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QUALITY AND PRICE STABILIZATION

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HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

EIGHTY-SEVENTH CONGRESS

SECOND SESSION

ON

H.J. Res. 636, H.J. Res. 637, H.J. Res. 639, H.J. Res. 679, H.R. 10335, H.R. 10340, H.R. 10517, H.R. 11227, H.R. 11346, and H.R. 11778

JOINT RESOLUTIONS AND BILLS TO AMEND THE FEDERAL TRADE COMMISSION ACT TO PROMOTE QUALITY AND PRICE STABILIZATION, TO DEFINE AND RESTRAIN CERTAIN UNFAIR METHODS OF DISTRIBUTION, AND TO CONFIRM, DEFINE, AND EQUALIZE THE RIGHTS OF PRODUCERS AND RESELLERS IN THE DISTRIBUTION OF GOODS IDENTIFIED BY DISTINGUISHING BRANDS, NAMES, OR TRADEMARKS, AND FOR OTHER PURPOSES

JUNE 11, 12, 13, 14, 15, 1962

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QUALITY AND PRICE STABILIZATION

MONDAY, JUNE 11, 1962

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE AND FINANCE OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., in room 1334, New House Office Building, Hon. Peter F. Mack, Jr. (chairman of the subcommittee) presiding.

Mr. MACK. The committee will come to order.

The Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce is meeting this morning to begin hearings on several bills to promote quality and price stabilization. These identical bills are House Joint Resolution 636 by the distinguished chairman of this committee, Mr. Harris, of Arkansas; House Joint Resolution 637, which I introduced; H.R. 10335 by Mr. Madden, of Indiana; H.R. 10340 by Mr. Holifield, of California; House Joint Resolution 639 by Mr. Tollefson, of Washington; H.R. 10517 by Mr. McMillan, of South Carolina; House Joint Resolution 679 by our colleague on this committee, Mr. Glenn, of New Jersey; H.R. 11227 by Mr. Dent, of Pennsylvania; H.R. 11346 of Mr. Harvey, of Indiana; and H.R. 11778 by Mrs. May, of Washington.

The purpose of this legislation is to promote quality and price stabilization, to define and restrain certain unfair methods of distribution and to confirm, define, and equalize the rights of producers and resellers in the distribution of goods identified by distinguishing brands, names, or trademarks. These bills establish the right of the owner of a brand, name, or trademark to retain his property right in his identified goods in all sales or transfers of such goods until they reach the ultimate consumer. The owner of the brand, name, or trademark would have authority to revoke the use of his identifying mark by anyone selling such goods if the seller (1) has used such goods in furtherance of "bait" merchandising practices; (2) has advertised, offered for sale, or sold such goods at prices other than those established by the owner; and (3) has published misrepresentations concerning such goods with intent to deceive the public.

This legislation is necessary to protect small independent businessmen from the onslaught of unrestrained cutthroat competition and retaliatory price cutting of the large chainstores, department stores, mail-order houses, and discount houses, which have been flourishing as a result of a breakdown of State resale price maintenance laws.

I might state for the record that this committee has previously dealt with this legislation. In April and May 1958, my subcommittee held hearings on a bill to establish a national fair trade law and the

subcommittee reported a bill favorably to the entire committee. However, there was not sufficient time left during the remainder of the 85th Congress to complete action on this bill. In the 86th Congress, the entire committee under the leadership of the distinguished and very able chairman, Mr. Harris, again held hearings on this legislation. Again, we succeeded in getting a bill reported by the entire committee but we were unable to get clearance from the Rules Committee in order to take the bill to the floor of the House for debate. Hence, the hearings today deal with this same subject matter for the third time in succession.

A copy of House Joint Resolution 636 and all departmental and agency reports thereon will be inserted in the record at this point.

(H.J. Res. 636 and the reports follow:)

[H.J. Res. 636, 87th Cong., 2d sess.]

JOINT RESOLUTION To amend the Federal Trade Commission Act, to promote quality and price stabilization, to define and restrain certain unfair methods of distribution and to confirm, define, and equalize the rights of producers and resellers in the distribution of goods identified by distinguishing brands, names, or trademarks, and for other purposes

Whereas it is recognized that, in the chain of distribution of products so identified, there may be encountered resellers having predatory interests and committing, in the resale of such products, unfair or deceptive acts or practices (such as, but not limited to, store-traffic baiting, and misrepresentation as to the size, capacity, quality, conditions, model, or age of the goods), all tending to destroy unfairly the value to its owner, to smaller resellers, and to the public, of the brand, name, or trademark, and tending to disable and destroy competition, thus to create monopoly of retail distribution, contrary to public interest; and

Whereas the above-recited deceptive acts and practices and unfair methods of competition tend to diminish the volume of such identified products moving in commerce by adversely affecting the demand for such goods, thereby impairing the producer's ability, and reducing his incentive, to maintain and increase, with relation to price, the value of such goods to the public, or to maintain and increase opportunities for employment, or pay rates for labor, in his factory; and

Whereas substitutions of inferior labor and materials forced by the downward spiral of unrestrained predatory pricing on popular identified products, in the fields of foods, drugs, and beverages, endanger public health and, in other fields, endanger public safety; and

Whereas it is recognized that unless competitive practices can be maintained in all appropriate stages in the distribution of such identified products, the marketing of such identified products is depressed and the quality thereof tends to deteriorate; and

Whereas the distinguishing brand, name, or trademark of a product, and trade and public goodwill associated therewith, constitute property, the rights to which are entitled to protection by the owner thereof despite transfer of the product itself; and

Whereas, in order to remove the above-recited obstructions to commerce, and to remove the quality-deteriorating and value-diluting pressures resulting therefrom, in the manufacture and resale of products bearing distinguishing brands, names, or trademarks, it is found and declared that it is in the public interest to define, confirm, and implement said property rights: Therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Quality Stabilization Act". Section 5(a) of the Federal Trade Commission Act, as amended, is hereby amended by adding, at the end thereof, paragraphs (7) to (14), inclusive, as follows:

"(7) The owner of a brand, name, or trademark shall be deemed to retain his property rights therein, and in the trade and public goodwill symbolized thereby, regardless of any sale or transfer of the goods to which such brand, name, or trademark relates, and no such sale or transfer shall be deemed to diminish or extinguish any such rights. Any person who resells in commerce

goods identified by a distinguishing brand, name, or trademark, either on the label, container, dispenser thereof, or otherwise, may rightfully employ such brand, name, or trademark, but only in effecting the resale of such goods, and subject to the provisions of paragraph (8) hereof.

"(8) When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark, the right of any person to employ such brand, name, or trademark in effecting resale of goods so identified may be revoked by the owner of such brand, name, or trademark, on written notice, for any of the following reasons:

"(a) that the person reselling such goods has employed goods bearing the brand, name, or trademark in furtherance of bait merchandising practices;

"(b) that the person reselling such goods, with knowledge of the owner's currently established resale price or prices, has advertised, offered for sale, or sold such goods at prices other than such currently established resale prices; or

"(c) that the person reselling such goods, with intent to deceive purchasers, has published misrepresentation concerning such goods.

"(9) Nothing herein shall be interpreted to abridge the right of a person, in the regular course of his business and within a reasonable time after the date of any revocation pursuant to paragraph (8) of this subsection, to sell all such goods of which on such date he is possessed: *Provided*, That in such sale he shall commit none of the acts described in paragraph (8) of this subsection: *Provided, however*, That if and in the event that such person, promptly upon such revocation, shall have supplied to the owner of said brand, name, or trademark a correct itemized listing of said inventory with a statement of the price paid per item and the total price paid therefor, together with a firm offer to sell and deliver all said inventory to said owner at any time within ten days thereafter upon payment of said total price, then such person, upon expiration of the ten-day term of said offer without acceptance, may so sell such goods in said inventory, in the regular course of his business and within a reasonable time thereafter, without restriction as to price, in which event each advertisement of, or offer to sell, such goods, shall state plainly that the right of the reseller, offering such goods, to employ in any way the brand, name, or trademark carried by the goods has been revoked as to any such goods not in that reseller's possession at the time of such revocation.

