVEN. And in number? How many do we have, 8 or 10?

Mr. KOENIG. I personally have not got the figures now. We can supply them.

Mr. HOEVEN. You propose \$5 million for 8 or 10 depressed areas?

Mr. KOENIG. No. There are considerably more than that.

Mr. HOEVEN. That money could be earmarked?

Mr. KOENIG. It is not earmarked; it would not necessarily be earmarked, Mr. Hoeven. To the extent that the \$5 million is not used, it would go back into the program as a whole, you see.

Mr. HOEVEN. The overall sum could be applied to all 50 States?

Mr. KOENIG. That is right. The program as set up under CCC is merely an authorization. It is not an appropriation of funds. This would provide that the Department could use not to exceed \$105 million for the special milk program. To the extent that we have to meet the needs of the needy schools under the special milk program, we would go ahead, but our intention is not to use any more than \$5 million. And the balance that is in excess—the excess over the \$95 million available for this fiscal year—would be available to provide for any additional growth in the special milk program.

Mr. HOEVEN. I am glad you clarified that point. I did not want to leave the impression that the full \$5 million would be limited to certain depressed areas.

Mr. KOENIG. No, sir. It is only to the extent there is real need present.

Mr. HOEVEN. Thank you.

Mr. JENNINGS. I want to commend the Department for adding this section to the bill. I know first hand that in many cases the students are not getting the milk that they should, because they just do not have the 3 cents for a half pint with which to make the initial deposit, and as a result, the milk is in many cases not going to those who need it the most. And this is a worthwhile program. I think it is a matter in which we should distribute our surpluses rather than processing and storing them and go through all of the unnecessary costs that entails.

I again want to compliment the Department and you for adding this particular \$5 million to the program.

Mr. McINTIRE. I want to ask one question. When does this program expire?

Mr. BAGWELL. June 30, this year.

Mr. McINTIRE. So far as working out the balance of this school year is concerned, there is no problem I understand. But in relation to the provision of the program that authorized the distribution to summer camps, you are faced with immediate consideration here for your program terminates in a month's time; is that not right?

Mr. BAGWELL. That is right.

Mr. McINTIRE. Thank you.

Mr. POAGE. Any further questions?

If there are no further questions, we are very much obliged to you.

Mr. BAGWELL. Thank you, Mr. Chairman.

Mr. POAGE. We will next hear from Mr. Brinkley.

Mr. HAGEN. I would like to ask one question. Do you feel that your recommended language here for cooperatives carries out the full import of the President's message reference to encouraging cooperatives?

Mr. BAGWELL. Well, I feel that it does in view of the fact that the Bureau of the Budget approved this language as being in line with the President's message. Whether that is a fact or not, I would not purport to speak on that.

Mr. HAGEN. However, he has referred at least by indirection and disapprovingly of this Maryland producer decision, and you want a change in the law to cover that?

Mr. BAGWELL. I want to say, Mr. Hagen, that this does not go so far as a great many leaders in the cooperative field want.

Mr. HAGEN. Thank you.

Mr. POAGE. Thank you.

We will now be glad to hear from Mr. Homer Brinkley of the National Council of Farmer Cooperatives.

STATEMENT OF HOMER L. BRINKLEY, EXECUTIVE VICE PRESIDENT, NATIONAL COUNCIL OF FARMER COOPERATIVES; ACCOMPANIED BY L. JAMES HARMANSON, JR., GENERAL COUNSEL; AND KENNETH D. NADEN, SECRETARY

Mr. BRINKLEY. Mr. Chairman, I would like to be accompanied by our general counsel, Mr. Harmanson—

Mr. POAGE. Certainly, we will be glad to have you do so.

Mr. BRINKLEY. And Mr. Naden, who is the secretary of the national association.

I want to express my appreciation for the privilege of presenting our views to this committee and we will try to do it as briefly as we can.

I am Homer L. Brinkley, executive vice president of the National Council of Farmer Cooperatives, 1616 H Street NW., Washington, D.C. We appreciate the opportunity of presenting to your committee today the policy position of the council and our views with respect to the issues encompassed in section 401 of title IV of H.R. 6400.

The composition of the National Council of Farmer Cooperatives is clearly illustrative of the importance of the subject matter of section 401. The council is a national organization composed of 122 di-

rect member cooperative associations, all of which are farmer-owned and farmer-controlled cooperative marketing and purchasing associations as defined in the Agricultural Marketing Act of 1929, as amended. Some of these member associations of the council are centralized cooperatives whose members are individual farmers. Other council member associations are of the federated type whose direct members are local, county, district, State, or regional cooperatives through which the marketing and purchasing needs of the farmer members are served at the local level. Considering all of the separate associations affiliated with the council's direct member associations, about 5,000 separate cooperative associations are represented in the council membership serving approximately 2.75 million farmer memberships.

Our position and views on section 401 are based upon two policy statements adopted by the members of the council at the 1960 and 1961 council annual meetings entitled respectively "Acquisition of Facilities by Cooperatives" and "Competitive Equality for Farmers." The complete text of these two policy statements is attached as appendix I to this statement. The views expressed herein as to the application of these policy positions to section 401 of title IV of the bill before you is in accord with action by the council's executive committee on May 5, 1961.

POSITION

Section 401 is a short, weak step in the right direction but it falls far short in its present form of providing what farmers need and what is justified to help them compete effectively in the national economy today. It falls far short of providing by statute the legal and economic climate described by President Kennedy as needed by farmers today in the following excerpts from his published statement on September 21, 1960:

Farmers suffer an almost unique disadvantage in our modern economy. Millions of individual farmers compete against each other when they sell their products. But the markets in which the farmer sells his products are dominated to an ever-increasing degree by a shrinking number of buyers. The market power of these fewer and larger firms grow steadily as each comes to command a growing share of the total market.

A most important first step to take in restoring farmers' income is to create a climate in which farmers can combine their resources as is done within other groups in our economy, and thus increase their bargaining power in buying and selling.

The Federal Government has both an opportunity and an obligation to assist by providing a favorable economic and legal climate for farmers to help themselves in this way. This will be one of the first steps which a new Democratic administration will undertake in its efforts to raise farm income. We can—and we will—help to create this climate in which farmers can work together to strengthen their bargaining power.

PARAGRAPH (a)

Paragraph (a) is a reaffirmation of natural policy pertaining to farmer cooperatives embodied in separate statutes enacted in 1922, 1926, 1929, and 1933. As a current and condensed restatement of favorable attitude and worthy objective, it is good and has our support. But the declaration of good intentions and noble objectives encompassed in the language of the paragraph does not add anything of statutory significance to existing law and cannot reasonably be ex-

pected, standing alone, to result in any more favorable interpretation of existing law relating to farmer cooperatives than if the paragraph is not enacted. We feel that it is important for your committee to recognize this.

PARAGRAPH (b)

Paragraph (b) of the bill reads as follows:

(b) Two or more cooperative associations, as defined in the Agricultural Marketing Act of 1929, as amended, may act jointly in a federation of such cooperative associations, or through agencies in common, in performing those acts which farmers acting together in one such association may lawfully perform.

This paragraph would add two elements to the present rights of farmer cooperatives, one of which is not presently set forth at all and the other not directly and clearly set forth in existing statutory law, as follows:

1. The right of farmers to act jointly in two or more cooperative associations to the extent that they may act lawfully in one association is extended by the paragraph to farmers in their purchase of farm supplies and farm business services. This results from the fact that the definition of a cooperative association in the Agricultural Marketing Act of 1929, as amended,¹ includes associations engaged in the furnishing of farm supplies and farm business services, as well as marketing and related activities. The Capper-Volstead Act² and the Cooperative Marketing Act of 1926³ at present are generally understood to apply to farmer cooperatives only in their marketing and related activities, such as processing, preparing for market, and handling.

This extension, however, is one of form and not of substance in its effect because the rights of farmers to act lawfully together in one association, or two or more associations, is not actually increased by the paragraph beyond the rights under existing law, which according to the Supreme Court are no more than and not different from the rights of other corporations.

2. The paragraph would give statutory recognition to the right of two or more associations of farmers to act jointly in a "federation" or "agency in common." While the implications of several recent court decisions have caused concern in some quarters that at some time in the future the legal right of two or more farmer cooperatives to act jointly in a "federation" of such cooperative associations or "an agency in common" might be challenged, we know of no case to date which has reached the court stage in which such right has been at issue or directly questioned.

Actually as early as 1930 in a ruling by the Attorney General of the United States (36 Op. Atty. Gen. 326, 339-340⁴), the Attorney General expressed the opinion in effect that it was intended by Congress that local associations could act through centralized marketing agencies and ruled that the federated method of cooperation and association between agricultural producers was intended to be authorized under the very broad language of the Capper-Volstead Act.

¹ App. II, Agricultural Marketing Act of 1929, as amended.

² App. III, sec. 1 of Capper-Volstead Act.

³ App. IV, Cooperative Marketing Act of 1926.

⁴ See app. V.

It is also significant to note that in the official opinion of the Attorney General rendered in 1930 (36 Op. Atty. Gen. 326, 333 (1930)) with respect to the qualification of cooperatives for loans from the Federal Farm Board, it was stated that the object of the Capper-Volstead Act was—

primarily to insure cooperative associations that qualified thereunder immunity from prosecution under the Federal antitrust laws.

Although we believe it improbable that the present or future U.S. Attorney General will take a contrary view as to “federated” cooperatives being encompassed within the scope of the Capper-Volstead Act, this question is of sufficient practical importance to farmers and their cooperatives that all doubt should be removed through the proposed statutory recognition of the right of two or more cooperative associations to act jointly in a “federation.”

Although we certainly have no objection to the restatement of the law that—

two or more cooperative associations * * * may act jointly * * * through agencies in common * * * ,

we would point out that with respect to the marketing and related activities of farmer cooperatives, the language of the paragraph adds nothing of substance to existing law because the Capper-Volstead Act, enacted in 1922, provided in part, as follows:

Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: * * * .

It should also be noted that the Cooperative Marketing Act of 1926 expressly authorizes the acquisition, exchange, interpretation, and dissemination of past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between farmers, “associations” or “federations” of associations of farmers and “by and through a common agent created or selected by them.”

Thus, the facts are clear as to the limited extent to which this paragraph in the bill would add to the rights of farmers under existing law to increase their bargaining power in buying and selling through their cooperatives.

PARAGRAPH (C)

We object to this paragraph because, while the first part of the paragraph would appear to give farmer cooperatives some legal protection in making acquisitions and effecting mergers and consolidations needed to carry out their authorized purposes, that part of the paragraph beginning with the word “unless” in line 13, page 78, removes any such apparent legal protection. The net effect of the paragraph would be to write into statutory law the general rule enunciated by the Supreme Court in its decision of May 2, 1960, which is that the Capper-Volstead Act simply gives individual farmers, acting through agricultural cooperatives as entities, the same unified competitive advantages and responsibilities as are available to other businessmen acting through corporations as entities. In other words, even though a cooperative can construct needed facilities with

its own funds or the funds of its farmer members, it would run the risk of prosecution by the Federal Government in purchasing the facilities of an existing business if in the opinion of the Department of Justice the effect of the purchase "may be substantially to lessen competition or to tend to create a monopoly." Although the Supreme Court decision of May 2, 1960,⁵ did not specifically deal with the question of acquisitions, mergers, and consolidations as between co-operatives, the implications of recent Court decisions and public statements by Department of Justice officials strongly suggest that such intercooperative transactions might be actionable if, in their opinion, the effect thereof "may be substantially to lessen competition or to tend to create a monopoly."

President Kennedy in his published statement last fall was even more specific on the broad issue involved in paragraph (c) of section 401 of this bill. I quote from his statement:

Farmers are entitled to adequate legal protection of their right to operate efficiently and effectively through cooperatives. To secure this legal protection the Capper-Volstead Act of 1922 was adopted, with bipartisan support. This act simply gives farmers the right to organize and to make the contracts necessary to carry out that purpose. This act rightfully does not give farmers the freedom to engage in predatory business practices, and it was never intended to do so.

Recent court decisions, however, have jeopardized the right of farmers to act together effectively and efficiently in processing and marketing their products which the Capper-Volstead Act was intended to protect. It is of special importance that the original intent of the Capper-Volstead Act be reaffirmed and clarified by Congress in unmistakable terms. This will be recommended to Congress by a new Democratic administration early next year.

We agree with the President's statement, and would emphasize that the only recent court case—certainly the only one finally adjudicated by the Supreme Court of the United States—laid down, on the basis of the peculiar and unrepresentative facts of that case, the restrictive interpretation of the Capper-Volstead Act, which, as we read the President's statement, he did not believe was in accord with the original intent of the Capper-Volstead Act or the justified needs of farmers today.

The substance of the rule laid down by the Supreme Court in the May 2, 1960, decision was that, the Capper-Volstead Act notwithstanding, the acquisition of the whole or any part of the stock or other share capital or the whole or any part of the assets of another corporation shall be a violation of section 7 of the Clayton Act where "in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." (Quoted language is from sec. 7 of the Clayton Act, first paragraph.) Thus section 401(c) of the bill before you would adopt the restrictive rule laid down by the Supreme Court and make it generally and absolutely applicable by statute to all cooperative mergers, consolidations, and other acquisitions.

We do not recommend that any general jurisdiction be taken from the Department of Justice or the Federal Trade Commission under the antitrust laws.

We recommend that, consistent with the President's quoted statements and the procedure now provided in the last paragraph of sec-

⁵ *Maryland and Virginia Milk Producers Association v. U.S.*, 362 U.S. 458 (1960).

tion 7 of the Clayton Act, paragraph (c) of section 401 be further amended to provide a procedure whereby a cooperative may submit a proposed acquisition, merger or consolidation to the Secretary of Agriculture and if approved by him, it shall be lawful.

The last paragraph of section 7 of the Clayton Act now provides:

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

It is important to note that while the Secretary of Agriculture is mentioned in the above paragraph along with the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission, and the U.S. Maritime Commission, as having the power to approve acquisitions under any statutory provision vesting such power in him, the Supreme Court pointed out in its decision of May 2, 1960, that there was no "statutory provision" vesting power in the Secretary of Agriculture to approve a transaction of the type at issue. Section 11 of the Clayton Act does vest specific power in certain of these other agencies to approve mergers and acquisitions with respect to those segments of the economy over which those agencies respectively have regulatory jurisdiction.

We emphasize that we are not suggesting that any general jurisdiction in the antitrust field be taken away from the Department of Justice. We are only suggesting that a permissive procedure be established by law whereby a farmer cooperative may submit to the Secretary of Agriculture any proposed acquisition, merger, or consolidation and if approved by him it shall be lawful. Just as the Congress has deemed the ICC to be the appropriate and most knowledgeable agency to act on the justification in the public interest of acquisitions and mergers of common carriers coming under their jurisdiction, it would certainly seem to be in the public interest that the Secretary of Agriculture is the appropriate and most knowledgeable official in the executive branch of the Government to act on the justification for acquisitions, mergers and consolidations of business organizations of farmers in agriculture. The justification for vesting such permissive approval authority in the Secretary of Agriculture as to mergers and requisitions appears to us compelling in view of and as an aid to him in the exercise of other broad powers already vested and proposed to be vested in the Secretary of Agriculture under other titles of the bill.

Adoption of our recommendation in this regard would not mean that all proposed acquisitions, mergers, and consolidations by farmer cooperatives would be submitted to the Secretary of Agriculture for prior approval. In many instances, perhaps in most instances, the management on advice of counsel, would feel that a proposed acquisition, merger or consolidation could not by any stretch of the imagination be interpreted as being offensive to the Clayton Act rule or acquisitions. In such cases the cooperatives would no doubt go ahead and be fully subject to section 7. In those cases, however, where any doubt existed, our recommendation would give the cooperative the right to

submit the proposal to the Secretary of Agriculture in advance and would vest the Secretary of Agriculture with full power in such case to act. Thus the cooperative and its farmer members would not be forced to operate under the continuing legal and financial hazard inherent in not knowing whether the Department of Justice or some court might conclude that the effect of a particular transaction "may be substantially to lessen competition or to tend to create a monopoly."

We are attaching to this statement as appendix VI a suggested amendment of section 401 which we believe provides a constructive improvement over the section now in the bill and will be a reasonable procedure in the public interest and the interest of farmers. It will fill the gap that has been pointed up by the Supreme Court decision of May 2, 1960, by vesting the Secretary of Agriculture with permissive statutory power to approve acquisitions, mergers, and consolidations by farmer cooperatives, subject to a showing of meeting certain standards set out in the amendment to fully protect the interests of consumers and the public generally.

We appreciate the opportunity to express our views to this committee.

(The appendixes follow:)

APPENDIX I

ACQUISITION OF FACILITIES BY COOPERATIVES

(Policy Resolution Adopted by National Council of Farmer Cooperatives at its 1960 Annual Meeting)

The Council reiterates its support of the policy of Congress, established in a succession of enactments over the years, to aid and encourage the organization, operation, and growth of strong farmer cooperatives. Further legislative action to assure the fulfillment of such policy is imperative, under the law as presently enforced, in order to assure to farmers and their cooperatives the unquestioned right to acquire facilities by which they might achieve a bargaining position sufficiently effective to enable them to cope with their marketing problems arising from the ever-growing concentration in industries serving agriculture and resulting from a constant reduction in the number of buyers for their products.

Therefore, the Council favors legislation to make it clear that an agricultural cooperative, as defined in the Capper-Volstead Act, shall not only continue to have the right to develop and operate its own facilities, but shall also have the right to acquire from others the facilities needed in the marketing, or preparing for market, of the agricultural commodities handled by them, subject only to such regulatory procedures as are now, or may hereafter be, vested in the Secretary of Agriculture.

COMPETITIVE EQUALITY FOR FARMERS

(Policy Resolution Adopted by National Council of Farmer Cooperatives at its 1961 Annual Meeting)

Throughout the years, the Congress by various enactments, notably the Clayton and Capper-Volstead Acts, has authorized and encouraged the existence and operation of farmer cooperatives in the collective handling of the products of their members in order to permit their individual farmer members to compete effectively in the national economy. Recently, decisions of the U.S. courts and policies enunciated by the U.S. Department of Justice have applied a restrictive interpretation of such legislation, which tends to reduce to minimal or nominal amounts the benefits to farmers from this policy of the Congress. Furthermore, the growth of the **competitive strength** of industry and labor has far surpassed that attained by our farmers and their organizations.

The National Council, therefore, favors new legislation or amendments to existing legislation which will make it clear that farmers through their cooperative associations have the right to grow in competitive strength and to utilize techniques such as merger, consolidation, joint selling agencies, and other means to create an economic structure which will assure equality of opportunity with industry and labor in earning their equitable share of the national income.

APPENDIX II

SECTION 15(A) OF THE AGRICULTURAL MARKETING ACT

(Approved June 15, 1929, as amended, 49 Stat. 317, 12 U.S.C.A. 1141j(a))

As used in this act, the term "cooperative association" means any association in which farmers act together in processing, preparing for market, handling, and/or marketing the farm products of persons so engaged, and also means any association in which farmers act together in purchasing, testing, grading, processing, distributing, and/or furnishing farm supplies and/or farm business services: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof as such producers or purchasers and conform to one or both of the following requirements:

(1) That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; and

(2) That the association does not pay dividends on stock or membership capital in excess of 8 percentum per annum.

And in any case to the following:

(3) That the association shall not deal in farm products, farm supplies, and farm business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members. All business transacted by any cooperative association for or on behalf of the United States or any agency or instrumentality thereof shall be disregarded in determining the volume of member and nonmember business transacted by such association.

APPENDIX III

CAPPER-VOLSTEAD ACT

(APPROVED, FEBRUARY 18, 1922—SEC. 1)

AN ACT To authorize association of producers of agricultural products

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum,

And in any case to the following:

Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members.

APPENDIX IV

COOPERATIVE MARKETING ACT

(7 U.S.C. 455)

§ 455. Dissemination of crops, market, etc., information by cooperative marketing associations.

Persons engaged, as original producers of agricultural products, as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in association, cooperate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them. (July 2, 1926, ch. 725, § 5, 44 Stat. 803).

APPENDIX V

OPINION OF THE ATTORNEY GENERAL OF THE U.S.

(36 Op. Atty. Gen. 326, 339-340 (1930))

The Attorney General has so ruled, 36 Op. Atty. Gen. 326, 339-340 (1930) :

"The statute imposes no restriction upon business forms of cooperation and association which may be employed to effectively organize cooperative associations of agricultural producers for handling and marketing their products. Obviously, it is convenient, if not indeed necessary, to any effective cooperative association, that local associations should act through centralized marketing agencies in disposing of the products of their members, and that they should, in representation of their members, hold stock in such centralized marketing agencies; I cannot doubt, in view of the purpose of the Capper-Volstead Act, that such methods of cooperation and association between agricultural producers were intended to be authorized under the very broad language of this statute."

APPENDIX VI

SUGGESTED AMENDMENT OF TITLE IV, SECTION 401, (H.R. 6400)

SEC. 401(a) Congress hereby reaffirms, consistent with the policy embodied in the Capper-Volstead Act, the Cooperative Marketing Act of 1926, the Agricultural Marketing Act of 1929, as amended, the Farm Credit Act of 1933, as amended, and related legislation, the national policy of aiding and encouraging the organization, operation and sound growth of farmer cooperatives to the end that the farmers of the Nation may through group action effectively market their farm products and procure their farm production supplies and farm business services so as to obtain a fair share of the Nation's income, and hereby finds that there is need for clarification of the law in order to safeguard the rights of farmers, acting through their cooperatives, intended by the enactment of the aforesaid laws.

(b) Two or more cooperative associations, as defined in the Agricultural Marketing Act of 1929, as amended, may act jointly in a federation of such cooperative associations, or through agencies in common, in performing those acts which farmers acting together in one such association may lawfully perform.

(c) Any cooperative association as defined in the Agricultural Marketing Act of 1929, as amended, or a federation of such cooperative associations, may, in addition to the rights otherwise conferred by law, acquire, directly or indirectly, the whole or any part of the assets, stock, or other share capital of any other such cooperative association or other corporation engaged in the same or a related kind of commerce or may merge or consolidate with any other such cooperative or other such corporation unless in any line of commerce in any section of the country, the effect of such acquisition, merger or consolidation may be substantially to lessen competition, or to tend to create a monopoly: *Pro-*

vided: That any such acquisition, merger or consolidation shall be lawful if approved by the Secretary of Agriculture in the manner provided in this section. An approval granted under this section shall not, however, make lawful any subsequent act or omission to act by the cooperative association succeeding such acquisition, merger or consolidation, if such act or omission to act is otherwise prohibited by law.

(d) Any such cooperative association or such federation may apply for approval of a proposed acquisition, merger or consolidation by filing an application with the Secretary of Agriculture in such form as he shall prescribe. Such application shall set forth the details of a proposed acquisition, merger or consolidation, the need therefor to promote the National policy as set forth in subsection (a), the probable effect on the relevant market or markets and other pertinent facts. The Secretary of Agriculture shall give due notice of a hearing upon such application. Any person, upon petition in writing establishing to the satisfaction of the Secretary that he has a substantial interest in the outcome of the proceeding, may appear and be heard. The Attorney General or the Chairman of the Federal Trade Commission, or both, shall have the right to appear at such hearing to present such evidence and arguments as each deems pertinent. The Secretary, after such a hearing, shall approve such transaction if he finds upon the evidence produced at such hearing that the proposed acquisition, merger, or consolidation will tend to promote orderly marketing or procuring by farmers, will not result in the undue enhancement of prices, will not result in undue injury to competition or consumers and is otherwise in the public interest. Where the firm acquired is not a cooperative, the Secretary shall approve the transaction only if he finds that the succeeding cooperative association qualifies under the definition in the Agricultural Marketing Act of 1929, as amended. The decision of the Secretary if supported by substantial evidence, shall be final.

(e) In carrying out his responsibilities under this section the Secretary is authorized to prescribe such rules and regulations as he deems necessary.

Mr. POAGE. Thank you, Mr. Brinkley. Your statement raises one question I feel we ought to go into.

Do you feel that there should be mergers of cooperatives allowed where the merger would, probably, result in lessening of competition?

Mr. BRINKLEY. No, we do not at all, Mr. Poage, if the probable effect would be an undue injury to competition.

Mr. POAGE. I understand your statement. But would you object to having a provision inserted in here stating that they could not do so where it would lessen competition?

Mr. BRINKLEY. I think that is pretty definitely set forth that we are not asking for a provision that would immunize us from any action by the Department of Justice as a result of this kind of legislation.

Mr. POAGE. If the Secretary approves it, then it does not make any difference whether it is an absolute monopoly. As I see it, you could not be prosecuted if the Secretary approves the merger.

Mr. BRINKLEY. Except he could not approve anything that would be held otherwise unlawful, under the antitrust laws.

Mr. POAGE. And I do not think that under this suggestion that the court would review what the Secretary did. If you confer power on the Secretary to make the decision, and then the cooperative acts under the protection of that decision, it seems to me that actually the monopoly's effect is no longer a concern of the law.

Mr. BRINKLEY. Mr. Harmanson might speak to that and give a better answer to that than I can. I have some answers but his would be better.

Mr. HARMANSON. Mr. Chairman and members of the committee; in the proposed draft that has been submitted, you will notice, as Mr. Brinkley has indicated, there are certain statutory standards that are

set up in the draft that must guide the Secretary in the exercise of this approval authority.

Mr. POAGE. I understand that—I understand the proposed standards are those set out in the ICC law, are they not?

Mr. HARMANSON. No, these are the standards in the draft. It provides specifically that:

The Secretary, after such a hearing, shall approve such transaction if he finds upon the evidence produced at such hearing that the proposed acquisition, merger, or consolidation will tend to promote orderly marketing or procuring by farmers, will not result in undue enhancement of prices, will not result in undue injury to competition or consumers.

There is precedent for this language of "undue injury to competition or consumers" in the Capper-Volstead Act itself. It is comparable to the measure of undue enhancement of prices. It is recognized that, of course, there may be through the cooperation of farmers and the operation of cooperatives some enhancement of prices, but the statutory standard which in the wisdom of the Congress has been established is that there shall not be "undue enhancement" of prices.

Mr. POAGE. Is not that the standard we use in the ICC Act?

Mr. HARMANSON. In the ICC Act?

Mr. POAGE. Yes.

Mr. HARMANSON. You mean with respect to the powers of the ICC?

Mr. POAGE. With regard to mergers.

Mr. HARMANSON. I am not familiar with that. I do know that with respect to the powers given to these other regulatory commissions, the reason we are in a difficulty today is there was complete exemption from the operation of the antitrust laws in those other statutes, CAB and whatnot.

It was not made clear and certain in the passage of the Capper-Volstead Act, and there was a difference of view on the part of the Members of the Congress, and the legislative history shows that, as to the intent of this exemption in the Capper-Volstead Act. It was certainly not expressed as an absolute exemption. And I do not know what the statutory standards in the ICC Act are in passing upon these mergers. I am not sure what, if any standards are set out in the act to guide ICC in passing upon mergers of common carriers.

Mr. POAGE. Let us define that. What possible review is there if the Secretary makes these findings of fact? I realize that you require him to make the finding. Suppose he makes those findings and makes them erroneously, and he actually creates a monopoly? Is there not any appeal on the part of the public?

Mr. HARMANSON. I am not an authority on the Administrative Procedure Act, but I am of the opinion that it is not appealable as to his finding on the fact.

Mr. POAGE. That is right.

Mr. HARMANSON. I think that with respect to the matter of law that it would be reviewable in the court.

Mr. POAGE. That is a question of fact, though, as to whether or not it substantially depresses competition.

Mr. HARMANSON. On the matter of fact, I think that would not be reviewable, but as a matter of law it would be.

Mr. POAGE. As I understand it, being not reviewable, I cannot see how there is any appeal from the decision of the Secretary of Agricul-

ture which would be of any value to anybody. Maybe we want to vest this power in the Secretary of Agriculture but when we do it we should recognize we are making a court of the Secretary, that we are making both an administrative agency and a court of the Secretary. I think there is considerable question as to whether that is a wise procedure or not.

Mr. BRINKLEY. The Secretary has review authority already with respect to a situation that might result in undue enhancement of prices. He has that authority.

The Secretary has rather broad powers, too, in this same general area as it might relate to marketing agreements and orders. So that he has a certain amount of broad powers already vested in him in this general area.

Mr. POAGE. All I am getting at here is, if we follow this course, we must answer the question of whether the Secretary of Agriculture or the court is best qualified to make the decision, as to whether this actually does create a monopoly or not. You just heard me express my rather limited reliance upon the gentlemen across the street from us, and I have an idea that the Secretary could find a more reasonable approach than they will, but does it not establish a judicial power down in the Government at the other end?

Mr. BRINKLEY. Of course, that is a matter that would be debatable, I am quite sure. We have this very distinct feeling that this authority in the Secretary of Agriculture would be vested in someone who would be knowledgeable with respect to the needs and the requirements and the possible effects on the public, on consumers and on the farmers themselves of certain actions in this field.

Certainly, we feel now rather strongly that the reliance that we had placed in the Capper-Volstead Act since 1922 is a very weak reed on which to lean.

Mr. POAGE. Yes; and the bill recognizes that.

Mr. BRINKLEY. Yes.

Mr. POAGE. You can acquire these powers so long as it is not creating a monopoly.

Mr. BRINKLEY. The bill before you does say that. You realize, however, that it is clear from section 2 of the Capper-Volstead Act that a group of farmers might lawfully be in a monopoly position so long as there is no undue enhancement of prices for the product marketed.

Mr. POAGE. That is right. But the trouble now, the reason you suggest it, is the milk decision where the Supreme Court has indicated or has held in the one case that you could not acquire this, and they indicated their reasoning was that it did result in a monopoly in the situation, although they have not said it in so many words. If it did not, it would be all right. Had they gone ahead and said in that Virginia-Maryland decision that if no monopoly was created that the purchase would be valid, then I think you would not have any trouble now; would you?

Mr. BRINKLEY. I think that is true. I might say, too, that even if the product was such as you indicate that this is not without precedent because powers have already been vested in all of these other Government agencies I have indicated through their regulated agencies, but the point is that the Secretary of Agriculture has already been included in this list. There is some doubt as to why he was included,

except as he might move with respect to undue enhancement of prices as a result of cooperative operations.

What we are attempting to do is to broaden the permissive authority. We certainly would not want this to be mandatory. We would not want the Secretary of Agriculture or anybody else having broad authority to say what is and is not possible under this Capper-Volstead philosophy, but the situation is such because of court decisions and because of the extreme likelihood that the weakness that has ensued from that court decision may result in additional suits brought by the Government and from competitors of farmer cooperative organizations.

The situation is so serious in other areas of the general economic welfare of agriculture that we feel that this kind of an approach is necessary.

We point to the fact that if farmers are to develop anything like the bargaining power with the people to whom they sell and from whom they purchase, this is about the only route they can do it, through the farmer cooperative organization. And we cannot build and merge and control where we might involuntarily with the best intentions in the world come acropper so far as the antitrust laws and so far as the Capper-Volstead decisions are concerned.

Mr. POAGE. I want to speak for myself and for nobody else. I fully agree with you.

Mr. BRINKLEY. Yes.

Mr. POAGE. I fully agree with you that we should have spelled out in the law that the cooperative has the right to purchase these facilities so long as it does not create monopolistlike powers. I do not think the cooperative has any right to engage in a monopoly any more than a private individual or private corporation.

Mr. BRINKLEY. We certainly do not seek the right for farmer cooperatives to engage in predatory practices.

Mr. POAGE. I do not want to confer them upon anybody, that is, the right to create a monopoly. But I do go along with you with the proposition that when you eliminate monopolistic practices, that they should have the right to acquire properties, and if there is any doubt raised by the Supreme Court decision that should be removed.

I want to go along with you on that. Now, if we are going to provide that the Secretary of Agriculture shall have authority over everything that comes within his realm, we are asking him to assume a burden that we never asked the Court to assume in most cases.

It is true that some States have these advisory judgments, but most of them are afraid of them and I think for good reason, because they do not have all of the facts at the time you get the advisory judgment.

In most cases it is impossible to have all of the facts until the facts are heard. Here you are asking the Secretary to make a case upon the facts before they are known. It is sort of like shooting from the hip, as it were, it seems to me, because he is going to have to make a decision before he knows what the result is, whether it will result in monopoly or not.

We always like to be free of doubt. We always like to be assured that our income tax deductions will be approved before we turn them

in. But we have to take the risk. The Federal Government does not have to take those risks. They make the individual take them.

Can we very well make the Secretary pass upon these things in advance of the actual happening?

Mr. BRINKLEY. Do you want to say something?

Mr. HARMANSON. I would like to say, Mr. Poage, with respect to that, the statutory rule in section 7 of the Clayton Act is that there is a prohibition against the acquisition where the effect of such acquisition may be—it does not say that it is—but that it may be substantially to lessen competition, or to tend to create a monopoly. The philosophy of the Clayton Act in contract with the Sherman Act is to prevent these things from happening before they happen.

And then with respect to the contents of the application, there are certain things now spelled out but there could be specific matters as to the share of the market of the industry in the particular trade area that is now held by the acquiring cooperative and the percentage of the market that would be held after the merger; and they are the factors now that the Department of Justice has to go on in passing judgment after a merger whether or not it may tend to create a monopoly or may substantially lessen competition. And we feel that it is important that the proposal here in this amendment the approval by the Secretary, would not validate either acts of omission or commission leading up to the merger. You can be assured that there would be in the record of any such hearing at which the Attorney General, the Chairman of the Federal Trade Commission, or any party that had a substantial interest, appeared, facts as to any conduct, improper or illegal, under any law that the cooperative had engaged in leading up to the point of making the acquisition. This would certainly be spread upon that record.

Also, the Secretary's approval of a merger would not validate any conduct after the acquisition and merger, in the event he shall approve it, but all provisions in the Sherman Act and all of the antitrust acts would be fully applicable to the conduct of the cooperatives after the merger or acquisition if it is approved.

So we feel that it would be merely the act of merging, which is covered in section 7 of the Clayton Act that would be validated but not any conduct, business conduct of a cooperative, either before or after the merger. And even today the Department of Justice, in discharge of its responsibility under the law, has to render judgment on the basis of the rule of reason, where they believe, looking at all facts, whether this may tend to create a monopoly or may—and I would emphasize and underscore “may” substantially lessen competition. So we do not have a quantitative rule in the antitrust cases involving mergers. If an exact quantitative rule was followed today, one would know in advance in a particular situation whether a merger would be held to be unlawful. But today in the administration of the antitrust laws in the merger field it is largely the rule of reason, an overall qualitative analysis, looking at all of the facts, and then passing judgment whether it might tend to create a monopoly or may substantially lessen competition.