"(10) Any person whose right to employ a brand, name, or trademark has been revoked by the owner thereof pursuant to the provisions of paragraphs (8) and (9) of this subsection and who thereafter, without the express written consent of said owner, first had, resells such goods so identified, or who otherwise employs such brand, name, or trademark in effecting resale of such goods or any other goods, shall be deemed to have committeed an act of unfair competition and shall be liable in a civil action for damages and injunctive relief by the owner of the brand, name, or trademark, to prevent and restrain further violations of this Act. Such owner may sue in any district court of the United States in the district in which defendant resides or is found or has an agent, without respect to the amount in controversy, and may recover the cost of suit including reasonable attorneys' fees.

"(11) In any proceeding under paragraph (10) it shall be a defense to the charge of unfair competition for the defendant to establish that the plaintiff has not used due diligence in revoking the right of all other persons in substantial competition with the defendant who are known to plaintiff to be committing any of the acts set forth in subparagraphs (a), (b), and (c) of paragraph (8) hereof.

"(12) No action pursuant hereto shall preclude action otherwise provided by law for wrongful use of a brand, name, or trademark.

"(13) Paragraphs (7) to (12) hereof shall apply to all acts and transactions in or affecting commerce which Congress may lawfully regulate, and to all acts and transactions in any territory of the United States or in the District of Columbia. As used in paragraphs (7) to (12) hereof, the term 'person' means any individual, partnership, or corporation.

"(14) No exercise of any right or remedy provided in paragraphs (7) to (13) inclusive of this subsection shall be construed to be a violation of any of the Antitrust Acts; and all such rights and remedies shall be also available to any owner of a brand, name, or trademark who, in the resale of goods identified by

such brand, name, or trademark, shall compete, at any level of distribution, with any reseller offering such goods: *Provided*, That such owner shall sell such identified goods at any level of distribution at the price established for that level of distribution: *And provided further*, That nothing in this Act shall be deemed to modify or repeal the Lanham Trademark Act, Public Law 489, approved July 5, 1946; the Miller-Tydings Act, Public Law 314, approved August 17, 1937; the McGuire Fair Trade Act, Public Law 342, approved July 14, 1952, or any State law described therein."

DEPARTMENT OF AGRICULTURE,
Washington, D.C., June 6, 1962.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of February 23 for a report on House Joint Resolution 636, to amend the Federal Trade Commission Act, to promote quality and price stabilization, to define and restrain certain unfair methods of distribution and to confirm, define, and equalize the rights of producers and resellers in the distribution of goods identified by distinguishing brands, names, or trademarks, and for other purposes, and your letter of February 27 requesting a report on H.R. 10335, a bill with the same purpose.

The Department recommends against this bill and resolution.

While the Department is in accord with certain purposes of H.R. 10335—such as the promotion of quality—we doubt that this bill would be an effective way to accomplish these purposes. Furthermore, provisions of the bill probably would provide further incentive for large, well-financed merchandising organizations to offer their own highly advertised brands at prices of their own choosing. Smaller merchants would have to abide by the stipulated or minimum resale prices set by manufacturers or wholesalers for branded items. Also, smaller manufacturers with their own proprietary lines probably would be under increasing pressure to enter into agreements to manufacture for large merchandisers who have their own highly advertised brands. If smaller distributing and manufacturing firms were put under competitive disadvantage by large organizations through these developments, markets would tend to become more concentrated in the hands of a few large producers. Service competition including advertising would tend to replace price competition. Those merchants who by the adoption of more efficient methods achieved real economies in retailing would have difficulties in passing on the resulting savings to consumers if they were bound by a retail price schedule established by wholesalers or manufacturers. Thus, prices of food and fiber products to consumers might be somewhat higher than otherwise and the volume of sales of some products might be reduced. This, in turn, would mean that higher prices at the retail level would not be reflected in higher prices paid to farmers.

We have the same reservations with respect to House Joint Resolution 636 as those expressed above concerning H.R. 10335.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

ORVILLE L. FREEMAN, *Secretary.*

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., June 5, 1962.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Bureau of the Budget on House Joint Resolution 636 and H.R. 10335, identical measures, to amend the Federal Trade Commission Act, to promote quality and price stabilization, to define and restrain certain unfair methods of distribution and to confirm, define, and equalize the rights of producers and re-

sellers in the distribution of goods identified by distinguishing brands, names, or trademarks, and for other purposes.

These measures would provide, among other things, that the owner of a brand, name, or trademark could revoke, under prescribed circumstances, the right of any person to employ such brand, name, or trademark in reselling goods. It would also grant the owner of the brand, name, or trademark the right to sue in a civil action for both damages and injunctive relief.

The Federal Trade Commission and the Departments of Agriculture, Commerce, and Justice have all submitted reports to your committee opposing enactment of House Joint Resolution 636 and H.R. 10335. The Bureau's report of February 13, 1962, on H.R. 116, which is substantially the same as House Joint Resolution 636 and H.R. 10335, with one addition discussed below, enumerated several of the objectives to this kind of legislation. A copy of our report on H.R. 116 is enclosed.

The new provision (par. 14) provides that the exercise of any right or remedy in paragraphs 7 to 13 shall not be construed to be a violation of the antitrust acts. As pointed out in the report of the Federal Trade Commission on House Joint Resolution 636 and H.R. 10335, it appears that the paragraph adds strength to the price maintenance objectives of these bills and "apparently is designed to negate the effect of the Supreme Court's decision in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956) cited in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47 (1959) wherein it was held that a manufacturer with its own wholesale outlets cannot make fair trade agreements with independent wholesalers covering its own products, such horizontal agreements being violative of the Sherman Act."

In view of the above objections, the Bureau of the Budget recommends against enactment of House Joint Resolution 636 and H.R. 10335.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

FEBRUARY 13, 1962.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Bureau of the Budget on H.R. 116, a bill to amend the Federal Trade Commission Act, to promote quality and price stabilization, to define and restrain certain unfair methods of distribution and to confirm and define the rights of producers and resellers in the distribution of goods identified by distinguishing brands, names, or trademarks, and for other purposes.

H.R. 116 would provide, among other things, that the owner of a brand, name, or trademark could revoke, under prescribed circumstances, the right of any person to employ such brand, name, or trademark, in reselling goods. It would also grant the owner of the brand, name, or trademark the right to sue in a civil action for both damages and injunctive relief.

The Federal Trade Commission, Department of Justice, and Department of Commerce have all submitted reports to your committee opposing enactment of H.R. 116. FTC points out that the bill would grant broad authority to the trademark owner to control the channels of distribution and thus empower a private party with the right to restrain trade. Justice opposes enactment because the bill would appear to extend the Federal commerce power to every local retailer; it would establish a Federal system of fixing resale prices on identified merchandise; by removing local flexibility, it would eliminate effective price competition; and it might well make State fair trade laws virtually meaningless. Commerce opposes because independent distributors might be placed at a serious disadvantage, price competition at the retail level would be reduced, and added costs of nonprice competition would raise prices.

In view of the above objections, the Bureau of the Budget recommends against enactment of the bill.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

THE SECRETARY OF COMMERCE,
Washington D.C. June 8, 1962.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your request for the views of this Department with respect to House Joint Resolution 636 and H.R. 10335, similar measures, to amend the Federal Trade Commission Act, to promote quality and price stabilization, to define and restrain certain unfair methods of distribution and to confirm, define, and equalize the rights of producers and resellers in the distribution of goods identified by distinguishing brands, names, or trademarks, and for other purposes.

These measures would add eight paragraphs to section 5(a) of the Federal Trade Commission Act (which deals with unfair methods of competition). The essence of the provisions thus added would be that the owner of a brand, name, or trademark retains his property rights in such brand, name, or trademark; and that, based on those property rights, he may revoke the right of any person to resell goods bearing his brand, etc., who:

(1) uses the goods for bait merchandising;

(2) resells the goods at prices other than those stipulated by the owner of the brand, and so forth, or

(3) has published misrepresentation of the goods with the intent to deceive purchasers.

Provisions would be made whereby a reseller whose right had been revoked could liquidate his inventory provided he committed none of the three acts enumerated above. As an alternative, he could offer his stock to the owner of the brand, name, or trademark at his invoice cost, and if the offer were not accepted within 10 days he could sell out his stock in the regular course of his business and within a reasonable time, without restriction as to price, provided each advertisement carry notice that the right of the seller to use the brand, name, or trademark had been revoked except as regards his stock of such goods at the time of revocation.

A person using a brand, name, or trademark after his right to do so had been revoked would be deemed to have committed an act of unfair competition, and could be sued by the owner of the brand, and so forth, in the U.S. courts for damages and injunctive relief. It would be a defense to the charge of unfair competition for the defendant (seller) to establish that the plaintiff (owner of brand, name, or trademark) had not used due diligence in revoking the right of others in competition with the defendant because of infractions of the prohibited acts.

The Department of Commerce recommends against enactment of this legislation.

The preservation of fair competitive buying and selling conditions has the wholehearted support of this Department. However, we believe that under legislation such as that proposed the gains achieved would be more than offset by the drawbacks.

True competition is largely based on price. It cannot be denied that much of the public is price-minded and selective in its buying. To eliminate price as a competitive element at the retail level is to deprive the public of its historical freedom to choose what it wants to buy, where it wants to buy it, at the price it wants to pay for it.

It should not be assumed that the public is so gullible and uninformed that it cannot distinguish between the added values it receives when it buys to same product with a warranty, service, delivery, credit, and other similar extras, and what it receives when it buys without these conveniences. All of these, and other factors, compose part of the cost of what is being sold, and justify a difference in dollar charge to the consumer. The latter should, however, be free to decide whether and to what extent he wants his product with or without the extras, and should not have the decision legislated for him.

Price competition is essential to the maintenance of a pricing structure which maximizes public purchasing power. Whatever serves as a check on price competition tends to drive prices up, and to reduce the ability of the public to buy a larger quantity of goods and services. This in turn reacts on our rate of economic growth. A faster economic growth rate for the Nation is universally

recognized as necessary to our well-being, and much study and effort are being devoted to the best means of its realization. Resale price maintenance would result in lower rather than higher growth rates.

Resale price maintenance, and the price rigidity which results from it, are inconsistent with our tradition of a free economy.

Price competition is the whiplash of efficiency. It is the mechanism which dictates constant striving to reduce costs and prices, to increase volume. It leads to greater production and employment, to a higher standard of living.

Our country is faced with a problem of making our international trading position more favorable. Resale price maintenance, by raising prices, costs and cost of living, moves in the direction of inflation. Our international competitive standing would thereby be weakened. Neither at home nor abroad can we afford to abandon price freedom.

The rigidity which fixed prices introduce is slow to reverse once it permeates the economic life of the Nation. If a manufacturer is left with high inventories at the end of a season, he will find it difficult to unload at bargain prices because he is under heightened pressure to maintain his price structure. He finds himself with less competitive mobility, less ability to adjust to changing conditions.

A feature of these proposals which appears to us to be undesirable is the probability that independent distributors would be seriously disadvantaged in a volatile market condition. Under a system of owner pricing, those purchasing for resale would not be free rapidly to adjust sales prices of their identified price-maintained merchandise to meet the competition of vertically integrated firms, which by their nature have instantaneous control over prices of own-brand merchandise at their outlets. Thus many stores that depend on merchandising a variety of brands which they do not own or control would be handicapped, and this group includes many small independent stores which would be deprived of their flexibility.

Price competition at the retail level, based on local conditions, and on costs and management at the individual store, would be illegal for price-maintained items of the same brand. In our opinion, the costs of marketing would be influenced upward because the lessening of price competition would necessitate greater emphasis on nonprice competition, such as more extensive advertising and display, and elaboration of customer services. These added costs could be expected to be reflected in higher prices. Moreover, the spread of resale price maintenance would substantially facilitate price leadership and uniform pricing.

The provisions of these measures would constitute an affirmative endorsement and authorization by the Federal Government of resale price maintenance throughout the entire distributive process.

It is our understanding that the misrepresentation of goods by the seller with intent to deceive purchasers is already regulated under the Federal Trade Commission Act, so that this provision of the proposed legislation is unnecessary.

We recognize that many arguments can be made in favor of resale price maintenance. Nevertheless, in our judgment the business and economic case for a Federal resale price maintenance law has not been made and we accordingly recommend against enactment.

The Bureau of the Budget advised there would be no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

EDWARD GUDEMAN,
Under Secretary of Commerce.

FEDERAL TRADE COMMISSION,
Washington, April 18, 1962.

HON. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request of February 23 and 27, 1962, for a report and comment on House Joint Resolution 636 and H.R. 10335, 87th Congress, 2d session, a joint resolution and a bill, respectively, to amend the Federal Trade Commission Act, to promote quality and price

stabilization, to define and restrain certain unfair methods of distribution, and to confirm, define, and equalize the rights of producers and resellers in the distribution of goods identified by distinguishing brands, names, or trademarks, and for other purposes.

The subject joint resolution and bill are in substance "fair trade" measures and are substantially similar to H.R. 116, 87th Congress, 1st session, in that they too are designed to facilitate resale price maintenance. On June 8, 1961, the Commission submitted a report on H.R. 116 expressing its opposition to that measure. The Commission adheres to the views therein expressed and, accordingly, opposes the subject resolution and bill.

It is observed that paragraph (14) of the resolution and bill contains new matter not previously covered in similar legislation of this type. That paragraph provides that the exercise of any right or remedy provided in paragraphs (7) to (13) shall not be construed to be a violation of any of the Anti-Trust Acts, "and all such rights and remedies shall be also available to any owner of a brand, name, or trademark who in the resale of goods identified by such brand, name, or trademark shall compete, at any level of distribution, with any reseller offering such goods: *Provided*, That such owner shall sell such identified goods at any level of distribution at the price established for that level of distribution." These provisions apparently are designed to negate the effect of the Supreme Court's decision in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956) cited in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47 (1959), wherein it was held that a manufacturer with its own wholesale outlets cannot make fair trade agreements with independent wholesalers covering its own products, such horizontal agreements being violative of the Sherman Act.

The insertion of paragraph (14) in the resolution and bill, in our opinion, merely is an attempt to strengthen their price maintenance objective, and does not alter the Commission's opposition to their enactment.

By direction of the Commission:

PAUL RAND DIXON, *Chairman.*

N.B.—Pursuant to regulations, this report was submitted to the Bureau of the Budget on April 17, 1962, and on April 18, 1962, the Bureau of the Budget advised that there is no objection to the submission of this report from the standpoint of the administration's program.

JOSEPH W. SHEA, *Secretary.*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., May 2, 1962.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on companion measures House Joint Resolution 636 and H.R. 10335 to amend the Federal Trade Commission Act, to promote quality and price stabilization, to define and restrain certain unfair methods of distribution, and to confirm, define, and equalize the rights of producers and resellers in the distribution of goods identified by distinguishing brands, names, or trademarks, and for other purposes.

The provisions of House Joint Resolution 636 and H.R. 10335 are the same as those of Senate Joint Resolution 159. The views of the Department of Justice on this legislation are those expressed by Lee Loevinger, Assistant Attorney General, Antitrust Division, when he appeared on behalf of the Department before a special subcommittee of the Senate Commerce Committee on April 19, 1962. A copy of Assistant Attorney General Loevinger's statement is enclosed.

For the reasons given in the enclosed statement, the Department of Justice strongly recommends against enactment of this legislation.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

NICHOLAS DEB. KATZENBACH,
Acting Deputy Attorney General.

STATEMENT OF LEE LOEVINGER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

I appreciate the opportunity of appearing before this committee to present the views of the Department of Justice concerning Senate Joint Resolution 159, a bill bearing the title, "Quality Stabilization Act."

Though called a Quality Stabilization Act, it is in fact another price maintenance bill of the type which has had the so-called fair trade label for many years. It would amend section 5(a) of the Federal Trade Commission Act to provide a Federal system of resale price fixing. The Department of Justice strongly opposes enactment of this type of legislation, which would substantially alter our traditional free enterprise system and hamper the Nation's economic growth.

The bill would authorize the owner of a brand, name, or trademark to establish resale prices of goods bearing his identifying mark. It would accomplish this by authorizing the owner of the name or trademark to revoke the right of the owner of the goods to resell them if the owner of the goods has (1) used them "in furtherance of bait merchandising practices"; (2) knowingly sold them at prices other than the trademark owner's "currently established" resale prices; or (3) with intent to deceive, "published misrepresentations" concerning them.