And as Mr. Brinkley has said, we believe that the Secretary of Agriculture can be trusted, and, certainly, is more knowledgeable to render

this judgment, a reasonable judgment on specific matters in the merger itself.

Mr. POAGE. Any questions?

Mr. HAGEN. I want to ask you a question. Have you explored alternative methods of reaching the same result? I know we had some bills in the Senate on that *Maryland* case. I am thinking, perhaps, adding some language qualifying the Supreme Court decision without setting up a new procedure.

Mr. BRINKLEY. We have explored any number of alternatives, Mr. Hagen. This is the best we have been able to do so far. We do not submit this as being the perfect, final solution. We think this is the general direction to the solution of the problem. We have not been able to do any better than this. Maybe someone else, but this is our best effort today.

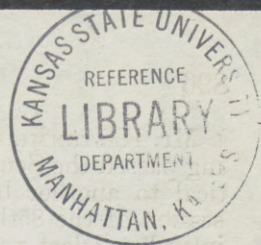
Mr. HAGEN. Because the courts could not go back of the finding of the Secretary under the language you submit. So, in effect, the Secretary would make the final decision. I think you might think about qualifying the language of the Supreme Court in the *Maryland* case, to provide some additional tests for the courts.

Mr. POAGE. Any further questions?

If not, Mr. Brinkley, we are very much obliged to you and your associates.

The committee will recess until 10 o'clock in the morning.

(Whereupon, at 11:45 a.m., the hearing was recessed to reconvene at 10 a.m., Friday, May 26, 1961.)



FRIDAY, MAY 26, 1961

At the hearing of Friday, May 26, 1961, John P. Benson, president, Western Cotton Growers Association, Rudolph Miller, executive secretary, and Bradley Nicholson, representing Carolina Bay Turkeys, Inc., testified on title I of H.R. 6400; and David Whatley, Washington, D.C., testified on title II of H.R. 6400. This testimony may be found in the parts related to these titles.

Mr. POAGE. We will now hear from our colleague Mr. Kastenmeier.

STATEMENT OF HON. ROBERT W. KASTENMEIER, A REPRESENTATIVE IN CONGRESS FROM THE SECOND CONGRESSIONAL DISTRICT OF THE STATE OF WISCONSIN

Mr. KASTENMEIER. Mr. Chairman and members, I realize your schedule is very tightly packed. I will not take up very much of your time.

The question I would like to raise before the committee is in a real sense a technical one, dealing with title IV. I would like to make a suggestion which deals with group bargaining by milk cooperatives. Though I feel that problems of group bargaining by cooperatives should be considered under title IV of the omnibus bill. I think you will find the problem I am going to discuss is very different from any of the others considered so far by the committee or dealt with in the bill under this section.

I would like to suggest to the committee that title IV of this bill be amended by the insertion of a fourth paragraph to section 401. This subsection would clarify the existing law which deals with bargaining by milk cooperatives.

Mr. Chairman, may I ask unanimous consent that the text of the amendment I am proposing be inserted in the record at this point?

Mr. POAGE. You may do so.

(The amendment follows:)

AMENDMENT TO H.R. 6400

On page 78, after line 16, insert the following:

“(d) Cooperative associations of producers, and marketing agencies in common owned or controlled by such associations, may bargain in good faith singly or in groups for the sale of milk and milk products and at the request of any one or more of such associations or marketing agencies, acting singly or in groups, dealers, handlers, processors, and other purchasers may bargain in good faith singly or in groups with such association, marketing agency, or group for the purchase of milk and milk products. Nothing in this subsection shall be construed to authorize any agreement relating to the price at which milk or any product thereof may be sold by any such dealer, handler, processor, or other purchaser. For the purposes of this subsection, “cooperative associations of producers” and “marketing agencies in common” mean such associations and marketing agencies as meet the requirements of the Capper-Volstead Act (42 Stat. 388, 7 U.S.C. 291-292). In determining compliance with said Act, business done for the United States or any of its agencies shall not be considered either member or nonmember business.”

Mr. KASTENMEIER. The substance of the amendment I am suggesting passed the Senate as a bill last year without objection. It is identical to another bill, S. 2444, which passed the Senate in the 2d session of the 85th Congress on July 15, 1958. It is the same bill I introduced last year which was discussed in special hearings before the House Judiciary Committee.

I might add that the Senate bill was treated by and passed by the Senate Agriculture and Forestry Committee.

The purpose of the amendment is a simple one, and I believe this amendment has little relation to other antitrust aspects of cooperative legislation you may have discussed.

The amendment merely clarifies the existing uncertainty with regard to group bargaining by milk cooperatives and it recognizes the special problems of cooperative associations of dairy farmers in the present day realities and difficulty and marketing.

The amendment would permit milk marketing cooperatives and their marketing agencies—as those terms are defined in the Capper-Volstead Act—and purchasers from such cooperatives or agencies, to bargain for milk and milk products in good faith in groups or singly.

Presently, the cooperatives are authorized by the Capper-Volstead Act to bargain through a marketing agency in common. This agency is now permitted to represent all of the cooperatives in the market.

However, the marketing cooperative associations bargaining with handlers—those who process and distribute milk—singly. This is where the problem arises.

In almost all metropolitan markets there is more than one handler. Consequently, although the cooperative association must charge uniform prices on the market to avoid the charge of price discrimination under the Robinson-Patman Act, the associations must bargain with each handler separately even though the price that will be ultimately arrived at must be the same for each milk transaction with all of the handlers at the market.

As you can image, this amounts to a great deal of wasted energy and time on the part of all concerned. Since the price must be the same, anyway, to all handlers, it is only reasonable to provide through law a more efficient means of running this market.

The cooperatives should be allowed to meet with all of the handlers at one time and negotiate with them as a group.

It goes without saying that the bargaining between the seller and the buyers would be, and should be, in good faith without any kind of collusion permitted.

Furthermore, under the terms of the amendment, the right of marketing associations to bargain as a group as sellers and the right of handlers to bargain as a group as buyers would be limited solely to buying and selling at the market and would in no sense, in no way, act as an agreement to fix the retail price of milk.

Many cooperatives presently say they have the right to bargain with handlers by a group method under the present law. However, this right is not clearly spelled out in either court decisions or statutes presently on the books. And since this right is not clearly stated, there is a chance of running afoul of the antitrust laws, the milk marketing system is, to say the least, in a great deal of great state of uncertainty. Many dealers and handlers who want to bargain collectively are afraid to bargain as a group.

Cooperatives are also forced into this same cloud of uncertainty.

Mr. Chairman, I believe the Congress could perform a necessary and important service to the dairy farmers and dairying industry of America by clearing up this situation in connection with milk marketing.

As you can see, the problem I have brought before you today is specialized, and in a sense, a technical question. There is a costly cloudy legal uncertainty which should be dispersed so that efficient and rational cooperative bargaining can take place without any fear.

It seems to me that this special problem can be handled efficiently under title IV of the present agricultural bill that is being considered by your committee. And I would hope that a new frontier of interest in efficient and straightforward legal clarification of the milk marketing bargaining could begin with this technical, but important, step.

Mr. Chairman, I would also like to ask unanimous consent that a letter from the National Milk Producers Federation be inserted following my remarks.

Mr. POAGE. Without objection that may be done.

(The letter follows:)

NATIONAL MILK PRODUCERS FEDERATION,
Washington, D.C., May 25, 1961.

HON. ROBERT W. KASTENMEIER,
House Office Building, Washington, D.C.

DEAR MR. KASTENMEIER: On behalf of our dairy farmer members and their cooperatives, we express our appreciation for your continuing interest in pushing for legislation to clarify the right of farmer cooperatives singly or in groups to bargain at the same time and place with more than one milk distributor for the sale of supplies of milk.

We are especially pleased at your efforts to include in the omnibus farm bill, H.R. 6400, the provisions of your bill H.R. 7191 which you introduced during the 86th Congress. I am sure you will be pleased to know that our board of directors at their recent meeting unanimously supported your procedure to make this vital issue a part of the omnibus farm bill.

In expressing our thanks, we recall vividly your previous work on the co-op bargaining issue, going back to the early weeks in your first term in the House of Representatives. It was on May 18, 1959, that you introduced the bill, H.R. 7191, which proposed to remove existing doubts on the right for dairy cooperatives to bargain, singly or in groups with milk dealers, either singly or in groups, for the price of farm milk.

The introduction of your bill was an important step in helping our farmers in this difficult problem. Even more important were your successful efforts, as a member of the House Committee on the Judiciary to secure hearings by that committee in which we could present our views on the proposed legislation. All previous attempts by us to have hearings were unsuccessful. Unfortunately, no further action was taken on the matter, notwithstanding the fact that the proposed legislation had already passed in the Senate.

We are confident that under your continuing leadership, favorable action will be taken to enact into law this much needed legislation.

Sincerely,

E. M. NORTON,
Secretary, National Milk Producers Federation.

Mr. KASTENMEIER. I want to thank you, Mr. Chairman, and the committee, for this opportunity.

Mr. POAGE. We thank you.

Any questions?

Mr. HAGEN. In the light of the fact that your proposal on separate legislation was referred to the House Judiciary Committee, is there a serious question of the ability of this committee to deal with it, even as an amendment?

Mr. KASTENMEIER. I would say not, because actually it is a clarification, an amendment of the Capper-Volstead Act, actually. I point out especially that the Senate Committee on Agriculture and Forestry has treated with this problem.

Apparently, in the House it was felt that because it dealt with at least, indirectly, antitrust that the bill as originally drafted ought to go to the Judiciary Committee. But, in my opinion, it is most properly treated in the piece of legislation that you have, or separately perhaps even by the committee.

It belongs really in this committee in terms of its content.

I might also say that the reference to the antitrust part of the Robinson-Patman Act is very indirect. While this bill actually concerns it directly, the Capper-Volstead Act, and how a certain part of the farming industry can bargain.

Mr. POAGE. Any further questions?

Thank you, Mr. Kastenmeier.

Mr. KASTENMEIER. Thank you.

Mr. POAGE. We will next hear from Mr. John E. Noakes, general counsel of the Dairymen's League Cooperative Association, Inc., of New York.

We will be glad to hear from you now.

STATEMENT OF JOHN E. NOAKES, GENERAL COUNSEL, DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC.

Mr. NOAKES. My name is John E. Noakes. I am general counsel of the Dairymen's League Cooperative Association, Inc., of New York.

I would like to address my comments briefly to section 401 of title IV of H.R. 6400, which you have before you.

Gentlemen, at the outset may I make it clear that I appear before you today as a confirmed advocate of strong, aggressive, and progressive farmer cooperatives, believing that they represent the most effective machinery today available to our Nation's farmers.

On May 11, 1961, the president of this association, Mr. Russell E. Dennis, appeared before the Senate Committee on Agriculture and Forestry, relative to the Senate version of this bill, S. 1643, and by leave of your committee granted May 4, his testimony is part of the record on H.R. 6400 which you now have under consideration.

At that time, Mr. Dennis briefly commented on proposed section 401 by praising the intention of that proposal, but questioning its effectiveness in carrying out the desired results. I appreciate this opportunity to expand upon his remarks and I hope to contribute to your favorable amendment of this section.

Section 401 of H.R. 6400 first recites and reiterates the laudable policy of this country in encouraging the organization, operation, and growth of farmer cooperatives as instrumentalities in enabling farmers to obtain a fair share of the Nation's income. It then provides that certain defined cooperatives may act jointly in federations or through common agencies in performing those acts which any single association might lawfully perform.

Finally, it provides that, subject to the prohibition against lessening competition or tending to create a monopoly, cooperative associations may merge, consolidate, or acquire the assets or stock of other

like associations or of corporations engaged in the same or related lines of commerce.

I believe that this section was designed to encourage cooperatives and to overcome the restrictive interpretation of recent judicial decisions relating to the status of cooperatives under the antitrust laws. I am concerned, however, that this proposal might have a contrary effect.

May I briefly review the lessons of the past, and further convey to you our concept of the potential role of cooperatives in the years ahead?

In 1914, farmers were being prosecuted under various State laws because of their efforts to organize themselves into cooperatives and thus develop a stronger bargaining position in the marketplace. This Congress enacted section 6 of the Clayton Act, by which the existence and operation of nonstock agricultural organizations were deemed not to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.

Later, in 1922, the Capper-Volstead Act, in effect, extended this protection to associations having capital stock, and further approved specifically the action of farmers, through such associations, in collectively processing, preparing for market, handling, and marketing their products.

Such rights were limited to associations meeting specific requirements and they were further tempered by providing for procedures to restrict their actions where the Secretary of Agriculture had reasons to believe that such an association monopolized or restrained trade to the extent that the price of any agricultural product was unduly enhanced.

These and other legislative pronouncements served to enunciate the policy of this Nation to the effect that farmer cooperatives should be formed without fear of prosecution and should engage in the activities and provide the facilities necessary to successfully market the products of their members. The need for a clear-cut and effective restatement and implementation of this policy has never, however, been any greater than it is today.

Since 1922, these sections of our law have undergone judicial scrutiny on many occasions, and today we are faced with the realistic possibility that, except for the right of farmers to organize into cooperatives, there is considerable doubt that the machinery thus made available to them can legally operate efficiently to obtain for them their fair share of our Nation's income.

The *Borden* case in 1938 confused the scope of authority and responsibility granted to the Secretary of Agriculture by the Capper-Volstead Act. In 1960, just about a year ago, the *Maryland and Virginia* decision laid out a pattern of restriction upon cooperative operation, upon cooperative growth through acquisition, and upon the authority of the Secretary of Agriculture to approve and validate any such expansion.

Later in 1960, a Federal circuit court in California cast serious doubt upon the right of affiliated cooperative organizations to enter into agreements or contracts with each other which might benefit their farmer-members.

In this setting, the bill before you tends to validate these restrictive interpretations and, consequently, fails to make a vigorous re-

statement or any enlargement of the policies first recognized by this legislative body in the Clayton Act of 1914. What then is needed by way of amendment to section 401?

First, we recommend that proposed section 401(b) be revised to clearly permit joint cooperative action through agreements, contracts, or arrangements less formal than a "federation" or "agencies in common." The formalization now proposed adds only burdensome requirements to what otherwise might be effective joint action by qualified cooperatives on a regional, national, or intercommodity basis.

Secondly, we propose that a procedure be incorporated into section 401(c) whereby a prospective cooperative merger, consolidation or acquisition might be submitted through the hearing process to the Secretary of Agriculture and, if approved by him, such action would not thereafter be subject to public or private litigation—civil or criminal—as a violation of the antitrust laws.

This procedure could be attended by such standards, safeguards, or other consultations and opinions as might tend to provide the Secretary of Agriculture with the facts and considerations necessary to support and sustain his ruling. This would be a permissive procedure and would place an appropriate regulatory authority in the hands of the official most conversant with the economic and competitive impact of the proposed merger, consolidation, or acquisition.

Our objective is simple. Within the accepted limitations of a controlled economy—and our economy today is less than completely free and open—we advocate congressional encouragement of cooperatives as a means to procure for our Nation's farmers the strongest possible standing in our competitive markets. This, I am sure you will agree, is preferable to the taxpayers' subsidization of our farmers, or the complete Government regulation of the production, processing, and distribution of agricultural products.

Our comments stem from experience—they are not armchair theories. For over 40 years our association has provided the dairy farmers of our area with a guaranteed outlet for their milk. Presently, our almost 18,000 members are served not only by the bargaining power over a major supply of milk going to the Nation's largest market, but also by 60 country milk plants, 2 manufacturing plants, 4 ice cream plants, and 22 distribution branches.

We have some practical concept of the techniques of selling farm products. We can visualize the economic power available to farmers through larger, experienced, and well-financed cooperatives, working together in bringing quality farm products to consumers at reasonable price levels.

This legislation, with the proposed amendments, could pave the way to such attainments. We hope that this opportunity to do so will not be lost.

Thank you for the opportunity to appear here today.

Mr. POAGE. Thank you, Mr. Noakes.

Are there any questions?

Mr. NOAKES. Thank you.

Mr. POAGE. We are now going to hear from the former Secretary of Agriculture, Hon. Charles Brannan, who was Secretary of Agriculture for a number of years and appeared before this committee for a number of years and is now representing the National Farmers Union. He will be accompanied by Mr. Angus McDonald.

We will be glad to hear from both of you. We are glad to have you here.

**STATEMENT OF HON. CHARLES F. BRANNAN, GENERAL COUNSEL,
NATIONAL FARMERS UNION; ACCOMPANIED BY ANGUS Mc-
DONALD, ASSISTANT DIRECTOR, LEGISLATIVE SERVICE DIVISION**

Mr. BRANNAN. Thank you very much. As you have indicated, Mr. Angus McDonald of the Washington office of the National Farmers Union is at the witness stand with me.

We have come before your committee today to talk about section 401, title IV, of H.R. 6400.

There is a prepared statement which has been supplied, I believe, to the members of the committee, and if it is agreeable with you, Mr. Chairman, we can allow that to be placed in the record and I can just discuss the highlights.