Enactment of this bill would lead to the following undesirable consequences: (*a*) substitution of arbitrarily fixed prices for open competition; (*b*) placing sellers under Federal supervision for possible price infractions; (*c*) establishment of artificially held price lines tending toward a pronounced inflationary effect on the economy; (*d*) elimination of the States' right to determine their own policy in this field; (*e*) flooding of the Federal courts with price litigation; (*f*) reduction of the incentive for better quality, increased standards, or better values; (*g*) stifling of private initiative and depriving small distributors of their one essential competitive weapon—price; (*h*) conferring advantage on large manufacturers, who would be able to pay for private enforcement; and on large distributors who could use private brands to compete, at the expense of small manufacturers and distributors; (*i*) establishment of distributive margins akin to subsidies determined privately and paid for by the consuming public; and (j) fostering a climate favorable to agreements among competitors.

Senate Joint Resolution 159 carves out from antitrust coverage a vast segment of the Nation's economy. It would apply to "all acts and transactions in or affecting commerce which Congress may lawfully regulate," thereby apparently covering all aspects of wholesale and retail trade as well as most of manufacturing and other economic activity. It would exempt from the antitrust laws "the exercise of any right or remedy" given by this legislation. It specifically provides that it shall not be deemed to "modify or repeal" the Lanham Trademark Act, the Miller-Tydings Act, the McGuire Fair Trade Act, or any State "fair trade" law described therein. By largely abolishing price fixing as an offense under the antitrust laws, it weakens section 1 of the Sherman Act without even referring to that basic antitrust statute. Moreover, the bill is aimed at overruling decisions of the Supreme Court in *United States* v *McKesson & Robbins*, 351 U.S. 305, and *United States* v. *Parke, Davis & Co.*, 362 U.S. 29.

In creating a Federal system of resale price maintenance, this legislation would eliminate competition and curtail free enterprise at all levels of distribution. Competition has always been the lifeblood of the Nation's economy. It is competition that has brought about improved methods of production and distribution, new products, lower prices, all to the benefit of the American consumer, as well as to the business community. Without competition there is little incentive for improvement. And the sine qua non of economic competition is price competition; other aspects of competition are basically means of security price advantage without competive pricing.

The bill, in providing for the establishment of a reseller's price by the owner of the name or mark, would remove the reseller (whether wholesales, retailer, broker, or other distributor) from price competition with others selling the same product. Thus, effective competition among sellers would be largely eliminated. It would also serve as a means of curtailing competition among manufacturers.

If anyone sells goods bearing the name or mark after his right to use the name or mark has been revoked, under the bill he would be deemed to have committed an act of unfair competition, and would be subject to a suit for damages and injunctive relief in Federal court.

Price maintenance legislation would subject independent retailers to severe competitive disadvantage, turning them into distributive appendages of the

manufacturer, and depriving them of their right to exercise independent judgment in establishing prices. With a price established for him by the manufacturer, the retailer would be powerless to make adjustments to conform with his own selling situation. This price could be fixed high to cover all retailers efficient and inefficient, large and small, urban and rural, independent and chain, under an umbrella of protection. Conversely, it could deliberately be fixed low to drive out the small independent retailer, especially where the manufacturer is competing at the same level of distribution, as he would be specifically authorized to do by this legislation. Either way, the independent retailer would be barred from using competitive pricing. He could only sit and wait for customers, since personal initiative and incentive would be stifled.

It is difficult to envision any goods that would not be subject to price fixing under the bill, since its provision would encompass all goods "identified by a distinguishing brand, name, or trademark, either on the label, container, dispenser thereof, *or otherwise*." (Emphasis added.) Although in the past fair trade has been used less extensively in some fields, such as groceries, than in others, such as drugs, under this bill it could be extended to cover all products. Little of what the consumer buys is not "identifiable," hence such commodities as fresh produce, canned goods, clothing, medicines, appliances, gasoline, building materials, almost everything, even meat and potatoes could be "price fixed" at the discretion of the manufacturer, wholesaler, or processor merely by imparting knowledge of the owner's currently established price or prices to his customer-resellers. And, as a practical matter, it is likely that more and more goods would bear fixed prices, for the owner of a trademark or trade name would be susceptible to pressure from retailers to establish resale prices. Since many commodities are sold in conjunction with services, this legislation could also extend price fixing to many services.

The bill refers to "currently established resale price or prices." On the one hand, it would appear that the owner of a brand or mark could impose uniform, nationwide resale prices for his goods, ignoring differing costs of living in various sections of the country. On the other hand, he apparently would also be free to establish several different prices for any item of merchandise. It might be, therefore, that by establishing different prices, a manufacturer could favor some retailers over others. This would be contrary to the philosophy of the Robinson-Patman Act. But the bill is silent as to what effect it is intended to have on that act, which prohibits discriminatory pricing.

No sales would be exempt from this legislation—including sales to governments, Federal, State, and local. This would not only raise the cost of governmental procurement, but would devitalize the entire system of competitive bidding for Government contracts.

That elimination of price competition would result in higher prices cannot be doubted. Basic to the fair trade and quality stabilization concepts are higher prices to provide higher margins for sellers. That is the aim of this type of legislation. Prices would be fixed at high, noncompetitive levels calculated to yield what the traffic would bear. Consumers would pay the bill. Markup increases over the broad range of products would accelerate price advances through each distributive level with ultimate inflationary results.

This legislation is inconsistent with the purposes of the President's trade agreements program. Price supports are provided for domestic products at a time when the President is seeking to lower tariffs to promote freer trade by permitting entry into domestic markets of imported merchandise. Domestic goods through such rigidly held supports could be at a relative disadvantage in competing with imports.

Senate Joint Resolution 159 gives advantage to large manufacturers and large merchandisers. Price maintenance affords built-in protection for the large manufacturer, whose goods bear an accepted brand name, and for the large retailer, who has sufficient sales volume to profit by the use of private brands. For example, many times a fair trade arrangement serves as a means for the manufacturer to secure the cooperation of retailers of this product as the latter agree to push a particular brand when price protection and margins offered are satisfactory. The small manufacturer is usually not in a position to persuade retailers to carry and promote his particular product in perference to the heavily advertised national brands of his larger competitors. Distributors, with a price established for them by the manufacturer, are powerless to make adjustments to conform with their particular selling situation. Notwithstanding that the competitive situations confronting them are widely different in various places and

circumstances they must sell at a fixed price, usually a uniform national price. Independent distributors, without a private brand to advertise extensively, are under a handicap in meeting competition of widely advertised brands of large distributors. They cannot reduce prices on the nationally advertised price-maintained products to meet private brand competition. Absent price maintenance they can use nationally advertised products to compete, not only with other sellers of such products, but also with private brands. Finally Senate Joint Resolution 159 places the small independent wholesaler and retailer at the mercy of the manufacturer. Regardless of the needs or desires of the retailer or wholesaler the price is fixed, and therefore the retailers' and wholesalers' profit margin are fixed by the manufacturer in terms of his own economic advantage.

Advocates of price maintenance by legislation have been most active in seeking to freeze distribution channels by making sales below established minimums illegal. They are opposed to new mass distribution methods and to any change in established distribution channels. No ground exists for public policy restricting the developments of new methods of distribution. In a number of cases these have reduced the cost of the Nation's distribution. The efforts of retailers and wholesalers, as well as some manufacturers, to eliminate price cutting follows the classical reaction of the distribution industry to all new entrants. Traditional retail functions and merchandising lines are also shifting—drugstores have taken over candy and hardware; supermarkets have entered drugs, cosmetics, apparel, and hardware; discount houses have grown to department store dimension from their basic appliance and electric lines. Thus the manufacturer finds widening channels for his mass output.

The resulting changes—the lowering of the costs of distribution and the corresponding rise in efficiency—are precisely that economic result which effective competition, the goal of the antitrust laws, envisions. Progress and growth on the manufacturing and distribution levels of the economy is not possible through restricting opportunities for newcomers or by sheltering the vested interests of established firms in existing price structures and methods. Businessmen, generally recognizing the dynamics of manufacture and distribution in an ever-adjusting economy, adopt newer forms to compete effectively.