On the other hand, if you wish it read, I certainly am available to read it in detail.

Mr. POAGE. You can proceed as you want to proceed. And without objection the statement will be inserted in the record.

You may read such sections as you want or any portion of it.

Mr. BRANNAN. I would like to say the purpose of our appearing today is to suggest that section 401 in its present form does not accomplish even its own announced purposes, which are to afford farmer cooperatives the opportunity to maintain a fair and equitable competitive position in the rapidly vertically integrating business economy of today with respect to the production and the handling and the processing and the marketing of the agricultural and livestock products of the members of these cooperatives.

The Congress and this Government has long had a policy, it is our view, which was to encourage cooperatives in this area; and that, as a matter of fact, it was generally thought that the present law, as it was on the books, clearly evidenced this intention and clearly evidenced the branch of government which was charged with the responsibility of seeing that these opportunities were provided and that this was the Department of Agriculture.

We believe, also, that the Capper-Volstead Act and the amendment to the Sherman Act intended to provide the Secretary with these powers, and that many folks believed this to be the situation until recently, when the case to which one of the previous witnesses referred, namely, the Maryland and Virginia Milk Producers—and that decision clearly removed any impression that the Capper-Volstead Act, or the amendment to the Sherman Act gave farmer cooperatives the kind of protection which we heretofore thought was the case.

I would just like to say to you that it is significant to read one sec-

tion of the decision in that case, because it points up the problem which is before the committee.

In its decision the Supreme Court of the United States had this to say, among other things:

The association—

which was the Maryland and Virginia Milk Producers—

The association contends that its purchase of Embassy Dairy was—

quoting the contention of the counsel for the dairy—

“consummated pursuant to authority given by * * * the Secretary of Agriculture.”

The Court further said:

The trouble with this contention is that there is no statutory provision that vests power in the Secretary of Agriculture to approve a transaction and thereby exempt a cooperative from the antitrust laws under the circumstances of this case. While there is a statutory provision vesting power in the Secretary of Agriculture to enter into agricultural marketing agreements which shall be deemed to be lawful and not * * * be in violation of any of the antitrust laws of the United States, no such marketing agreement is involved here.

Therefore, this decision created an effective barrier to the efforts of farmer cooperatives to expand their processing and marketing facilities to meet the ever-expanding activities of their competitors.

So it is our recommendation that the Congress clarify the existing law and establish authorities and regulations by means of which farmer cooperatives, if they choose to do so, can expand their production, processing, and marketing facilities consistent with the public interest but free of threats and possibilities of prosecution under the Sherman and Clayton Acts.

The present language of section 401 does not do this. In fact, subsection (c) probably solidified into legislation the full negative impact upon cooperatives of the above-cited decision, the Maryland-Virginia decision.

We seek not any special privileges for farmers. On the contrary, there is only sought for farmer cooperatives the right to present a proposed merger, consolidation or acquisition to the Secretary of Agriculture in advance of consummation, so that its contrary effect, if any, upon the public interest may be disclosed and considered.

If the Secretary finds that the proposals do not unduly lessen competition, or unduly tend to create a monopoly, or unduly increase prices, then he may approve them, but the merger thereafter is subject to his regulation and consideration and review as he now exercises these functions under the Marketing Act, and no subsequent unlawful act by the organization can be validated by anything that the Secretary does on that particular occasion.

I just would like to point out and emphasize that actually no new type of function is proposed for the Secretary which he does not now possess and exercise under other statutes.

For example, the Secretary of Agriculture is now authorized by the Marketing Agreements Act to approve a combination of cooperatives or other business organizations and to approve their methods of operating under a marketing agreement which may tend to be monopolistic and increase prices, if he finds that such operation is, nevertheless, in the public interest.

And I would like to point out that the language that I read from the decision of the Supreme Court in the Maryland-Virginia case indicates that if that particular operation could have been brought within the scope of the Marketing Agreements Act—and it, very obviously, could not have—but if it could have been, then the approval of the Secretary, if it had been given in that case, if it had been sought in that case, and given in that case, would have dictated a different conclusion.

So that, first, there is before this committee the question as to whether or not farmer cooperatives alone of the major types of business which so closely and directly affect the public interest shall be denied an opportunity to strengthen themselves without running the risks of attack from both governmental and nongovernmental sources under the present antitrust laws.

And second, if farmers are entitled to this opportunity, whether the Secretary of Agriculture is not peculiarly well equipped to judge competently of the impact of a proposed merger upon the public interest.

And, of course, it is our opinion that they are entitled to this kind of an opportunity. It is our opinion that the Secretary of Agriculture is the most competent person to judge the effect of such mergers.

And I point out there is a section in the Sherman Act which says that its provisions shall not apply to mergers or to consolidations of various kinds which are approved by bodies which have a jurisdiction in that field. And it names them. And in that it also names the Secretary of Agriculture, but said, in the case of all of them, that they must have specific authority to perform these functions.

In the case of all of the others named, such as the Securities and Exchange Commission, the Federal Trade Commission, the Civil Aeronautics Board, and several others which deal with various types of public utilities and similar businesses—they had the power not only to prejudge a proposed merger but, also, to regulate it.

And obviously, the framers were thinking that the Secretary of Agriculture had similar authorities because they included the Secretary of Agriculture among this group. But the Maryland-Virginia case said he did not have—they could not find the specific authority except under the Marketing Agreements Act and the Marketing Agreements Act is not broad enough.

Therefore, the essence of the proposal which is before the committee by the statement which suggests language which will accomplish this is simply to provide a procedure whereby the Secretary of Agriculture can be asked, if called upon, if the group of cooperatives chooses to do so—he can be asked to judge it from the standpoint of the public interest and from the standpoint of its possible effect upon commerce and trade in a harmful way, if any, and to determine whether or not, notwithstanding this fact, it still is advisable in the public interest for such a merger to be approved.

I think this is a very appropriate piece of legislation. It is a needed piece of legislation at this time.

And in addition to that, it is what was contemplated, in my opinion, by the Congress in both the Clayton Act and the Capper-Volstead Act.

I appreciate the opportunity to discuss this with the committee.

The CHAIRMAN (presiding). We thank you very much, Mr. Brannan.

I want to thank you for presenting your views and the views of those whom you represent.

On pages 9 and 10 of your statement—is that the language you think is necessary to accomplish what you have in mind?

Mr. BRANNAN. It is, Mr. Chairman.

The CHAIRMAN. Do you propose that the bill be amended so as to include this provision?

Mr. BRANNAN. I do, sir.

The CHAIRMAN. Mr. Quie.

Mr. QUIE. I would like to ask if you feel that the noncooperative, if it merges with a cooperative, has the same right to go to the Secretary for approval?

Mr. BRANNAN. If it deals in agricultural products, Mr. Quie, and, also, that is specifically covered in the amendment or in the language which you will now find in section 7, I believe, of the Sherman Act.

Mr. QUIE. Why do you then say in your proposed amendment that the cooperative must qualify with the definition in order to have the Secretary approve the transaction?

Mr. BRANNAN. Because the definition is a definition of an agricultural cooperative. We are not here seeking to present to the Secretary of Agriculture, or authorize the presentation to the Secretary of Agriculture of any other type of operation other than that dealing with agricultural products.

Mr. QUIE. Is it possible now for a firm or a cooperative, whether cooperative or noncooperative, to go to the Department of Justice to gain approval for a merger, similar to the way other business operations do?

Mr. BRANNAN. May I say this with some reservation: that I do not consider myself completely an expert on the regulations of the Justice Department, but it is my impression that if there is such a regulatory procedure permissible before the Attorney General's office, it has practically never been resorted to by anybody.

The people who have problems of this kind, for example, the recent consolidation or merger of United Air Lines and Capital Air Lines, of course, went before the CAB. If it lies in other fields it goes before the particular regulatory body which has general jurisdiction in that field. And most of these kinds of mergers which are obviously monopolistic—and no one can gainsay that they are not monopolistic but yet can be in the public interest—go before the particular tribunal which has broad regulatory power in that field.

And for this reason, I think the Justice Department has not been called upon to pass upon these things generally.

Mr. QUIE. However, would it have been necessary for the proposed merger of United and Capital to go to the Department of Commerce, would it not?

Mr. BRANNAN. I think it went before CAB, did they not?

Mr. QUIE. It went before CAB. But the Department of Agriculture is not a regulatory agency the way CAB is, or the ICC is.

Mr. BRANNAN. I am not quite sure that I can agree with that because they are considerably of a regulatory agency and do exercise many regulatory functions.

In the cases of the Stockyards Act, in the cases of all of the marketing agreements, they are quite regulatory. And I would say that a good part of the functions of the Department of Agriculture are regulatory.

Mr. QUIE. That is all.

Mr. HOEVEN. Will the gentleman yield?

Mr. QUIE. I yield.

Mr. HOEVEN. Mr. Brannan, is it not true, that these other regulatory agencies you refer to deal entirely with public utilities?

Mr. BRANNAN. Well, I suppose so. I would think that was probably a pretty general identification of them. Yes.

Mr. HOEVEN. Will the gentleman yield further?

Mr. QUIE. Yes.

Mr. HOEVEN. I am a bit concerned about the delegation of additional authority to the Secretary of Agriculture without any review whatsoever by the courts. Do you think such procedure is sound?

Mr. BRANNAN. Well, I am not prepared to say that any decision of the Secretary of Agriculture is not reviewable by the court, anyhow.

Mr. HOEVEN. The bill before us seems to indicate that the decision of the Secretary is final.

Mr. BRANNAN. Is not that language you find in almost all of these kinds of provisions, but they are nevertheless subject to review for being capricious and arbitrary, and so forth.

Let me say further to you that in my opinion if this does not clear—if it were to be concluded that the Secretary of Agriculture's decision was wholly and utterly unreviewable, then I would say a provision for review should be included. I do not want to make him a czar.

Mr. HOEVEN. I am glad to have your comment because in our discussions during the last few days there has been some indication that the decision of the Secretary would be final. It seems to me that there should be some provision in the bill to make it very clear that the decision of the Secretary would be reviewable. Certainly there should be some recourse to the courts.

Mr. BRANNAN. I do not disagree with that.

Mr. HOEVEN. You do not disagree.

Mr. BRANNAN. No, sir. I might point out to you, that there is some language like that suggested here which parallels quite closely the provisions of section 11, I think, of the Sherman Act, under the terms of which the Attorney General is given notice of the proceeding, and he really becomes a party, and if he thought that the decision was capricious or arbitrary he could appeal it just as the adversary party, just as, let us say, the cooperatives if they were not satisfied on the grounds that it was capricious, arbitrary, and unreasonable. I think that the Attorney General might be made the kind of a party which even he could carry it up.

I do not think the language does quite that at this moment. But if the committee thought it should go that far, then I think a very slight amendment could cover that. And the precedent would lie in the relationship between the Attorney General's office and the Federal Trade Commission as indicated by this section 11 to which I referred. I am sure that is it.

Mr. HOEVEN. And that should be in the present bill?

Mr. BRANNAN. Yes, sir.

The CHAIRMAN. Any further questions?

Mr. FINDLEY. It seems to me that the effect of the amendment you propose would be to give special rights or position to cooperatives that private enterprise do not enjoy. I wonder how you can justify the protection of cooperatives against antitrust prosecutions as opposed to the fact that private organizations would be subject to prosecution. Why should they be in a special category because they are cooperatives, because they do represent farming interests?

Mr. BRANNAN. Most of the major businesses of this country can go before their particular regulatory body. We referred a moment ago to the merger of United and Capital which, obviously, cut down competition very substantially.

Whether or not it will increase prices, of course, remains for the regulatory body to determine.

The telephone company is a complete monopoly of communication by the spoken word, yet I think most people say or would say that it is completely a monopoly which is nevertheless in the public interest.

So I am arguing, in effect, with your basic assumption. A great many businesses which have a public interest are as a matter of fact given the opportunity to become quite monopolistic as long as this is in the public interest.

Mr. FINDLEY. The effect of this amendment is to apply it to activities which seem to tend toward monopoly?

Mr. BRANNAN. You see the limitation that we are talking about, I mean, the area we are talking about here, is farmers and farm products. This is the identifying area.

Mr. FINDLEY. It could develop into a monopoly situation, could it not?

Mr. BRANNAN. It has not so far as the farmer producers are concerned.

Mr. FINDLEY. The parallel between the monopoly situation that exists and that which is here for the farmers, that is pretty close, is it not?

Mr. BRANNAN. No; I do not think they are parallel, except they could or could not be within the public interest to do what is proposed to be done.

Mr. FINDLEY. What danger do you see to the interests of the cooperatives in letting the courts determine whether or not they are in violation of the antitrust laws?

Mr. BRANNAN. The very practical problem, Mr. Findley, that any group of cooperatives today who want to start to put together a consolidation of their activities for a marketing outlet or some such thing, or marketing facility, could find themselves now confronted with a whole series of lawsuits which even if they won every one of them would still break them. Because you are aware under the law the adverse party does not have to wait for the Attorney General, he can bring a triple damage suit which even though it had very little chance of success, had no chance of success, before it finished would break these little cooperatives.

We are just seeking the opportunity for them to have these proposed mergers prejudged, that is all.

Mr. FINDLEY. Is this a problem that cooperatives do face to any greater degree than private enterprise which wish to merge?

Would not private enterprises face the same hazards of expense and bankruptcy?

Mr. BRANNAN. May I make two points here.

First of all, the point is that I am here talking for farmers——

Mr. FINDLEY. Yes.

Mr. BRANNAN (continuing). And farmer cooperatives.

And secondly, two wrongs do not make a right. And therefore, let us accept what you were driving at, sure, there are some other outfits here that are denied this right, and that is wrong, but you must not say to me, "because there is a wrong existing over here, I am not going to rectify a wrong over here."

Mr. FINDLEY. But if we embark on this new departure such as being suggested here—I deem it a new departure—I think we should view the interest of the whole American people and try to treat alike all other segments of our economy. I think it is our responsibility in Congress to try to weigh all of that in that fashion.

For example, I think we reach the conclusion that the Secretary of Commerce would have the right to relieve private business from the antitrust prosecutions, from that danger.

Mr. BRANNAN. If it was in the public interest, why should it not be? There is nothing wrong in business as long as it is not inconsistent with the public interest, so far as I am concerned. I am not arguing that, or against your premise, although I say it is irrelevant for the purposes for which I am here today.

Mr. FINDLEY. Would the courts, in reviewing the Secretary's action, go much farther than to determine whether he was acting within the powers given to him by law?

Mr. BRANNAN. It is no different, however, than the type of hearing which you would get before the Federal Communications Commission if you were dealing with that type of subject, or the Federal Power Commission, or the ICC or any of the other regulatory bodies which the Clayton Act itself mentions, you see. If you are not familiar with it may I read that section to you?

The Clayton Act, in section 7, provides that—

no corporation shall acquire the assets of one or more corporations engaged in commerce if the effect of such acquisition be substantially to lessen competition or tend to create a monopoly.

Then this section proceeds, and I am reading from page 3 of my statement—if you would like to refer to it:

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the U.S. Maritime Commission or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

It says "commission and Secretary." The only Secretary" that is mentioned there is the Secretary of Agriculture. So it was obviously clear that they anticipated that or believed there was authority in the Secretary then existing or that there would be.

Now, the Maryland-Virginia case says there is not. And so this precipitates the whole problem being before the committee right now to provide what the Clayton Act actually thought existed or anticipated would be provided if it did not exist.

Mr. FINDLEY. What I am inquiring into is the wisdom of the whole thing, not necessarily the extent of the basic law.

Mr. BRANNAN. You are raising the question as to whether or not this whole proviso affects the other areas?

Mr. FINDLEY. That is correct.

Mr. BRANNAN. Yes.

Mr. FINDLEY. And your references to these other authorities, like the CAB and the like, I am not too sure that their authority in the past has been proper. Perhaps there, too, one wrong does not make another wrong more desirable.

Mr. QUIE. Will you yield?

Mr. FINDLEY. Yes.

Mr. QUIE. In your proposed amendment on page 9 where it states—undue enhancement of prices, and will not result in undue injury to competition or consumers—

where did you pick up the word “undue”? From previous law?

Mr. BRANNAN. Yes, it is in the Clayton Act in various parts.

Mr. QUIE. In the Clayton Act?

Mr. BRANNAN. Yes, the test could not be, will this increase the price of the commodity 1 cent to consumers, because it might clearly be found that it would. And as a matter of fact, being in the public interest even so. And in the long run that is in the immediate benefit. The word “undue” has a long legal interpretation in this context.

The CHAIRMAN. It is the difference between the activities and operations of a private corporation and the cooperative—Congress exempted them from the antitrust laws. That is right, is it not?

Mr. BRANNAN. They purported to under the Capper-Volstead Act as well as the section of the Sherman Act.

The CHAIRMAN. Any further questions?

If not, we thank you very much, Mr. Brannan. We appreciate your coming.

Mr. BRANNAN. Thank you.

(The prepared statement follows:)

STATEMENT OF CHARLES F. BRANNAN, GENERAL COUNSEL OF THE NATIONAL
FARMERS UNION

Mr. Chairman and members of the committee, I am Charles F. Brannan, appearing as general counsel of National Farmers Union for the purpose of discussing section 401, title IV, of H.R. 6400, known as the Cooley-Ellender bill.

It is our purpose today to suggest that section 401 of this bill does not accomplish its announced objective of affording farmer cooperatives the opportunity to maintain a fair and equitable competitive position in the rapidly vertically integrating business economy of today with respect to the production, handling, processing and marketing of the agricultural and livestock products of their members. We believe that such opportunities should be provided for farmer cooperatives and that this can be done in a manner wholly consistent with the public interest.

The policy of this Government has long been established that farmers are entitled to an opportunity to market their products through cooperatives and like voluntary business associations and to make necessary contracts with other farmers and organizations for such purposes. This policy was clearly stated in the Capper-Volstead Act of 1922, which was adopted with bipartisan support.

The first section of the Capper-Volstead Act, now in force, provides as follows:

“That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in asso-

ciations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes."

The second section of the Capper-Volstead Act provides that if the Secretary of Agriculture shall have reasons to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he may initiate an action and hold a hearing. If he reaches a conclusion that such is the case, he may order the association to cease and desist from monopolizing or restraining trade, and such an order may then be enforced by the Attorney General. Thus, not only is the intent to insure an opportunity for farmer cooperatives to function efficiently and effectively clearly evidenced but the branch of Government with which rests the primary responsibility to make certain that abuses do not result is clearly identified.

Furthermore, there is evidence that the Congress intended to provide the Secretary of Agriculture with specific authority to review a proposed merger of farmer cooperatives in advance of its consummation and approve it if he found such merger to be in the public interest although it tended to monopolize or lessen competition. For, after providing in section 7 of the Clayton Antitrust Act that "no corporation shall acquire * * * the assets of one or more corporations engaged in commerce * * * if the effect of such acquisition * * * be substantially to lessen competition or tend to create a monopoly," this section then proceeds as follows:

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 10 of the Public Utility Holding Company Act of 1935, the U.S. Maritime Commission or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board."

However, in 1959, the Supreme Court in *Maryland and Virginia Milk Producers Association, Inc. v. the United States* (362 U.S. 458, 4 Fed. 2d 880, 80 S. Ct. 847) found that the Capper-Volstead Act and the Clayton Act had not fully accomplished their announced purposes of relieving farmer cooperatives from the full force of their antitrust provisions. The following language from the decision is significant:

"The association contends that its purchase of Embassy Dairy was 'consummated pursuant to authority given by * * * the Secretary of Agriculture.' The trouble with this contention is that there is no 'statutory provision' that vests power in the Secretary of Agriculture to approve a transaction and thereby exempt a cooperative from the antitrust laws under the circumstances of this case. While there is a 'statutory provision' vesting power in the Secretary of Agriculture to enter into agricultural marketing agreements which 'shall be deemed to be lawful' and 'not * * * be in violation of any of the antitrust laws of the United States,' no such marketing agreement is involved here."

This decision created an effective barrier to the efforts of farmer cooperatives to expand their processing and marketing facilities to meet the ever-expanding activities of their competitors. This effect is contrary to the intent of both the Capper-Volstead Act and the Clayton Act.

It is our recommendation that the Congress clarify the existing law and establish authorities and regulations by means of which farmer cooperatives, if they choose to do so, can expand their production, processing and marketing facilities consistent with the public interest and free of threats and possibilities of prosecution under the Sherman and Clayton Acts.

The present language of section 401 does not do this. In fact, subsection (c) probably solidified into legislation the full negative impact upon cooperatives of the above-cited decision.

We know of no one who desires to create a situation in which cooperatives may engage in a predatory practice inimical to the public interest or unfair to competitive business enterprises.

On the contrary, there is sought for farmer cooperatives the right to present a proposed merger, consolidation or acquisition to the Secretary of Agriculture in

advance of consummation, so that its contrary effect, if any, upon the public interest may be disclosed and considered. If the Secretary finds that the proposed steps do not unduly lessen competition or unduly tend to create a monopoly and are consistent with the public interest, he may approve them and by his approval relieve the organizations from the threat of criminal prosecution and other penalties. Thereafter the merged operations are subject to review and correction by the Secretary, and no subsequent unlawful act is in any way validated.

Cooperatives which conclude that a contemplated merger would not violate the Sherman or Clayton Acts need not apply to the Secretary for review or approval. Their actions would be subject to the antitrust laws as at present.

It is a long-established and well-accepted principle that some business enterprises which tend to lessen competition or which are very clearly monopolistic may yet be in the public interest. The authority to determine whether or not such business operations are in the public interest is vested in an impressive group of departments and commissions of the Government. For example, the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission and all of the other agencies mentioned in the above-quoted paragraph from the Clayton Act possess the power of premerger review, approval, and regulation.

It was clearly the intention of the Clayton Act to vest this same type of authority in the Secretary of Agriculture if there existed "any statutory provision vesting such power" in the Secretary. Vesting such power in the Secretary is all that is being recommended and nothing more.

No new type of function is proposed for the Secretary which he does not now possess and exercise under other statutes. For example, the Secretary of Agriculture is now authorized by the Marketing Agreements Act to approve a combination of cooperatives or other business organizations and to approve their method of operating under a marketing agreement which may tend to be monopolistic and increase prices, if he finds that such operation is, nevertheless, in the public interest.

But all marketing activities of farmer cooperatives cannot be brought within the scope of the Marketing Agreements Act. Those which the cooperatives themselves believe to be justifiable and proper and necessary to preserve their competitive position in a rapidly vertically integrating business economy, but which do not fit under the Marketing Agreement Act, should be provided with some means for testing their susceptibility to the antitrust laws. Otherwise, they merge at the risk of attack from any competitor seeking triple damages and also by the Justice Department seeking fines and imprisonment.

A vast number of businesses in this country are given an opportunity to avoid these very serious consequences by premerger review and approval pursuant to proceeding before the agency concerned with their line of business. It is clearly in the public interest to provide like opportunity for farmer cooperatives.

The questions presented to this committee and the Congress are: First, whether or not farmer cooperatives alone of the major types of business which so closely and directly affect the public interest shall be denied an opportunity to strengthen themselves without running the risks of attack from both governmental and nongovernmental sources under the present antitrust laws. Second, if farmers are entitled to this opportunity, whether the Secretary of Agriculture is not peculiarly well equipped to judge competently of the impact of a proposed merger upon the public interest. It is our opinion that the Secretary of Agriculture is the most competent to judge the effect of such mergers and that farmers have a right to seek his guidance if they wish.

To accomplish this purpose it is proposed that the period at the end of the present section 401 be changed to a colon and the following language added:

"Provided, That any such acquisition, merger, or consolidation shall be lawful if approved by the Secretary of Agriculture in the manner provided in this section. An approval granted under this section shall not, however, make lawful any subsequent act or omission to act by the cooperative association succeeding such acquisition, merger, or consolidation, if such act or omission to act is otherwise prohibited by law.

"(d) Any such cooperative association or such federation may apply for approval of a proposed acquisition, merger or consolidation by filing an application with the Secretary of Agriculture in such form as he shall prescribe. Such application shall set forth the details of a proposed acquisition, merger, or consolidation, the need therefore to promote the national policy as set forth in subsection

(a), the probable effect on the relevant market or markets and other pertinent facts. The Secretary of Agriculture shall give due notice of a hearing upon such application. Any person, upon petition in writing establishing to the satisfaction of the Secretary that he has a substantial interest in the outcome of the proceeding may appear and be heard. The Attorney General or the Chairman of the Federal Trade Commission, or both, shall have the right to appear at such hearing to present such evidence and arguments as each deems pertinent. The Secretary, after such a hearing, shall approve such transaction if he finds upon the evidence produced at such hearing that the proposed acquisition, merger, or consolidation will tend to promote orderly marketing or procuring by farmers, is otherwise in the public interest, will not result in the undue enhancement of prices, and will not result in undue injury to competition or consumers. Where the firm acquired is not a cooperative, the Secretary shall approve the transaction only if he finds that the succeeding cooperative association qualifies under the definition of the Agricultural Marketing Act of 1929, as amended. The decision of the Secretary, if supported by substantial evidence, shall be final.

"(e) In carrying out his responsibilities under this section the Secretary is authorized to prescribe such rules and regulations as he deems necessary."

The CHAIRMAN. The next witness is Mr. Perry R. Ellsworth, associate director of the Milk Industry Foundation.

STATEMENT OF PERRY R. ELLSWORTH, ASSOCIATE DIRECTOR, MILK INDUSTRY FOUNDATION

Mr. ELLSWORTH. I am the associate director of the Milk Industry Foundation. My name is Perry R. Ellsworth. We have headquarters in Washington, D.C. We are an association of some 1,500 processing plants that process fluid milk and milk products.

Among our membership are a few cooperative plants and I would make the record straight that I do not speak for them today but under authority given by a meeting of the board of directors of our association, I have been given instruction to take this stand which I will present today and follow through on.

The Milk Industry Foundation is unalterably opposed to any regulation or legislation which would enable one segment of the dairy industry to operate under one set of rules regarding mergers, consolidations, or acquisitions, while another segment of that same industry must operate under another set of rules.

I would like your permission, sir, to file a statement with this committee that will set forth our views in this whole matter in great detail.

The CHAIRMAN. Without objection you may file the statement with the reporter. Thank you very much.

Mr. ELLSWORTH. Thank you.

(The statement follows:)

STATEMENT OF PERRY R. ELLSWORTH, ASSOCIATE DIRECTOR, MILK INDUSTRY FOUNDATION

During the course of hearings before this committee on H.R. 6400, known as the Agricultural Act of 1961, representatives of certain agricultural cooperatives proposed amendments to section 401 and testified in support thereof.

Specifically, the proposed amendments would revise subsections 401(a) and 401(c), and add new subsections (d) and (e).

The Milk Industry Foundation is an association of approximately 1,500 fluid milk processing plants in all 50 States of the Union. Within its membership are a number of cooperative milk processing businesses. We do not now know the views of these individual members regarding this matter. However, at the January 1961 meeting of the board of directors of the milk industry, record was duly and lawfully made in opposition to any legislation which would allow one segment of an industry to operate under a different set of rules from those

governing its competition. If the proposed amendments are made part of H.R. 6400, this is exactly the situation which would arise. The Milk Industry Foundation, speaking in accordance with the actions of its board of directors, wishes to be on record before this committee as opposed to the amendments proposed and as hereinabove identified.

PROPOSED AMENDMENT TO SUBSECTION 401 (a)

This proposed amendment states that the Congress "hereby finds that there is need for clarification of the law in order to safeguard the rights of farmers, acting through their cooperatives, intended by the enactment of the aforesaid laws." (Capper-Volstead Act, the Cooperative Marketing Act of 1926, the Agricultural Marketing Act of 1929, as amended, and the Farm Credit Act of 1933 and related legislation.)

Decisions of the Supreme Court in *U.S. v. Borden Co.*, 308 U.S. 188 and *Milk Producers Ass'n. v. U.S.*, 362 U.S. 458, have clarified these laws most completely. That the decisions went against certain cooperative associations in their attempts to carry out mergers and to monopolize trade is, of course, not pleasing to the associations involved, but these decisions do assure fair play between competing segments of the same industry. Never, since the passage of the various laws governing cooperatives, have these laws been more clear in relation to the antitrust laws. That there is need for clarification now, is untenable—change is what the cooperative associations really here seek, not clarification.

CHANGES INCORPORATED IN THE PROPOSED SUBSECTIONS 401 (c), (d) AND (e)

These amendments would provide that any acquisition, merger, or consolidation carried out by an agricultural cooperative association shall be lawful if approved by the Secretary of Agriculture, and spell out certain details pertinent to such proposed action by the Secretary.

The general purport of the amendment proposed is contained within the proposed enlarged subsection (c) to wit: that, subject only to the supervision of the Secretary of Agriculture, any cooperative association of agricultural producers as defined in the Agricultural Marketing Act of 1929, as amended, or a federation of such cooperatives, may in addition to rights otherwise conferred by law, merge or acquire directly or indirectly the whole or any part of the stock, share capital, or assets of another business entity, corporate, or otherwise, for the purpose and objectives authorized by such act (the Agricultural Marketing Act of 1929, as amended).

This amendment as proposed by the cooperative representatives and submitted to this committee near the close of its public hearings on this important legislation, while containing certain unique and unprecedented provisions, is generally intended, if we may judge from their language, to implement the basic purpose sought to be achieved by subsection (c)—the right of cooperatives to expand via the route of merger and acquisitions of other businesses, cooperative and non-cooperative alike, subject only to the primary jurisdiction of the Secretary of Agriculture. Were these proposals to become law, mergers, acquisitions and consolidations by cooperatives if approved by the Secretary, would be effectively excluded from the operation of important provisions of the antitrust laws relating to monopolies, restraints of trade, and diminution of competition which are applicable to all other forms of business enterprise including those noncooperative entities engaged in the processing, distributing, and selling of agricultural commodities. Thus, a double standard of conduct would be created; one for cooperatives, another for noncooperatives—for business entities competing with each other in the same or like areas of processing, distribution, and sale of the same or like commodities.

The amendments introduced are a disguised attempt to have enacted into law, as part of the Agricultural Act of 1961, substantially the same provisions of S. 2014 (86th Cong.) on which hearings were held before the Subcommittee on Agriculture Production, Marketing, and Stabilization of Prices of the Senate Agriculture and Forestry Committee on August 13, 14, and 17, 1959. Following hearings, that bill was never reported out of committee.

For the same compelling reasons and principles involved in the nonapproval of S. 2014 by the Senate Agriculture and Forestry Committee, we urge that the proposed amendments be rejected now.

The right of cooperatives and other business entities to merge, acquire, directly or indirectly, the whole or any part or other share capital, or the whole or any part of the assets of another business entity, corporate or otherwise, absent adverse competitive effects, is recognized under existing law, and procedure is presently provided whereby the effect of such mergers may be judged. Hence, no new legislation is needed unless the Congress is prepared to grant broad exemptions to cooperatives, which do not now exist.

There is no need to turn to the Secretary of Agriculture for pre- or post-merger, consolidation, or acquisition clearance. Through the Department of Justice and the Federal Trade Commission such a clearance procedure is now available and has been available to cooperatives just as it is to other forms of business. Upon notification, in advance of a merger, acquisition, or consolidation, and upon the furnishing of all relevant facts, the Department of Justice or the Federal Trade Commission will state whether the carrying out of such a merger, acquisition, or consolidation is or is not objectionable.

That the Department of Justice is qualified to handle such requests for clearance is evidenced in the December 1960 report of Mr. James M. Landis, former dean, Harvard Law School, to President Kennedy. The report commends most highly the effective manner in which the Justice Department has discharged its responsibilities in the antitrust field.

In connection with the proposals set forth in S. 2014 (86th Cong.), the following persuasive point was made by the Department of Justice in a letter to the Honorable Allen J. Ellender, chairman, Senate Agricultural Committee, dated July 15, 1959 (hearings, p. 2) :

"* * * instead of clarifying the existing provisions of the Capper-Volstead Act, the bill would give rise to more questions concerning the scope of exemptions from the antitrust laws granted to cooperatives by the act than it might conceivably settle."

The same comments especially are applicable to the currently proposed amendments to H.R. 6400 in view of the definitive decision of the Supreme Court (*Milk Producers Ass'n. v. U.S.*, 362 U.S. 458). The current laws applicable to cooperatives and noncooperatives alike provide equality of treatment with respect to mergers, acquisitions, and consolidations. While there may be objections to the way these laws are applied or interpreted, the fact remains that between the several segments of the business community there is equality of treatment.

It is our opinion that the stated need for clarification of laws governing cooperatives is a guise for a request for complete exemption from the established laws; not clarification, but annulment.

Under the proposed amendments, the Department of Justice and Federal Trade Commission would be reduced to the status of being merely parties before the Secretary of Agriculture.

We call your attention to the fact that the provisions of the proposed amendments are liable to such an interpretation that section 401 would be far broader in scope than its stated purposes indicate, amounting to virtually complete exemption of cooperatives from all antitrust laws.

Under the proposed amendments:

- (1) Persons injured by cooperatives would be denied the right to bring private treble damage suits as now provided by law.
- (2) There would be no provision for injunctive relief against antitrust practices by cooperatives arising from mergers.
- (3) No criminal sanctions would exist to deter the wrongdoing cooperative.
- (4) Individual farmers would be at the mercy of cooperatives in competing for markets (as a case in point: *Milk Producers Ass'n. v. U.S.*, 362 U.S. 458—the *Embassy Dairy* case), and small cooperatives would exist at the sufferance of the larger ones.

Since the inception of the Capper-Volstead Act in 1922, the Secretary of Agriculture has acted against cooperatives in only one or two instances under the provisions of section 2 of that act, which already authorizes the Secretary to take certain limited action against cooperatives that engage in undesirable competitive practices.

It seems unrealistic to us in any event to have a Secretary dedicated to the assistance and advancement of cooperatives, sitting as judge and jury over the very cooperatives whose growth his Department is pledged to assure. Would his position as an impartial judge of proposed mergers, acquisitions, and consolidations not be a strained one at best? For the agricultural coop-

erative engaged in competition with corporate or private businesses, the Department of Justice and the Federal Trade Commission would be much more logical as the "policemen" whose duty it would be to assure equality of competition.

The procedures authorized by the proposed amendment would apparently authorize the Secretary to adopt procedures contrary to the Administrative Procedures Act of 1946 in which the Congress has laid down governing fundamentals for all Federal agencies.