Further, to meet cyclical maladjustments in the economy under a free enterprise system, monetary and fiscal policy seem to be the most flexible instruments. But monetary and fiscal policies of the Government cannot operate effectively where prices are kept inflexible in the face of sagging demand. Attempts at readjustment under such conditions only develop further distortions. The economic adviser to the Federal Reserve Board has put the problem succinctly:

"An economic system cannot be expected to operate on the principle that a seller can always obtain any price he wishes to ask for his product. In order to maintain sustainable economic growth, it is the task of the seller to adjust his prices or his product so as to stimulate demand. Otherwise it is to be expected that resources will be allocated to other uses, but this is a time-consuming process and results in unemployment." [1]

Resale price maintenance is not conducive to an environment in which sellers adapt to shifting consumer demands. Such rigidity in the economic system makes for idle resources and retards economic growth. Antitrust policy is directed to widening the areas in which market forces dominate and to the minimization of monopolistic decision.

Imposition of this Federal system of price fixing would destroy the right of the States to decide whether or not fair trade should exist within their borders. Four States have never adopted fair trade laws; 19 States have declared fair trade laws to be contrary to their State constitutions, either in whole or in part: 31 States have allowed only minimum resale prices to be set, while 15 allowed "absolute" prices. State courts have also repeatedly held that these fair trade laws are price-fixing legislation and that, as such, they delegate legislative powers to private individuals. This bill now would override such court declarations, as it would also override State antitrust laws. As the attorney general of Texas said with respect to a similar bill introduced in the 86th Congress:

"To sum up, this bill invades an area that has heretofore been reserved to the States. It would, in effect, preempt the area and nullify a large portion of the area covered by the Texas antitrust laws under which we have operated since the early 1880's." [2]

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[1] Letter to the Washington Post and Times Herald, Mar. 12, 1959, p. A–25.
[2] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., 1st sess. (1959), "Fair Trade," p. 494.

However, it is not clear what the status of State laws would be under this legislation. While it would impose a Federal system of fair trade, it would also leave State fair trade laws in effect. The ensuing uncertainty where State and Federal law conflict, as for instance whether minimum prices under State law or established prices under this legislation would prevail, would give rise to endless litigation.

The question must be raised whether this legislation would not require enforcement by the Federal Trade Commission. It would amend section 5(a) of the Federal Trade Commission Act, which declares unlawful unfair methods of competition and unfair or deceptive acts or practices, and specifically empowers and directs the Commission to prevent such acts or practices. It may be, therefore, that this legislation would create a situation involving Federal regulation of retail pricing.

The Department of Justice has had over 60 years' experience in preventing unreasonable restraints on competition. For some 30 years it has watched the operation of resale price maintenance laws. The uniform judgment of all those who have had responsibility in enforcing the antitrust laws has been that resale price maintenance legislation is unworkable, does not accomplish its own objective, and is generally harmful to the economy and the public interest.

Senate Joint Resolution 159 would impose price control as affirmative Federal policy. By making price competition an act of "unfair competition," it conflicts with the basic philosophy of the American free enterprise system. It would hand carte blanche authority to private persons to establish prices by fiat. If such blanket authority to fix prices were conferred on a governmental entity, there would be universal protest, and justifiably so. It is equally undesirable to confer that right on private persons.

Senate Joint Resolution 159 destroys common law property concepts by enabling a person to sell his property and still maintain significant control over it. By increasing the general level of prices, it would levy an indirect tax on the general public. By creating a large exemption from the antitrust laws, it would seriously weaken antitrust enforcement generally.

The Department of Justice, therefore, strongly recommends against enactment of this legislation.

SMALL BUSINESS ADMINISTRATION,
Washington, D.C., June 7, 1962.

Re House Joint Resolution 636, H.R. 10335, H.R. 7685.

HON. OREN HARRIS,
Chairman, Committee on Interstate, and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Further reference is made to your letters of February 23 and 27, 1962, and to your letter of July 25, 1961, requesting my comments on the captioned resolution and bills.

One of the principal purposes of each of these measures is to strengthen the right of manufacturers of trademarked products to stipulate, under certain conditions, the prices at which wholesalers or retailers can resell such goods. Such resale price maintenance, commonly called fair trade or quality stabilization, has long been permitted under statutes enacted by nearly all of the States pursuant to a special exemption (Public Law 542, 82d Cong.) from the Federal antitrust laws.

Although these local laws differ in some respects, they have one feature in common: a price floor established by a supplier in a contract signed by one retailer binds all other retailers in the same State provided they are notified of the existence of the contract. Notification to nonsigners is usually printed on the merchandise and contained in price quotations and in contracts relating thereto.

However the nonsigner provision, as it is called, has been invalidated in a large number of States by decisions of their courts that it violates the due process clause of the respective constitutions. In these jurisdictions manufacturers no longer have any feasible means of compelling the observance of their price stipulations. As a result such stipulations are ineffective in a wide area of the country. Indeed, many manufacturers which formerly controlled the resale price of their products have discontinued all efforts to do so.

The evident purpose of all the captioned measures is to overcome the effects of these State court decisions by resting the right of a supplier to establish resale-

price floors on Federal, rather than State, law. Although the proposals differ in their details, each is based on the theory that a manufacturer of a trademarked item retains a property interest in it and in the goodwill symbolized thereby. Each of the bills contains a provision authorizing such a manufacturer, under certain conditions, to establish a resale price for his product and making it unlawful for any retailer to disregard it. Violators could be enjoined or compelled to pay damages.

From my standpoint, of course, the most important aspect of the captioned measures, and of all other proposals to strengthen resale price maintenance, is the effect they would have on small business. There is a perplexing conflict of opinion on this question. Three years ago, in a report accompanying a bill similar to the measures we are now considering, your committee made the following findings:

"The reported bill is essential to the survival of hundreds of thousands of small independent businessmen—the corner druggist, the grocer, the jeweler, the hardware merchant, the electric appliance dealer, the bookstore dealer, etc. These small merchants are being hard pressed by competitors which sell highly advertised, nationally branded merchandise at very low prices, often below cost, in order to drive other merchants out of business or which use such merchandise as 'bait' in order to attract customers with the hope of selling them other items at high prices" (H. Rept. No. 467, 86th Cong., 1st sess.).

On the other hand the Department of Justice and other opponents of resale price maintenance insist that it is not beneficial to small business concerns and that it may be harmful to them. The argument is made, for example, that this system of pricing gives mail-order houses, department stores and other large retailers an advantage over small retailers of nationally branded products. It is said that the latter are prevented, by the restrictions imposed upon them by the manufacturers of such products, from lowering their prices to meet the competition provided by the private brands of the big outlets.

In the consideration of the captioned measures I have learned that in the past the Small Business Administration has undertaken no study of its own concerning the significance of resale price maintenance to the welfare of small business. Accordingly, I have instructed my staff to prepare, as quickly as possible, plans for an SBA survey to ascertain the facts on the described subject. As I have indicated, the form and scope of this study and other details relating to it have not yet been determined and will be announced later. Pending its completion I wish to reserve my position respecting the merits of resale price maintenance and of all proposals, including the captioned measures, to strengthen it.

For the foregoing reasons I do not plan to appear as a witness at the hearings to be held concerning the captioned bills, beginning June 12, 1962, by your Subcommittee on Commerce and Finance. You may be sure, however, that we will follow these proceedings with close attention.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the administration's program.

With kind regards, I am,

Sincerely,

JOHN E. HORNE, *Administrator.*

Mr. MACK. The first witness will be the Honorable Ray J. Madden, of Indiana, who is the author of H.R. 10335.

Mr. Madden, we are very happy to have you with us today in behalf of your legislation.

Mr. MADDEN. Thank you, Mr. Chairman.

Mr. HARRIS. Mr. Chairman, it has been traditional that prepared statements are included in the record and the witness is permitted to give a résumé.

We have gone on the presumption in this committee over the years that this is done by unanimous consent.

The distinguished chairman of this subcommittee has observed that on many occasions I have simply acknowledged the request of the witness and had his statement included in the record.

In the Legislative Reorganization Act of 1946 there is a provision requiring a witness before congressional committees to file his prepared statement in advance of the hearings in order that the staff members of the committees involved may have a chance to analyze it. This law also provides that the witnesses should limit their oral statements to brief summaries.