To support further our views concerning the dangers inherent in the proposed amendments, we attach copies of releases from the Federal Trade Commission. They point out beyond all reasonable doubt what would happen in the dairy industry should one segment of the dairy industry (cooperative) be granted the privilege of operating outside the present antitrust laws while the balance of the industry is regulated by the antitrust laws.

We urge your rejection of the proposed amendments to subsection 401 (c), (d), and (e) of H.R. 6400, not only to assure equality of competition, but to assure the chances of survival as free entities, of small processors, small cooperatives, and individual farmers. Freedom to endure within the enterprise community must be associated with appropriate restraints upon the concentration of power, both that achieved by vigorous competition and that imposed by Government itself. Government can and has acted to impose restraint. Were the Government to remove such restraint upon a single segment of the enterprise community, what assurance is to be had that the very situation which is now prevented, or susceptible to prevention, would not as to the relieved business segment—the cooperatives—become fact? We can find in the proposals submitted to this committee no such assurance. We therefore most strongly urge their rejection.

SUBSECTION 401 (b)

The Milk Industry Foundation is also opposed to subsection 401(b) as currently written in H.R. 6400.

Under subsection 401(b): "Two or more cooperative associations, as defined in the Agricultural Marketing Act of 1929, as amended, may act jointly in a federation of such cooperative associations, or through agencies in common, in performing those acts which farmers acting together in one such association may lawfully perform." This confers an undesirable special privilege upon one segment of the economy.

This subsection apparently, in the case of the dairy industry, is designed to allow one or more cooperative associations to call together all its buyers of milk. The cooperatives, protected by exemption from the antitrust laws would have privileged status. It would however, subject handlers and purchasers to two practical disadvantages. First, it would be difficult, if not impossible as a practical matter, for individual processors or distributors to refuse any request from producers' associations to establish milk prices by collective agreement, thus subjecting the processors and distributors to legal action under the antitrust laws governing them since they are not immunized.

Second, because processors and distributors would also not be immunized with respect to resale prices, they would run the risk of being charged with fixing resale prices in connection with any agreements they might be compelled to make with producers' associations. As a practical matter, it would be extremely difficult for handlers and purchasers to negotiate collectively with producers without reference being made to resale prices. The mere fact that resale prices were referred to in the course of such collective bargaining might support a charge of unlawful price understanding or agreement.

A further objection is raised based on the testimony given by Mr. Harvey L. Richards, Sr., Hygeia Dairy Co., Harlingen, Tex., before the Antitrust Subcommittee of the House Judiciary Committee on August 20, 21, 1959, when consideration was given to H.R. 7191 (86th Cong.) a bill almost identical to the provisions of subsection 401 (b).

In his statement on page 16 of the above-mentioned hearings, Mr. Richards documents in great details the pressures brought to bear on Dallas, Tex., processors by producer cooperatives, acting in combination, to attain a 40-cent-per-hundredweight premium which the Department of Agriculture had, after public hearings, declared unwarranted.

Again, through multiple producer cooperative association pressures the price was forced up in Harlingen, Tex.

In his statement, Mr. Richards said:

"The fact that dairy cooperatives have grown to dominating size without the immunities now sought clearly demonstrates that the legislation now proposed is not needed for their protection. The fact that cooperatives will conspire and combine together in violation of the antitrust laws presents a persuasive reason why cooperatives should not be made immune to the restraints of the antitrust laws." [Italic by MIF.]

Further in his statement, Mr. Richards concluded:

"In the eyes of the public, and certainly in the eyes of their competitors, these cooperative milk processors and distributors cannot be distinguished from other distributors in their market, whether these distributors be one of the large, nationwide concerns or an independent locally owned business like our own. These cooperative processors, with the expenditure of great sums of unjustly retained tax-exempt money, have established brand names which find a tremendous acceptance with the public. They are truly competitors for the housewife's food dollar, and many of them are major business concerns which have long since lost any resemblance to our traditional concept of a cooperative association.

"There is no justification for giving these strong, aggressive cooperative competitors the additional immunities and freedoms from restraint proposed in S. 753 and H.R. 7191 (86th Cong.). It seems completely unworkable, as well as unthinkable, to apply a different set of rules to a part only of the contenders in the common battleground. The cooperatives have entered into the highly competitive business of processing and distributing milk to the consumer. All the other participants in this industry are subject to the antitrust laws. There is no moral, legal, or economic justification for proposing that the cooperatives should not be governed by the same laws as others competing in the same industry."

The Milk Industry Foundation's basic position is not in opposition to the legitimate operations of cooperatives as such. Rather, we hold to the view that cooperatives as business entities in the private enterprise community should be subject to the same rules, regulations, restrictions, and privileges as are all other business units if there is to be equitable competition within the business community and between the members of that community—a situation which the whole body of antitrust and fair trade laws is intended to maintain in the interest of the whole American public—producers, processors, and consumers alike.

For the above reasons, we respectfully urge the committee to reject any and all proposals to change the existing laws respecting the status of cooperative associations under the antitrust and related statutes.

[Federal Trade Commission News Release]

COMPLAINT (8391) (MILK)

The Federal Trade Commission today issued a two-count complaint against Central Arkansas Milk Producers Association, Inc. (CAMPA), 1008 Ringe Street, Little Rock, Ark., charging it with participating in a conspiracy in restraint of trade and with giving discriminatory prices to favored purchasers of its milk.

Also named as a respondent is CAMPA's secretary-manager, David L. Parr, who allegedly personally directs its business operations and activities.

The association sells raw milk produced by its members and others to independent milk processors. Its membership consists of approximately 1,500 dairy farmers in Arkansas, Louisiana, Texas, Oklahoma, and Missouri.

Since 1954, the first count of the complaint alleges, CAMPA and Mr. Parr have conspired with unnamed processors for the purpose or with the effect of restraining or eliminating competition in the production, sale, and distribution of milk in Arkansas and adjoining areas. The participants have agreed that CAMPA should supply all the raw milk requirements of these processors. The processors, the complaint asserts, are involuntary coconspirators and have been forced into the agreements as the result of threats and intimidations by respondents.

The complaint charges that the respondents have used the following and other activities in furtherance of the conspiracy:

Agreed to sell, and to force the processors to buy, raw milk at premium prices higher than those established as being reasonable by the U.S. Department of Agriculture under Federal Milk Marketing Orders;

Agreed between themselves and with processors to sell the milk at fixed prices higher than those charged other processors by CAMPA for raw milk of like grade and quality;

Used threats, intimidation, and coercion to cause processors to contract to buy all of their raw milk requirements from CAMPA;

Threatened to drive out of business those processors who refused to agree to purchase all of their requirements from CAMPA;

Caused raw milk to be processed and shipped into areas and offered for sale at unreasonably low prices in competition with processors there, with the purpose or effect of compelling them to contract with respondents for their milk supply;

Agreed to fix, and have fixed, raw milk prices so that these resulted or tended to result in price discriminations against independent local dairies and in favor of national or regional dairies.

These practices have suppressed and eliminated competition and are unfair methods of competition forbidden by section 5 of the FTC Act, the complaint alleges.

The complaint's second count contends that the respondents have violated section 2(a) of the Robinson-Patman amendment to the Clayton Act by charging different prices to competing purchasers of raw milk of like grade and quality.

These examples of their unlawful pricing practices are cited: some customers in Little Rock, Ark., have been charged substantially less than others who compete in reselling the milk, and some Arkansas purchasers have been favored with a price advantage of about 20 cents per hundredweight over competitors.

The effect of these price discriminations, the complaint charges, may be substantially (1) to lessen competition and to tend to create or further monopoly in the lines of commerce engaged in by respondents and their favored customers, and (2) to destroy competition between respondents and their competitors, as well as between purchasers of their raw milk.

The respondents are granted 30 days in which to file answer to the complaint.

[Federal Trade Commission News Release]

DISCRIMINATORY PRICES AND ALLOWANCES (RP) COMPLAINT (8406)
(Dairy Products)

United Farmers of New England, Inc., Morrisville, Vt., a cooperative marketing association with a membership of some 2,200 dairy farmers in Maine, New Hampshire, and Vermont, has been charged by the Federal Trade Commission with granting discriminatory prices and allowances to favored purchasers of its milk and other dairy products.

United Farmers processes, purchases, and sells these products on its own account and as agent for its members throughout the above three States and New York, Connecticut, Rhode Island, and Massachusetts. Its annual net sales exceed \$24 million.

The FTC's complaint alleges that the cooperative has violated section 2(a) of the Robinson-Patman amendment to the Clayton Act by charging some retailer-purchasers in Massachusetts substantially higher prices than competing retailers. The price differentials allegedly have ranged as high as 40 percent for cream and 15 percent for fluid milk.

These price discriminations, the complaint says, may result in a substantial lessening of competition between (1) United Farmers and its competitors in the processing, manufacture, sale, and distribution of dairy products, and (2) favored and unfavored retailers.

A further allegation is that the cooperative has paid advertising, promotional, and other allowances to some customers without making them available on proportionately equal terms to other competing customers as required by section 2(d) of the law.

For example, the complaint states, certain selected Massachusetts customers, principally large grocery chains, were granted preferential cash payments for promotional advertising, display cabinets, and new store openings.

Earl N. Gray, Eldon J. Corbett, William F. Sinclair, and J. C. Thomas, officers and directors of the association, are joined in the complaint in their individual and official capacities as well as representative of the entire membership. To name each member specifically is impracticable because of the large and changing membership.

The respondents are granted 30 days in which to file answer to the complaint.

(The following statements and letters were also submitted to the committee:)

STATEMENT OF GRAIN AND FEED DEALERS NATIONAL ASSOCIATION

SUBMITTED BY ALVIN E. OLIVER, EXECUTIVE VICE PRESIDENT

We wish to raise the question with the House Committee on Agriculture and with the Members of the Congress as to either the wisdom or need of the special declarations and proposals especially favorable to cooperatives which are embodied in the proposed Agricultural Act of 1961.

This bill is proposed as a new charter for the management of commodity programs in our Nation and this national association does not believe it is in the public interest to link up with these programs in any way a favoring or encouraging of any particular type among the many sorts of businesses serving American agriculture.

The position of our members was stated clearly in March of this year in the following policy directive:

"Work to bring about fully equitable treatment by Government of all firms in our industry so as to foster a competitive marketing system.

"(a) Oppose any legislation, Executive order, administrative ruling or regulation that would create discriminatory operational or ownership advantages for one segment or group of the grain and feed industry to the detriment of another; and

"(b) Work for constructive legislation to correct inequities of Government taxation and financing procedures where they exist today between competing companies."

We recommend that the matter of Congress declaring any antitrust policy or any other policy specifically favoring cooperatives as such or dealing with the privileges of cooperatives to act in concert, to merge, to acquire other companies, et cetera, beyond antitrust advantages already offered by the Capper-Volstead Act, is so serious and so far reaching that it should be examined critically and entirely independently of commodity legislation. Testimony given at the Senate Committee on Agriculture and Forestry hearings during the last Congress demonstrated the dangers of removing antitrust violations by the cooperative segment of a competitive marketing economy from scrutiny by the Federal Trade Commission and/or the Department of Justice.

We suggest that it is especially important now if we are to keep our Nation vigorous and strong that we preserve as much as possible a truly competitive situation in the agricultural marketing system which, by and large, has performed superbly in the low-cost movement of farm products from producer to consumer.

We therefore urge that the subject matter covered by section 401 be deleted from the proposed act as being both unneeded and unwise public policy.

STATEMENT OF E. M. NORTON, SECRETARY, NATIONAL MILK PRODUCERS FEDERATION

Mr. Chairman and members of the committee, our statement on title IV of the bill, H.R. 6400, covers the provisions in section 401—acquisitions and mergers by cooperatives, and section 403—extension of the special milk program.

In connection with the former item, we suggest that subsection (c) of section 401 be replaced with the amendment which is attached to this statement.

Section 401 lays side by side two important and conflicting policies of Congress. One is that farmers cooperatives should be encouraged to grow and expand until they have attained sufficient size to provide farmers with effective bargaining power in the sale of their commodities. The other is the general policy against monopolies and restraints of trade.

Legislation is needed to harmonize these policies and adjust them to each other. That can be done without sacrificing any of the basic principles of the antitrust law. Mergers and acquisitions are harmful only when the end result is not in the public interest. There are many instances where mergers and acquisitions are recognized in the present law as being in the public interest.

We would like to see these two policies of Congress harmonized so as to permit farmers cooperatives to expand through mergers and acquisitions where the overall result, as determined by the Secretary of Agriculture, would be in the public interest.

In addition to authority to effect mergers found to be in the public interest, there is needed, most urgently, an effective clearance procedure under which mergers can be weighed by officials experienced in business judgment and approvals given which can be relied upon.

The attached amendment would accomplish these objectives. It would permit mergers and acquisitions by agricultural cooperatives. The Secretary of Agriculture would supervise all such mergers and acquisitions, and only those found to be in the public interest would be approved.

In determining whether any merger or acquisition was in the public interest, the Secretary would take into consideration the policies of Congress relating to agriculture and to cooperatives and also these relating to monopolies and restraints of trade.

This decision should be made by the Secretary of Agriculture because he is charged with the administration of the policies of Congress relating to cooperatives and is well qualified to weigh the advantages and disadvantages that might flow from any such merger or acquisition.

The decision should be based on economic and business factors, and it should be made by a person experienced in such matters. The decision should not be based on technical legal issues and it should not be made by prosecuting officials.

Provision is made in the proposed legislation for notice to both the Department of Justice and the Federal Trade Commission, and both these agencies would be entitled to present arguments and recommendations either for or against a proposed merger. The Secretary would be required to justify, in an annual report to Congress, any approval granted over the objection of either of these agencies.

Mergers or acquisitions approved by the Secretary after notice to the Department of Justice and the Federal Trade Commission and after hearing would be deemed lawful.

Farmers could rely on such approvals, and they would thus be encouraged to move forward and to invest their funds in developing more effective and efficient units.

The proposed legislation would permit cooperatives voluntarily to seek approval of past as well as proposed mergers or acquisitions. It is believed that a very substantial portion of future mergers would be presented for clearance under this provision thus accomplishing on a voluntary basis prior notice of such mergers and an opportunity to stop at the beginning those not deemed to be in the public interest.

Any merger or acquisition not previously approved would be subject to challenge by the Secretary. Any person injured by a merger or acquisition not found to be in the public interest could obtain prompt relief by petitioning the Secretary for an investigation under this section.

There is taking place within the dairy industry in this country a sharp trend toward concentration. This trend has persisted for several years, and much of the concentration has already taken place, particularly at the processing and distributing level. The last few years have seen the rapid expansion of powerful nationwide dairy corporations.

The milk industry which at one time was local in character has become regional and, in the case of some of the larger companies, is practically nationwide in scope. This has resulted partly from improved transportation and refrigeration for fluid milk and partly from the general trend toward bigness that now prevails.

Small local dairy cooperatives are not in a position to bargain effectively with large, well-financed distributing corporations, and small cooperative processing plants are at a competitive disadvantage.

This means that many of the small cooperatives in a region must unite to form one larger, more efficient, and more effective organization. This is in line with the general policy of Congress that cooperatives should be strong enough to provide an effective bargaining agency for the farmers they represent.

Permitting cooperatives to expand and thus provide a counterbalance for the already expanded dairy corporations would be in the public interest.

The Secretary of Agriculture should be granted authority through legislation such as that suggested to screen such mergers to the end that those found to be in the public interest can be cleared and to the end that those found not to be in the public interest can be stopped or dissolved.

In addition to the above amendment, we suggest also that a new section be added after section 401. This proposed amendment is attached to this statement.

The purpose of this amendment is to clearly state and clarify the right of farmers cooperatives to bargain at the same time and place with more than one milk distributor for the sale of supplies of milk. It would permit the more efficient negotiation of the details of uniform milk sales contracts which the law requires to be nondiscriminatory as to all competing distributors.

The proposed section is carefully safeguarded to limit its application to this one objective. It requires bargaining at arm's length between the seller and the buyers. Several buyers would be permitted to bargain at the same time and place, but only in their individual capacities. Buyers could not bargain as a unit, and no collusion between buyers would be permitted. Any agreement as to retail prices would be forbidden. In effect, the relationship of the buyers would be little different than that of two or more buyers that might attend an auction sale to bid separately, but at the same time and place, for portions of a common milk supply, the final terms of the sale being required by law to be nondiscriminatory as to all.

In addition to all the safeguards mentioned above, the section would be subject to the general overall safeguard that it could be repealed at any time if its operation should prove unsatisfactory or result in any improper use.

Basically, this section would do no more than state the present law in clear terms and remove uncertainty as to its application. Enactment of the section would resolve efficiently an issue which otherwise may require needlessly the expenditure of farmers' time and money in litigation.

In connection with the special milk matter, this statement incorporates the views which we expressed at the hearings by the Dairy and Poultry Subcommittee of this committee.

The special milk program was fostered by the federation and has been vigorously supported by our membership since its beginning.

The program has continued to expand every year. Last year children in 83,922 schools and child-care institutions consumed 2.385 billion half-pints of milk. The milk consumed this year estimated at 2.5 billion half-pints under the program represents more than 2 percent of all the fluid milk consumed by our population. It is an increase of almost 6 percent over last year. However, some States are reporting increases from 10 to 23 percent. In fact, it is estimated that 3 out of 4 schoolchildren in the United States are attending schools that participate in the special milk program.

We have come a long way since the first year when \$50 million was authorized for each of the fiscal years 1955 and 1956. That first year over 41,000 schools entered the program and nearly 450 million half-pints were used at a cost of \$17.3 million.

Operations were expanded the second year by 167 percent and Congress raised the authorization to \$60 million and extended the program for 2 years with an annual authorization of \$75 million for the second year. Beginning in 1957, camps and child-care institutions were made eligible and although they were small in relation to the schools, these groups helped to operate an expanded milk service for children. This year over 4,000 summer camps participated compared to about 450 when the summer camp program first started. The 1957 fiscal year authorization for the program showed an expansion of 32 percent over 1956. In 1958 the special milk program was extended for another 3 years, through the 1961 fiscal year. The authorization was raised to take care of the increased participation. The increase in authorization was 10 percent in 1958, over 1957, 12 percent in 1959 over 1958 and 8.3 percent in 1960 over 1959. The increase for 1961 over 1960 will be about 6 percent. The authorization of \$95 million for this fiscal year expires June 30.

These figures show that the special milk program has made real progress since its beginning in 1954, which is a real tribute to congressional leadership, and cooperation among Federal, State, and local agencies, school officials, and parents.

The special milk program has shown significant increases in school participation and in milk consumption by the students. Increases this year over last year

in the number of schools participating amounted to 2 percent. The year before the increase over the previous year was 2.9 percent. The number of half-pints, consumed by children, has increased steadily in the past 3 fiscal years—from 2.2 billion in 1959, to 2.4 billion in 1960, to an estimated 2.5 billion in 1961. Complete progress of the special milk program, is shown on the attached statement for the 3 years, 1959, 1960, and preliminary figures for the fiscal year ending June 30, 1961.

The figures show that the goals set by the Congress are being met. More milk is being consumed in schools and in child-care centers and summer camps and the acquisition of dairy products by the Commodity Credit Corporation has been directly decreased. This means that more children are getting more milk in school than ever before, and are developing the habit of including it in their diet, and improving the nutritional level of their diets.

We endorse and strongly support the bills under consideration of this committee to extend the special milk program for 1 year and increase the amount of CCC funds available to not less than \$105 million for the 1962 fiscal year.

Since the hearings on April 11 and 12, an urgency has developed which we earnestly ask this committee to consider and take prompt action to assure the continuation of this program.

As you know, the authority for this program expires June 30, 1961, and immediate action to extend this authority is needed to give assurance to participating schools and camps that they may continue to offer milk to children below what it costs them, without the risk of having to assume the expense of the price reduction themselves. Most schools and camps cannot assume such a risk.

We are informed that State agencies and offices of the Department of Agriculture are now receiving applications and inquiries from some 7,000 summer camps and year-round schools and institutions whose operations will commence on or before July 1. These schools and institutions are wanting to make necessary arrangements now for full participation in the program.

In the event legislation is not completed very promptly, it will be necessary to notify all cooperating State agencies that reimbursement beyond June 30 cannot be assured. This would cause serious confusion and administrative difficulties involving approximately 85,000 participating schools and institutions, and should be avoided if at all possible.

We therefore most urgently ask that the authorization for \$105 million for the special milk program for the fiscal year beginning July 1, 1961, be removed from the bill, H.R. 6400, and acted upon separately as soon as possible in order to assure that there be no lapse in the operation of this highly accepted and effective program.

PROPOSED AMENDMENT TO H.R. 6400

On page 78, strike subsection (c) and insert in lieu thereof the following new subsections:

“(c) Subject to supervision by the Secretary of Agriculture, as hereinafter provided, any cooperative association of agricultural producers as defined in the Agricultural Marketing Act of 1929, as amended, or a federation of such cooperative associations, in addition to the right otherwise conferred by law, may merge, or may acquire, directly or indirectly, the whole or any part of the stock or other share capital, or the whole or any part of the assets, of another business entity, corporate or otherwise, for the purposes and objectives authorized by such Act.

“(d) If the Secretary of Agriculture shall have reason to believe that any such merger or acquisition, whether heretofore or hereafter made, is contrary to the policies of Congress relating to monopolies and restraints of trade when considered in conjunction with, and when correlated with, the policies of Congress relating to agriculture and to cooperative associations of agricultural producers, he shall cause an investigation to be made and a hearing to be held to determine whether such merger or acquisition is in the public interest.

“(e) If on the basis of the record made at such hearing the Secretary determines that any such merger or acquisition by any such association is contrary to the policies of Congress as so correlated and is not in the public interest, he shall issue an order directing the association to take such action, or to refrain from the taking of such action, as he deems necessary to protect the public interest. Any such order may be appealed and enforced in the same manner that orders under section 2 of the Capper-Volstead Act may be appealed and enforced. Orders so issued by the Secretary may include dissolution of mergers and divestiture in whole or in part of any property or assets so acquired as well as limitations on the use thereof. If the Secretary determines that the merger

or acquisition under consideration, or any part thereof, is in the public interest, he shall approve the same, subject to such conditions, if any, as he deems necessary to protect the public interest. Any transaction so approved by the Secretary shall be deemed lawful. Any person claiming injury or threat of injury from any such merger or acquisition may petition the Secretary for an investigation and hearing under this subsection, but no such hearing shall be held unless the Secretary shall have reason to believe that there is probable cause therefor as above provided. No action shall be initiated or maintained against any such association because of any such merger or acquisition except under the provisions of this subsection.

"(f) The Secretary is authorized and directed at the request of any such association to investigate and determine whether any proposed merger or acquisition by such association would be contrary to the policies of Congress as so correlated, and, if so, whether such proposed merger or acquisition would be in the public interest, and to approve or disapprove the same, subject to such conditions, if any, as he deems necessary to protect the public interest. Transactions duly consummated pursuant to the approval of the Secretary under the provisions of this subsection shall be deemed lawful.

"(g) The Secretary is authorized and directed at the request of any such association to investigate and determine whether any merger or acquisition previously made by such association is contrary to the policies of Congress as so correlated, and, if so, whether such merger or acquisition is in the public interest and to approve or disapprove the same, subject to such conditions, if any, as he deems necessary to protect the public interest. Transactions so approved by the Secretary under the provisions of this subsection shall be deemed lawful.

"(h) The Secretary may prescribe such rules as he deems appropriate or necessary to carry out the purposes and objectives of this subsection.

"(i) Upon the initiation of any proceeding under this subsection, including proceedings based on requests for the approval of proposed or past mergers or acquisitions, the Secretary shall give notice to all parties directly involved and to the Attorney General and the Federal Trade Commission. In addition, notice of such proceeding shall be published in the Federal Register. Statements approving or opposing any merger or acquisition involved in any such proceeding may be submitted to the Secretary by the Attorney General, by the Federal Trade Commission, and also by any person, organization, or agency showing substantial interest in the matter, within 30 days after the publication of such notice in the Federal Register. The Secretary may extend the time for filing such statements upon a showing of good cause.

"(j) The Secretary shall report annually to Congress all actions taken under this subsection during the preceding year. The Secretary's report shall include a list of all proceedings pending during the year, the recommendations, if any, of the Attorney General or of the Federal Trade Commission, and the status or final disposition of the proceeding. With respect to any approval granted by the Secretary over the objection of the Attorney General or the Federal Trade Commission, the Secretary's report shall describe the merger or acquisition so approved and state the basis for the approval.

On page 78, after line 6, insert the following new section 402 with appropriate renumbering of other sections:

"SEC. 402. One or more cooperative associations of agricultural producers, or marketing agencies in common owned or controlled by such associations, may meet with one or more processors or distributors of milk for the purpose of bargaining in good faith and at arms length with such processors or distributors for the sale of milk; and, when requested to do so by any such association or marketing agency, one or more processors or distributors of milk may meet with one or more of such associations or marketing agencies for the purpose of bargaining in good faith and at arms length in the respective individual capacities of such processors or distributors for the purchase of milk from such associations or marketing agencies. Nothing in this Act shall be construed to authorize any agreement relating to the price at which milk or any product thereof may be sold by any such processor or distributor nor to authorize any collusion between any such processors or distributors as to the prices that will be paid for milk. For the purposes of this Act, 'cooperative associations of producers' and 'marketing agencies in common' means such associations and marketing agencies as meet the requirements of the Capper-Volstead Act (7 U.S.C. 291-292). In determining compliance with said Act, business done for the United States or any of its agencies shall not be considered either member or nonmember business."

STATEMENT OF WILLIAM A. QUINLAN, GENERAL COUNSEL,
U.S. WHOLESALE GROCERS' ASSOCIATION, INC.

My name is William A. Quinlan, and I make this statement as general counsel of the United States Wholesale Grocers' Association, Inc., a national trade association of wholesale food and grocery distributors, with headquarters in Washington, D.C. I am a member of the bar of Illinois, the District of Columbia and Maryland, and have been associated for 28 years with food industry associations and companies, including 13 years as counsel to the United States Wholesale Grocers' Association, Inc.

We oppose subsections (b) and (c) of section 401 of the bill H.R. 6400 and oppose also the recommendations made by the National Farmers Union, the National Council of Farmer Cooperatives and the Dairymen's League Cooperative Association, Inc., for modifications of or additions to those provisions, and respectfully ask your committee to reject those provisions and recommendations, for the reasons that they would result in unwarranted and discriminatory weakening of the antitrust laws.

First, subsection (c) of section 401, on first reading sounds like section 7 of the Clayton Act provision prohibiting acquisitions the effect of which may be substantially to lessen competition, or to tend to create a monopoly. Examination of it, however, reveals a significant difference which would substantially weaken Clayton Act restrictions. That is, the restraint on acquisitions set forth in the bill is stated as a qualification of an affirmative authorization, in contrast to the positive prohibition of the Clayton Act. Taken in conjunction with legislative history, this inversion of the Clayton Act prohibition could require a construction of the bill favoring the acquisition of competitors by cooperatives, whereas the policy expressed in the Clayton Act would prevent the same acquisitions if made by ordinary persons or corporations. This could be construed as a promoter bill, as concerns such cooperatives.

Second, the broad provision in subsection (b) of section 401 of the bill that cooperatives may act jointly in federations of such cooperatives or "through agencies in common" could open the way to undesirable suppression of competition without formal acquisitions or mergers.

Third, the amendments to section 401 which have been proposed by the farm organizations named above would open a vast hole in the antitrust laws, not only by transferring jurisdiction, or so-called "primary jurisdiction," over acquisitions by cooperatives to the Secretary of Agriculture, while leaving their business competitors subject to the jurisdiction of the Department of Justice and Federal Trade Commission, but, even worse, would authorize the Secretary of Agriculture to approve acquisitions by cooperatives, and thereby exempt them from section 7 of the Clayton Act, notwithstanding that they may destroy competition or create monopoly.

These proposals not only would result in serious confusion and undue litigation, but would violate the basic principle that business competitors should be subject to the same enforcement agencies as well as the same laws, that persons competing in any line of business should be subject to the same interpretations and enforcement of the same laws, since discrepancies and inequities are otherwise inevitable.

They would give cooperative associations which choose to compete with ordinary processors and marketers greater freedom to acquire existing concerns, as well as a friendly and sympathetic judge of their conduct and its competitive significance, while leaving competitors of such associations subject to the more stringent restrictions of section 7 of the Clayton Act, and to the impartial judgement of the courts.

Any doubts that the bill would be a promoter bill would be removed by the suggested amendments placing jurisdiction over cooperative acquisitions in the Secretary of Agriculture. That officer is now under a statutory mandate to foster and encourage the growth of agricultural associations. Experience with previous grants of similar jurisdiction to regulatory agencies more specifically charged with protection of the overall public interest than is the Secretary of Agriculture justify the belief that the Secretary would consider it his duty to resolve all doubts in favor of a challenged acquisition. Time and again the Department of Justice has vainly opposed, on antitrust grounds, mergers, acquisitions, and restrictive agreements approved by regulatory agencies charged with observance of the national policy to preserve competition. (See, for example, *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).)

The analogy drawn by some in regard to regulated industries, in support of favoring acquisitions of distribution outlets by agricultural associations, overlooks two essential distinctions. First, the Congress has adopted legislation favoring mergers and acquisitions only in those industries where the basic policy of competition has been superseded by a policy of direct Government regulation of all or virtually all business decisions which would normally be dictated by individual initiative subject only to antitrust restraints. This is not true of the marketing of agricultural products. Apart from price-support programs and such minimum regulation in limited areas as the fixing of minimum prices in milk marketing orders, the great mass of transactions in the marketing of agricultural products are still subject to the basic policy of competition under the antitrust laws rather than to direct Government regulation. Second, where Congress has adopted legislation favoring mergers and acquisitions, as in regulated industries, such legislation has applied the same standards to all persons engaged in the affected business, and has placed all such persons under the same enforcement agency. This condition would not be met in the marketing of agricultural products if the proposals were to become law. Agricultural associations engaged in the marketing of agricultural products would be subject to the more liberal provisions of the proposed amendments, in acquiring existing businesses and marketing outlets, whereas ordinary business concerns engaged in the same business and in direct competition with such agricultural associations would be subject to the more severe prohibitions of the Clayton Act if they should seek to acquire the same businesses and distribution outlets. Further, acquisitions by agricultural associations would be judged by an officer required by law to favor the growth of such associations, whereas acquisitions by their competitors would be judged by impartial courts required by law to apply only the standards set forth in the Clayton Act.

It appears that the proposals are based upon an erroneous view of the regulatory function performed by the Secretary of Agriculture under present law. What has been said above demonstrates that the amendment ignores the competitive relationship and rivalry between distribution businesses owned by agricultural associations and those owned by ordinary corporations or individuals. The amendment also ignores the limited character of the regulatory power possessed by the Secretary of Agriculture. Indeed, it appears that the proposals are based upon an unjustified assumption that the Secretary possesses a regulatory power which in fact he does not have. Only such an assumption could explain the attempt to confer primary jurisdiction upon the Secretary. The term, "primary jurisdiction," reflects a judicial technique for preventing the general policy expressed in the antitrust laws from interfering with conduct regulated under a comprehensive scheme of regulation adopted by Congress for individual industries. The legislative adoption of this concept, as reflected in the proposals, would introduce a new element of confusion into the day-to-day problem of accommodating general and special statutory enactments, which is already enormously confused.

Without undertaking the very comprehensive analysis and discussion necessary in any attempt to define and describe the doctrine of primary jurisdiction, it is sufficient for present purposes to note only that the essential purpose of the doctrine is to promote "proper relationships between the courts and administrative agencies charged with particular regulatory duties" (*United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956)). This is accomplished by withholding judicial action for enforcement of a claim requiring resolution of issues which, under a comprehensive regulatory scheme, "have been placed within the special competence of an administrative body" (*ibid.*, at pp. 63-64). This doctrine is based upon the view that the uniformity of conduct and remedies contemplated in a regulated industry under a comprehensive scheme of regulation can be secured only by causing the courts to defer, at least initially, to the views of the expert body to which Congress has entrusted special regulatory power (*Texas & Pacific Railroad Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Far Eastern Conference v. United States*, 342 U.S. 570 (1952); *Federal Maritime Board v. Isbrandtsen Co., Inc.*, 356 U.S. 481 (1958)). In addition to these factors of uniformity and expertise which rest upon a comprehensive scheme of special regulation imposed upon an entire industry, the third element found in cases applying the doctrine of primary jurisdiction is that the special regulatory scheme provides its own system of remedies. As Mr. Justice Cardozo said in *Terminal Warehouse Co. v. Pennsylvania Railroad Co.*:

"The Commerce Act, like the Shipping Act, embodies a remedial system that is complete and self-contained. It provides the means for ascertaining the existence of a preference [to a shipper], but it does not stop at that point. As already shown in this opinion, it gives a cause of action for damages not only against the carrier, but also against shippers and consignees who have incited or abetted. For the wrongs that it denounces, it prescribes a fitting remedy which, we think, was meant to be exclusive" (297 U.S. 500, 514-515 (1936)).

The limited regulatory power possessed by the Secretary of Agriculture over only some aspects of marketing, and over only some of the persons engaged in it, falls short of meeting the conditions which Congress has previously considered as justifying the authorization of mergers and acquisitions, and far short of the conditions which the courts have considered as justifying application of the doctrine of primary jurisdiction.

The proposals are bad because they seek to confer unjustified privileges. The reasons of public policy which underlie the special treatment of cooperatives as collective producers are no longer applicable to co-ops which compete with ordinary business as processors and marketers. The protection presently given cooperative associations by the law is based upon the fact that collective action is considered necessary in order to overcome the inequality of bargaining power between individual farmers, on the one hand, and the purchasers of farm commodities, on the other hand. But when a co-op enters the marketing field, it brings to the distribution business a substantial advantage over other competitors, by reason of its control of a large portion of the supplies upon which its competitors are dependent. Even without the proposed legislation, therefore, marketing affiliates of agricultural cooperatives already enjoy a substantial advantage over their competitors. Any proposal to increase this advantage by allowing the co-ops to acquire existing outlets on more favorable conditions than those available to their competitors is unwarranted by the established public policy of fostering the collective organization of farmers as producers.