I would like to ask my distinguished colleague and friend, the chairman of the great Judiciary Committee, about it. I wanted to bring this up for a long time and if you, Mr. Celler, have had a similar problem and would like to comment for the record I would be glad to have your comment.

Mr. CELLER. It is a rule which has been more honored in the breach than in the observance. I find it rather difficult sometimes to enforce that rule because so many witnesses come before the committee and do not seem to have knowledge of the rule. It takes them by surprise when you tell them that they should have had their statement presented to the committee some time before, so you are in a rather strange dilemma. You either have to forestall their appearance and testimony or you have to waive the rule, so in most instances, as a matter of grace, I have been more or less compelled to waive the rule.

Mr. HARRIS. That has been the situation with this committee. Some day I will raise the question with this committee if it keeps on because I think it is a good rule. I would like to have that rule followed this morning with Mr. Madden.

Mr. MADDEN. I shall be glad to read the statement.

Mr. HARRIS. It also has been our experience that we save time by reading the statement rather than giving a résumé.

Mr. MADDEN. I shall proceed to read.

Mr. HARRIS. I want to say we are glad to have Mr. Madden, the sponsor of one of these resolutions, before us. I am quite familiar with the consideration which has been given to these matters heretofore.

Mr. CELLER. I don't know whether the rule is efficacious because frequently, even when statements are submitted in advance, members neither have the inclination nor the time to read the statements because there are so many of them.

I wonder whether or not the rule has served its purpose.

Mr. HARRIS. I don't know, but I think if it comes to a point where a chairman has to decide, I think we have to decide on the letter of the Rules of the House.

I raised the question at this point, Mr. Chairman, in order to make this additional comment at this time and in order that everyone be advised of what the rule is.

The hearing today will be devoted to Members of Congress who desire to appear, not only Members who are sponsors of resolutions but also others who want to be heard.

As chairman of the full committee I have allocated this week for this hearing and I have made available to this subcommittee the hearing room. Since we have had this subject matter discussed thoroughly and have an exceedingly large record on it, I see no reason to take weeks going through it again.

I have discussed it wtih the subcommittee chairman. It is the intention that 2 days, that is Tuesday and Wednesday, will be given

to the proponents of this legislation and then Thursday and Friday will be given to the opponents.

I think the proponents and opponents should have equal time.

I make this statement at this time, Mr. Chairman, in order that everyone may be put on notice that there will be a limitation of time. Therefore they should be prepared to file any lengthy statements they have and give a brief résumé of them.

Mr. MACK. Thank you, Mr. Chairman.

Mr. Madden, we have already agreed to have you file your statement. You may proceed to read your statement or give a résumé of it, whichever you prefer.

Mr. MADDEN. Thank you, Mr. Chairman.

STATEMENT OF HON. RAY J. MADDEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. MADDEN. Mr. Chairman and members of the special subcommitee of the House Committee on Interstate and Foreign Commerce, I am grateful to the chairman and members of this committee for your decision to hold hearings on the quality stabilization bill. Your cooperation demonstrates that you are much concerned over the devastating methods of merchandising in recent years that is causing great damage to the manufacturers, retailers, and consumers throughout the country.

Basically, the quality stabilization bill offers a major step in curbing dishonest practices that are misleading the consumer in merchandise values. It spells out bait advertising, deceptive pricing, and published misrepresentations of the product as reasons why a manufacturer may protect the property rights in his brand name or trademark.

The public will be helped by the enactment of the quality stabilization law, since the established price and quality symbolized by the brand name will be a standard from which it may judge the competitive values of products. The consumer will be guarded against the loss-leader operator who uses the honored brand name or trademark to build store traffic at the expense of his more honest competitors, while recouping his loss at the same time on overpriced, inferior, and "blind" merchandise.

If the owner of the trademark elects to come under quality stabilization, the retailers and distributors must cooperate with the owner or manufacturer in maintaining the stabilized price of that trademarked product. This enables the manufacturer to continue to build quality into his stabilized brand name product. If the retailer violates the provisions of the quality stabilization law, the brand name owner can revoke the retailer's right to use the brand name. If the distributor violates the revocation order, the brand name owner (the manufacturer) can then institute a Federal civil suit for damage. This legislation will call for no Government bureaucracy or department to supervise or enforce the quality stabilization law. The law is 100 percent optional and the manufacturer, retailer, wholesaler, or consumer can choose to come under or stay out of quality stabilization. It provides a wholly meritorious and worthwhile opportunity for quality products to be distributed through quality-conserving resellers.

Since its introduction last January 1961, the merits of this proposed

legislation have come to the attention of thousands upon thousands of manufacturers, distributors, retailers, and consumers.

This bill is not fair trade legislation and is not a price-fixing measure.

The quality stabilization bill has now become one of the most widely publicized and acclaimed measures that await action in this session of Congress. In our long and critical struggle against communism, the American system of free enterprise must be our major weapon. Business failures in recent years and the growing lack of protection for consumer purchases must be given consideration by this Congress. The marketplace is rapidly becoming infested with the so-called fast buck merchandisers.

In giving the manufacturer the optional right to control his trademark, safeguards are also established for the distributor, the retailer and, most important of all, the consumer. It is imperative in considering the bill, that you fully realize that its use by the manufacturer, retailer, and consumer is optional. No product can be stabilized under the proposed quality stabilization law unless competitive products are available to the consumer.

That is one of the distinguishing features of this legislation as against fair trade, and so-called price fixing.

And sale or purchase of a product stabilized under the proposed law is also completely voluntary on the part of the distributor, the retailer, and the consumer. It is of fundamental importance that this bill be recognized as one not aimed at harming any legitimate business, but as a measure of economic benefit to all.

The Senate Small Business Committee has reported that small business failures (bankruptcies—businessmen giving up the struggle for survival) climbed in 1960 to the highest point since 1933 and the great depression. The House Small Business Committee, in its December 16, 1960, report entitled "Status of Small Business—1948–58," 86th Congress, 2d session, made this frightening statement:

> Most small retailers discontinue business without going through bankruptcy. This explains why, of the 139,000 who discontinued business in 1959, only 6,873 showed up among the business failures.

There are about 2 million retailers in America; 88 percent of them operate in only one location from one store; 70 percent individually own their own businesses. These are not huge outfits; over 75 percent have annual sales under $100,000.

There are 165,000 merchant wholesalers in the United States; 91 percent of them are active owners of unincorporated businesses; 71 percent operate from only one building.

It is the well-known brand names, brands with a reputation for a reliability, that are taking it on the chin. If these brands did not have such an excellent reputation, do you suppose they would be of interest even for 1 minute to the discounter who needs a traffic builder for his kind of selling?

We cannot permit the further degeneration of the brand-name system of distribution. We must arrest the growing rate of failure of small business in this country. We must give the incentive to the manufacturer in this country to build toward excellence, and we must protect the consumer from junk merchandise.

Quality stabilization covers specific areas in which a manufacturer can control, that is, prevent the unfair use of his own property, his trademark, by the reseller. These areas are:

(1) International misrepresentation as to make, model, size, age, etc.;

(2) Bait and switch merchandising tactics; or

(3) Price.

To repeat, it is not compulsory that the brand-name owner use the law.

The manufacturer who does elect to use the quality stabilization law will publish a specific retail price at which his trademarked product must be sold. He has this right so that he may protect the quality of the product, the goodwill of his brand name, the ethical reseller, and the consumer. This is not to say that the manufacturer cannot change his specific price. Not at all. Competition is promoted, not restricted, by the quality stabilization bill, and the interaction of competitive forces will insure that the manufacturer's price represents fair value or else that manufacturer will be forced out of his business. Any price established under this law will be at the manufacturer's peril. This is the way the free enterprise system should function.

If a retailer knowingly violates the published policy of the manufacturer by engaging in any one or all of the three specific practices named in the bill—price deviation, bait and switch tactics, misrepresentation—then the manufacturer may revoke the right of that offending retailer to make any further use of the manufacturer's name, brand, or trademark.