One of the most serious consequences of the proposed legislation would be its encouragement of a race for the concentration of power in the hands of the largest co-ops. The proposed legislation would encourage the larger and more powerful cooperatives to eliminate their rivals by buying up the marketing outlets upon which such rivals depend.

We, too, are concerned over the increasing control of food distribution exercised by a few giant corporations. But this increasing concentration will not be cured by encouraging a parallel development of a few giant co-ops. Numerous independent businesses which are still competing with giant distributors would almost certainly fall prey to giant co-ops, because it is by their acquisitions and elimination that the proposals would encourage co-op growth. If Congress believes bigness has become an evil, it should strike at it directly, rather than by encouraging the further elimination of independent small business. To encourage the growth of more sharks is of no help to the minnows.

THE NATIONAL ASSOCIATION OF SOIL CONSERVATION DISTRICTS,
Gallion, Ala., May 10, 1961.

HON. HAROLD D. COOLEY,
Chairman, Committee on Agriculture,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN COOLEY: It is our understanding that the Committee on Agriculture is currently holding hearings on H.R. 6400.

The National Association of Soil Conservation Districts favors the amendment to the Great Plains conservation program proposed in section 402 of this bill and respectfully urges a favorable report by the committee on this section. In support of our request we are submitting a statement regarding section 402 and we request that this be included as part of the hearing record.

It is the policy of our association that we restrict our position on legislative matters to those concerned with soil and water conservation. Our statement, accordingly, is confined to the provision which would amend the Great Plains conservation program.

Respectfully,

A. D. HOLMES,
Chairman, Legislative Committee.

STATEMENT OF THE NATIONAL ASSOCIATION OF SOIL CONSERVATION DISTRICTS,
BY A. D. HOLMES, JR., GALLON, ALA., CHAIRMAN, LEGISLATIVE COMMITTEE

The National Association of Soil Conservation Districts favors the enactment of title IV, section 402 of H.R. 6400, the proposed Agricultural Act of 1961.

Section 402 would affect beneficially the Great Plains conservation program, which is a relatively new approach to the attainment of greater agricultural stability in the Great Plains States.

The Great Plains conservation program is designed to help farmers and ranchers in the hazardous climatic area of this region to conserve soil and water as basic requirements of a permanent agriculture. It emphasizes land use changes, wind erosion control, moisture conservation, and management practices which, in combination, will provide the most enduring benefits.

In order to take part in this voluntary program, a farmer or rancher must develop a conservation plan of operation for his entire unit. When a satisfactory plan is developed, the farmer can sign a contract with the Secretary of Agriculture under which technical assistance and long-term cost sharing will be guaranteed.

Technical assistance and cost sharing are integrated in carrying out farm or ranch conservation plans over a period not to exceed 10 years. Cost shares are limited to installing permanent nonrecurring conservation practices and are obligated at the time the conservation plan is developed and the contract signed.

This program supports the objectives of soil conservation districts and has attracted an initial high degree of farmer interest. The program has been underway since 1958.

As now written, the law provides that the termination date of contracts with producers shall be not later than December 31, 1971. This means that no contracts for the maximum period of 10 years may be entered into after January 1, 1962. Each year after that date the maximum period of contracts will be reduced by 1 year until the minimum period of 3 years is reached on January 1, 1969.

Section 402 of H.R. 6400 would authorize the Secretary of Agriculture to enter into contracts with producers for such length of time as needed, not to exceed 10 years, at any time during the period ending not later than December 31, 1971.

The proposed amendment would not only correct the inequities in the present law with respect to those producers who enter into contracts with the Secretary of Agriculture after January 1, 1962, but would also establish the basis for a more effective administration of the Great Plains conservation program.

We favor this amendment and urge the committee to consider it favorably. The amendment would help soil conservation districts in the Great Plains carry out their programs aimed at bringing about needed land use adjustments and the application of enduring conservation practices.

AMERICAN FARM BUREAU FEDERATION,
Washington, D.C., May 24, 1961.

HON. HAROLD D. COOLEY,
Chairman, Committee on Agriculture,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN COOLEY: We respectfully request that this letter be made a part of the hearing record with regard to title IV of H.R. 6400.

Section 402 deals with the Great Plains program.—We wish to continue our support of the Great Plains program. It is filling a need not available elsewhere; it is accomplishing results which could not otherwise be obtained; it is a cost-sharing, self-help program, operating on long-term contracts.

Section 402 provides that this program be extended through December 31, 1971. We believe that Congress should give periodic review to all of these programs; therefore, we would recommend that this authority not be extended for such a long period of time. We are sure that the Agriculture Committee of the House is desirous of keeping these programs on a sound basis, and we believe that this can best be accomplished by frequent congressional review of such programs. We are not suggesting a specific number of years for this basic authority to be extended; however, we believe 10 years is too long.

Under section 403 of title IV of H.R. 6400, a special milk program is authorized.—We favor this program and the method proposed for financing the acquisition and distribution of this milk. The current authority for the special milk program expires June 30, 1961, and in the past has been financed with funds administered from the Commodity Credit Corporation. This new legislation proposes to finance the program by direct appropriation of Congress, which we believe is a more satisfactory way to obtain the funds.

The primary objective of this program is to increase the consumption of fluid milk by children of school age and thereby assist in the reduction of the accumulation of dairy products. The method of distribution of this milk has been left to the authority of the local and State institutions, which we believe is a most desirable method of releasing this milk to the children. It is our conviction that the least possible Federal intervention in this program is the best approach. The benefits of this program are apparent, and we believe the authority to continue it should be approved.

Sincerely yours,

JOHN C. LYNN, *Legislative Director.*

CHAMBER OF COMMERCE OF THE UNITED STATES,

Washington, D.C., May 29, 1961.

HON. HAROLD COOLEY,
*Chairman, House Agriculture Committee,
New House Office Building, Washington, D.C.*

DEAR MR. COOLEY: With respect to title IV of H.R. 6400, the Chamber of Commerce of the United States requests that our views on this title be made a part of the record and given consideration.

Section 401 relates to farmer cooperatives. We are apprehensive about this section because we see in it another attempt to broaden the exemption of farmer cooperatives and their association from the Sherman Anti-Trust and Clayton Acts. If this is not the intent we see no need for Congress to "reaffirm" national policy as proposed in section 401(a).

If this is not the intent, the inclusion of the Sherman and Clayton Acts as "related legislation" in subsection (a) would help to remove the threat which this section appears to pose.

Cordially yours,

CLARENCE R. MILES,
Manager, Legislative Department.

STIEFEL, GREENBERG, BURNS & BALDRIDGE,
ATTORNEYS AND COUNSELORS,
Chicago, June 2, 1961.

Re H.R. 6400

HON. HAROLD D. COOLEY,
*Chairman, House Agriculture Committee, House of Representatives,
House Office Building, Washington, D.C.*

DEAR CONGRESSMAN COOLEY: At the hearing before your committee on H.R. 6400, on May 25, 1961, the National Council of Farm Cooperatives filed a proposed amendment to title IV of such act, which title relates to the activities of farm cooperative organizations and associations. It is my understanding that the transcript on such hearings will be open until June 7, 1961. I would like to make a statement herein in opposition to such proposed amendment and request that it be included in the record.

As I read the proposed amendment to title IV it would, if adopted, confer complete immunity upon farm cooperatives with respect to the proscriptions of the Federal antitrust laws. It would also immunize from such laws the activities of private business corporations which either merged with a cooperative association, or which sold some of their stock, however small the amount, to a cooperative association of farmers.

My interest in title IV of H.R. 6400 is twofold. First, I represent three independent processors of citrus fruit drinks who are dependent upon farm cooperatives for their supply of raw materials, including fresh fruit and juice concentrate. These concerns are the Realemon-Puritan Co. of Chicago, Ill.;

the Paramount Citrus Association of San Fernando, Calif.; and the Holly-Pak Corp. of Hollywood, Calif. Second, as a private citizen, I have an interest, developed during 12 years as an attorney in the Antitrust Division of the United States Department of Justice, in the application of the antitrust laws, without exception, to all classes of business enterprises, including farm cooperatives.

We have no objection to title IV of H.R. 6400, as it appears in the original bill which merely reaffirms the existing limited exemptions from the antitrust laws afforded farm cooperatives by section 6 of the Clayton Act and by the Capper-Volstead Act. But the proposed amendment would grant such cooperatives virtually a blanket exemption from the antitrust laws.

We object to the proposed amendment for the following reasons: (1) It would, in effect, transfer jurisdiction over the business activities of farm cooperatives from the courts to the Secretary of Agriculture; (2) it would permit the monopolization of entire industries; (3) it would legalize agreements between cooperative and noncooperative groups which restrain trade; and (4) it would prohibit the filing of private treble damage suits against cooperatives for violations of the antitrust laws, by persons injured thereby. Each of these objections will be discussed briefly.

1. TRANSFER OF JURISDICTION FROM COURTS TO THE SECRETARY OF AGRICULTURE

The proposed amendment transfers jurisdiction over acquisitions and mergers effected by farm cooperatives from the courts to the Secretary of Agriculture. Section 401(c) of the proposed amendment provides "that any such acquisition, merger or consolidation shall be lawful if approved by the Secretary of Agriculture in the manner provided in this section." Section 401(d) of the proposed amendment then provides that "The decision of the Secretary, if supported by substantial evidence, shall be final." While either the Attorney General or the Chairman of the Federal Trade Commission, or both, have the right to appear at the hearing before the Secretary, and to present arguments, they have no veto. (Sec. 401(d).)

Thus, acquisitions and mergers by cooperatives would be judged administratively, while those effected by all other types of business organizations are judged judicially.

Moreover, the standards for determining legality would differ as between the two groups. While section 401(c) of the proposed amendment retains the two standards for determining legality which are provided in section 7 of the Clayton Act; namely, that competition must not be substantially lessened and that there must be no tendency to create a monopoly, these are not the only tests. Section 401(d) provides that the Secretary shall approve an acquisition or merger if he finds after hearing that: (1) it will tend to promote orderly marketing or procuring by farmers; (2) will not result in the undue enhancement of prices; (3) will not result in undue injury to competition or consumers, and (4) is otherwise in the public interest. "The decision of the Secretary, if supported by substantial evidence, shall be final."

The Secretary might well find that these conditions exist even though one or both of the Clayton Act standards is violated. Furthermore, section 401(d) provides that if the four standards therein defined are satisfied the Secretary "shall approve such transaction."

2. ENTIRE INDUSTRIES COULD BE LAWFULLY MONOPOLIZED

Section 401(c) of the proposed amendment permits any cooperative association to acquire, directly or indirectly, the whole or any part of the stock, or assets, or other share capital, either of any other cooperative association, or of any other corporation engaged in the same or a related kind of business so long as the effect of the acquisition or merger does not substantially lessen competition or tend to create a monopoly in any line of commerce. This would permit a proliferation of mergers and acquisitions involving not only the merger of cooperatives but the merger of cooperatives with private business corporations engaged in the same or in a related line of business. It would permit cooperatives to combine with processors, distributors, and brokers and hence to monopolize an entire line of commerce.

3. COOPERATIVES COULD COMBINE WITH NONCOOPERATIVE BUSINESS GROUPS TO RESTRAIN TRADE

Under existing law as interpreted by the Supreme Court, if a cooperative combines with, or makes a contract with, a noncooperative business concern which restrains trade, the cooperative loses even the limited exemptions provided to it by the Clayton and Capper-Volstead Acts. The proposed amendment would legalize such contracts or agreements.

Section 401(c) of the proposed amendment provides that a cooperative, or a federation of cooperatives, may acquire, directly or indirectly, the whole or any part of the assets, stock, or other share capital of any other corporation engaged in a related kind of commerce, or to merge with any other such corporation, provided the section 7 Clayton Act tests are not violated.

Under this section a cooperative by the purchase of only a few shares of stock of a noncooperative business, could make discriminatory contracts with such noncooperative, and be exempt from liability therefor under the antitrust laws. One of the difficulties experienced by certain independent processors of citrus products is their inability to purchase raw materials from a cooperative on the same basis as some of their competing processors. The cooperative sells at one price to one processor, and at a different price to competing processors. The proposed amendment would make such price discrimination legal.

The section 7 Clayton Act tests provided in section 401(c) would not save this situation since the purchase by a cooperative of only a few shares of a noncooperative could not be held under controlling court decisions as substantially lessening competition or tending to create a monopoly in a line of commerce.

4. PRIVATE PARTIES COULD NOT SUE COOPERATIVES FOR TREBLE DAMAGES

Since the proposed amendment vests exclusive jurisdiction over acquisitions and mergers by cooperatives with cooperatives, and by cooperatives with non-cooperatives, in the Secretary of Agriculture, a private suitor could not maintain a suit for treble damages and injunctive relief, as provided in sections 4 and 16 of the Clayton Act, if an acquisition or merger injured him in his business. The Secretary is not empowered to award damages to an injured party.

The congressional purpose in passing sections 4 and 16 of the Clayton Act was to provide for a broader enforcement of the public policy embodied in the antitrust laws by making the private litigant an ally of the Government in their enforcement. (See 51 Congressional Record 16, 319 (1914)), and the major incentive for such enforcement lies in the possibility of the private litigant securing damages for competitive wrongs. (See 51 Congressional Record 9073 (1914).)

In our view title IV of H.R. 6400, as originally introduced, merely reaffirms the limited exemptions from antitrust liability granted farm cooperatives by the Clayton and Capper-Volstead Acts, and is not criticized herein. But the amendment to title IV, proposed by the National Council of Farm Cooperatives, is objectionable because, if adopted, farm cooperatives would enjoy complete immunity from the antitrust laws.

Sincerely,

HOLMES BALDRIDGE.

LIBBY, McNEILL & LIBBY,
Chicago, Ill., June 6, 1961.

Re Agricultural Act of 1961, H.R. 6400, before the Committee on Agriculture,
House of Representatives.

HON. HAROLD D. COOLEY,
Chairman, Committee on Agriculture,
U.S. House of Representatives,
Washington, D.C.

MY DEAR MR. COOLEY: Our attention has just been called to the proposed amendment of title IV of H.R. 6400, which title relates to cooperative associations. The purpose of this letter is to express, on behalf of Libby, McNeill & Libby, our opposition to such proposed amendment and request that it be made a part of the record of the hearing before your committee.

Libby, McNeill & Libby is engaged in the production and marketing of canned and frozen foods on a national scale and purchases its raw products from growers of fresh fruits and vegetables, many of whom are organized in the form of cooperatives and, in some cases, is required to compete with cooperatives in the production and marketing of the many products which it packs and distributes. For this, and other reasons, any preferential treatment accorded cooperatives would be inimical to the interests of not only our own company but many other companies similarly situated.

It is our understanding that the proposed amendment of title IV of such act would completely rewrite such title and, if adopted, would confer complete immunity from the Federal antitrust laws upon farm cooperatives and would, additionally, extend such immunity to private corporations which either merged with a cooperative or sold some of its stocks to such a cooperative association.

The proposed amendment would transfer jurisdiction of acquisitions and mergers to the Secretary of Agriculture who would be granted complete authority to either approve or disapprove any such acquisition, merger or consolidation. The decision of the Secretary, if supported by substantial evidence, would be final. Moreover, the proposed amendment would permit acquisitions and mergers by cooperatives to be judged under standards other than those to which their competitors and others who do business with them would be subjected. When a similar proposal was made in 1959 with respect to S. 2014, the Department of Justice strongly opposed such legislation because "the bill would give rise to more questions concerning the scope of exemption from the antitrust laws granted to cooperatives by the act than it might conceivably settle." (See letter from Deputy Attorney General to the Honorable Allen J. Ellender, chairman, Senate Committee on Agriculture and Forestry, July 15, 1959.)

Under existing law, agricultural cooperatives, despite the generous treatment accorded such organizations under the Capper-Volstead Act, are not immune from prosecution under section 2 of the Sherman Act or section 7 of the Clayton Act. *Maryland and Virginia Milk Producers Assn. v. U.S.*, 362 U.S. 458. Section 401(c) of the proposed amendment would seek to make such cooperative associations immune from the prohibitions in such antitrust laws along with other private corporations involved through acquisition or a purchase of stock. This would permit a prostitution of traditional antitrust policy without statutory or judicial precedent, and without opportunity for adequate hearing.

Conceivably, the amendments might well enable a cooperative, through acquisition or merger approved by the Secretary, to foreclose nonmember farmers—no matter what their personal preference—from markets they would otherwise enjoy, to their economic detriment.

Present laws prohibits agreements or contracts in restraint of trade between cooperative associations and private business concerns. To permit such cooperatives to acquire the whole or any part of the assets, stock or other share capital of any other corporation engaged in a related kind of commerce, or to merge with any other such corporation, opens the door to restrictive trade practices with virtually complete immunity from the otherwise prohibitory provisions of our antitrust laws.

Apparently the proposed amendment would even take away the right of a private person to sue for treble damages and injunctive relief as presently provided in sections 4 and 16 of the Clayton Act. This would inhibit the broad enforcement of our antitrust laws intended by Congress.

It is obvious from the cursory review we have been able to make of the proposed amendments in the short time available that they are highly objectionable. Farm cooperatives would be granted virtually complete immunity from the antitrust laws, to the distinct disadvantage of other substantial segments of our economy, in contravention of our established antitrust policy favoring competition and free enterprise, and in complete disregard of the public interest.

Sincerely yours,

ROBERT F. FINKE.



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