The quality stabilization bill is not a one-way street. It imposes an obligation on the manufacturer as well. The bill states that lack of due diligence in revoking the rights of competing resellers known to the trademark owner to be committing similar acts of unfair competition will constitute a valid defense against any action brought under this law.

With the enactment of the quality stabilization bill, the reseller and public will know where each manufacturer stands as to policy and quality consistency. The manufacturer no longer will have the convenient excuse that he cannot protect good resellers against unfair competition.

The quality stabilization bill contains none of the usual fair trade language. There is no provision for contracts as the bill is wholly predicated on the owner's property rights in his good name; there is no dependence on a nonsigner clause as is the case with fair trade. The essential difference is that fair trade enforcement is to compel a dealer to raise his prices for a product, while under the quality stabilization bill, the action is one akin to trespass—to stop a reseller from abusing a manufacturer's property right in his trademark.

The quality stabilization bill simply provides that when a trademark is abused, the trademark owner may deny that unfair reseller further use of the brand name or trademark. Essentially, it is a confirmation by Congress of the unanimous decision of the U.S. Supreme Court in *Old Dearborn Distributing Co.* v. *Seagram-Distiller's Corp.*, 299 U.S. 183 (1936), that the manufacturer possesses property rights in the goodwill symbolized by his trademark. The bill describes how

the manufacturer may protect his trademark as it moves along the channels of distribution.

The quality stabilization bill leaves the Sherman Act intact. Any group of manufacturers or wholesalers or retailers who abuse the quality stabilization bill to effect illegal collusive price fixing between themselves would be courting the same prosecution as the heavy electrical firms and their executives experienced not long ago in Philadelphia.

To underscore that the quality stabilization bill will promote competition, it must be emphasized repeatedly that the manufacturer alone must make the basic marketing decision—whether to stabilize his price, as a means of restoring and improving quality, or to rely primarily on price alone to attract customers. It is, after all, his brand and his reputation which is at stake. Only he can make the decision.

Wholesalers and retailers will be free, too, to determine whether they wish to handle products of stabilized quality or a competitive unstabilized one. They may elect to handle top brand lines which are stabilized and others on which they can vary the price. It is their decision. If they elect to handle the quality stabilized brand, they must respect the law and the manufacturer's established policy. This means that the reseller may not abuse the brand name by misrepresentation as to make, model, size, age, or other details of the quality stabilized brand, by bait-and-switch merchandising techniques, or by selling that brand name product at other than the manufacturer's specific price.

This legislation safeguards the consumer. This committee is not unmindful of the situation that results when an unprincipled retailer can take advantage of a product by running a loss-leader ad. For every dollar spent by the misguided customer who is brought in on account of this ad, sacrificing a brand name or a trademark of some producer, that customer spends an estimated $9 for inferior products at the regular or higher price. Now, what happens? It does not take long until that honored product loses customers. Soon the loss-leader advertiser drops the brand name product and picks up another quality product to temporarily pack his store with unsuspecting customers. It is operations of this kind that the quality stabilization bill will control by protecting the customer, the producer, and the small retail man.

We need protection for the small retailer, the consumer, labor, and for the man who invents a product or spends his adult life and great sums of money to establish a brand name or trademark.

Enactment of the quality stabilization bill will result in availability of products in which the public can have confidence—confidence in their stabilized price and in their quality. Customers can buy that which they seek: quality and price, or price alone. The retailer, by offering both quality stabilized and unstabilized brands, can give the consumer an excellent mix of durable, high-quality products and products of lesser quality whose prices fit his pocketbook or his limited needs.

I feel confident that there will be many brands, made by reputable manufacturers, which will not be stabilized even though some of their brands are stabilized. The quality stabilization bill will affect dis-

count merchants only as to the products the manufacturers place under quality stabilization and then, only as to the brand name thereof. On those products the manufacturer will have the legal and equitable right to protect his property. But the discounter is optionally free to handle quality stabilized products along with merchandise that he does not elect to come under quality stabilization.

It is not the purpose of the quality stabilization bill to put anyone out of business. Indeed, it is my conviction that it will reduce the number of small businesses whose owners find it necessary to liquidate. I predict that enactment of the quality stabilization bill will result in a drastic drop in the number of small business failures.

Obviously, the buying public will benefit from this bill. For the first time in a number of years, the consumer will have a standard against which to measure quality. The quality stabilization law will also give protection to the consumer against entrapment and unwise purchase of the loss-leader merchant specializing in bait-and-switch tactics.

The opponents of this legislation seem to be motivated by marketing forces who are the principal offenders against the historical retail methods and practices that have in the past, enabled legitimate retailers and manufacturers to build successful marketing economy second to none in the world. Their strategy appears to connect quality stabilization legislation by smear propaganda through identifying it with fair trade and price fixing. Anyone who reads and studies H.R. 10335 can easily determine that no provision in the bill identifies it with fair trade or even remotely with price fixing. The bill creates no Federal enforcing department and its provisions are 100 percent optional with both the manufacturer, retailer, and consumer.

In urging speedy consideration of this bill by this committee, I direct your attention to the fact that unrestrained price slashing is rapidly disabling labor, industry, resellers, and the public. Our entire economy will continue to deteriorate at a time when leading economists and statesmen agree we need instead economic growth to strengthen our Nation for survival.

I represent the great industrial Calumet region of Indiana. In recent years purchasers and small retailers have been asking me what can be done to reestablish confidence in retail marketing. Unemployment in my area is critical.

Enactment of this quality stabilization legislation will contribute more toward restoring employment than any other legislation that can be enacted by Congress. When a manufacturer is forced to make 15 men do the work of 20, and is forced to employ cheaper and less skilled labor as well as inferior materials, both American labor and the American consumer are injured where it hurts most. Small manufacturers of trademarked products have been forced to close their factories or downgrade the quality of their products to suit the high pressure, falsely advertising retailers, as a means of staying in business. This type of retailer may be few in number but they are powerful and heavily financed, and growing in size and number every day.

Enactment of the quality stabilization bill will give manufacturers the confidence to build better products instead of cheaper products with poor quality. This bill will give the bargain seeker an oppor-

tunity of knowing what is a bargain by placing a standard of value as a gage.

This is strictly nonpartisan legislation. Ten U.S. Senators of both parties have cosponsored quality stabilization, and 10 Members—from both parties—have introduced the bills in the House of Representatives.

I am hereby submitting the list of approximately 70 national trade and professional organizations that have endorsed this quality stabilization bill:

Quality Brands Associates of America, Inc.
National Retail Hardware Association.
National Office Machine Dealers Association.
Independent Garage Owners of America.
National Association of House to House Installment Cos., Inc.
National Sporting Goods Association.
National Association of Retailer Clothiers and Furnishers.
National Retail Furniture Association.
Retail Jewelers of America.
Master Photo Dealers & Finishers Association.
National Appliance & Radio-Tv Dealers Association.
National Wholesale Jewelers Association.
National Stationery and Office Equipment Association.
Wholesale Stationers' Association.
Toy Wholesalers' Association of America.
Billiard and Bowling Institute of America.
Gift & Decorative Accessories Association of America.
Marine Manufacturers Safety Equipment Association.
Sporting Goods Jobbers Association.
American Fishing Tackle Manufacturers Association.
Archery Manufacturers & Dealers Association.
National Wholesale Hardware Association.
Fountain Pen & Mechanical Pencil Manufacturers' Association, Inc.
American Watch Association, Inc.
Watch Material Distributors of America.
Automotive Service Industry Association.
National Association of Bedding Manufacturers.
The National Association of Shirt, Pajama & Sportswear Manufacturers.
National Industrial Distributors Association.
Christian Booksellers Association.
National Congress of Petroleum Retailers.
National Shoe Manufacturers Association.
Wallcovering Wholesalers Association.
National Small Business Association.
American Research Merchandising Institute.
American Retailers Association.
National Art Materials Trade Association.
National Shoe Retailers Association.
Motor and Equipment Manufacturers Association.
Northamerican Heating & Airconditioning Wholesalers, Inc.
National Association of Women's & Children's Apparel Salesmen, Inc.
American Watch Manufacturers Association.
National Bicycle Dealers Association, Inc.
National Audio-Visual Association, Inc.
National Office Furniture Association, Inc.
National Outerwear & Sportswear Association.
National Frozen Food Association, Inc.
The Automotive Warehouse Distributors Association, Inc.
National Association of Glove Manufacturers.
American Association of Small Business.
National Marine Products Association.
National Association of Retail Druggists.
Paint & Wallpaper Association of America, Inc.
Retail Tobacco Dealers of America.

National Association of Tobacco Distributors.
National Retail Farm Equipment Association.
American Pharmaceutical Association.
National Conference of State Pharmaceutical Association Secretaries.
Metropolitan Cities Drug Association Secretaries.
National Association of Chain Drug Stores.
Toilet Goods Association.
American Booksellers Association.
National Wholesale Druggists Association.
Automotive Electric Association.
Corset & Brassiere Association of America.
Proprietary Association.
The Independent Shoemen.
National Candy Wholesalers Association.

Mr. MADDEN. If there are questions I shall be glad to answer them.

Mr. MACK. You have made a very fine statement, Mr. Madden.

It occurred to me that this practice of "bait" advertising has caused many of our customers to go into the big supermarkets to take advantage of the low prices advertised for American-made products, and trade name products, and as a result, after they are in there and subjected to high pressure tactics of the salesmen in some of these big supermarkets, they end up purchasing foreign-produced merchandise which have no trade name at all or no prominent trade name.

Mr. MADDEN. I have had experience myself personally on that very thing. Here about a year ago I went down to one of the stores in Washington in answer to an ad on a particular product which I wanted.

When I got in there I discovered that the particular product I wanted was completely gone except for a few offsizes. These of course I didn't want.

Then before I left they took me over to another counter where they had some excellent products which were made in Japan which were just 50 percent cheaper than what I went down there to buy.

In my office last week I got a letter from a retired retailer in Virginia who used to be in the clothing business. He was astounded to find a quality brand suit advertised, a great big ad, in the local paper at $38, and the price ordinarily was $72.

He said "Out of curiosity I will get there early and see what this is all about."

When he went down there he discovered there were five off-sized suits which had been in the store for a long time which they couldn't sell, but they used the brand name to get the people in the store.

Five men's suits were the only merchandise they had in stock which prompted that big ad in the paper, five off-sized suits of that brand name.

Therefore, Mr. Chairman, this legislation is one of the musts in this session of Congress. I can go up and down the streets in my home district, and see stores locked up, but you can go to the edge of town and see a ramshackle building thrown together covering acres, and see people out there buying in 9 cases out of 10 junk merchandise.

I was home last Friday and one woman said "I heard about your stabilization bill. I hope it is passed. Two years ago, I thought I was getting a bargain on a washing machine that was reduced to $137. I have already paid about $200 since I bought that machine for repair parts for the machine."

I think it is about time for the Congress to protect the buying public.

Mr. DINGELL. This is an excellent point. Will you tell us how this bill will cure this problem you refer to?

Mr. MACK. If you will wait just a moment, Mr. Dingell, I shall recognize you in a moment. I wanted to follow through with the same point I raised, and that is that the bill is designed to protect the consumer, protect the producer-manufacturer, and it also would have the additional benefit of protecting the jobs of workers in this country. At least it would assist in this job. This is quite a routine procedure, as I understand it, in the supermarkets. You walk in and buy an American-manufactured product which has been advertised at a ridiculously low price. After you get into the store you are ushered over into the foreign-manufactured area, either German or Japanese products which they ultimately try to unload on the consumer.

I want to commend the gentleman.

Mr. MADDEN. I didn't hear you, sir.

Mr. MACK. I want to commend the gentleman for introducing this proposal. I think this is very valuable to America.

Now I shall be glad to recognize the gentleman from Michigan, Mr. Dingell.

Mr. DINGELL. I was delighted to hear this statement. I wonder if the gentleman can tell us how this bill will accomplish this thing.

How will this bill outlaw bait merchandising of the kind you alluded to in your statement?

Mr. MADDEN. It will not outlaw bait merchandising. I am glad you asked the question. It will not outlaw bait merchandising but it will protect any manufacturer who has a quality article who elects or chooses to put his quality article under the quality stabilization legislation. It will protect that quality article.

The retailer can continue in the future, as he has in the past, to sell foreign goods, junk, or whatever he wants to sell, and he is limited only to a quality manufactured product that the manufacturer elects to keep at a quality price so that he can put out a quality article.

Let me give you an example of personal experience, Mr. Dingell. For several years I bought a special brand sock from a clothing store in Gary. It was a brand-name sock. I used to get wear for 2 or 3 years. I used to buy them in dozen lots. I paid not a big price but a fair price.

I discovered in the last 4 or 5 years the heels would be worn threadbare after a few months. They had become shoddy socks of inferior quality.

I told the store owner that I wouldn't buy any more of the socks.

He asked, "Why?"

I said, "They are not what they used to be."

He agreed.

The retailer told me that the loss-leader merchants had run the Denver factory out of business. Because of loss-leader practices on that brand of sock, legitimate merchants wouldn't handle it. Distribution and sales declined. Quality in the product went down and down, as the manufacturer cut costs to try to stay in business. Now he's out of business, the quality brand has gone, all because the manu-

facturer was forced to compete with himself on a loss-leader basis from store to store.

Then, as this retailer told me, people came in to buy that sock and would say, "I bought that out at such and such a place for half your price."

What happens? The manufacturer loses. He not only loses the downtown legitimate retailer but he also loses the fly-by-night merchandiser who has dropped it after he has run down the price as bait to get customers into the store.

Mr. DINGELL. The gentleman is an old friend of mine, but I shall ask him to be responsive to my question, because I have a limited amount of time. I am sure the witness wants to cooperate with the committee. I still want to know, How will this bill outlaw bait advertising? As a matter of fact, it would not be violative under this bill for a retailer to bait-merchandise a commodity which he did not have on his shelf, would it? In other words, if I were to engage in the kind of bait merchandising the gentleman has alluded to, I could advertise Longines watches or GE refrigerators or any of the so-called commodity brands, Scotch tape, Anderson windshield wipers, or anything else, without having a single one of them on my shelf. Under this bill, is that not correct? The only thing the manufacturer could do would be to revoke my right to sell that particular commodity. Is that not correct?

Mr. MADDEN. Yes. If the retail seller continues bait advertising and false statements on a brand-name article, the law will give the manufacturer a civil suit in Federal court for damages.

Mr. DINGELL. Let us go on.

Mr. HARRIS. Before you leave that, I think the record should be as clear and complete as we can make it. Should such a condition as that exist and such advertising be continued deliberately, obviously it would be deceptive advertising and, therefore, the Federal Trade Commission could proceed against the violator under section 5 of the Federal Trade Commission Act.

Mr. MADDEN. This bill would handle that, also, including the Federal Trade Commission.

Mr. DINGELL. If the Federal Trade Commission Act handles it, why do we need language on that point in this bill?

Mr. MADDEN. This will give the manufacturer a direct protection on his own property. He can protect it because the Supreme Court in two different decisions has held that just because a manufactured product leaves the factory and goes on the shelves of the retailer, he does not lose his property interest in the trademark or in the brand name.

Mr. DINGELL. The heart of this bill is on page 4, lines 4 through 14, is that correct? Is there anything else in this bill which the gentleman feels must be in the bill besides the language which is contained there?

Mr. MADDEN. Of course, it provides that the retailer has 10 days to return the property if he is violating the law. Section 10 sets out the manufacturer's recourse in civil damages in Federal court. Section 9 provides for repossession of goods from a retailer who has violated the quality stabilization bill. Then, as you say, lines 4 to 15

on page 4 provide for bait advertising and deceptive advertising and misrepresentation.

Here is another thing which I failed to mention. The manufacturer cannot invoke this quality stabilization law unless there are other goods usable for the same general purpose.

Section 8:

> When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark, the right of any person to employ such brand, name, or trademark in effecting resale of goods so identified may be revoked—

if he violates provisions of quality stabilization and so on.

Mr. DINGELL. Would you define for the committee what the language "for the same general purpose" means?

Mr. MADDEN. To what paragraph are you referring?

Mr. DINGELL. The language I just read, page 3, line 19, "for the same general purpose."

Mr. MADDEN. Suppose you want to buy a washing machine. If there is not any other washing machine in the market for sale, of course the retailer cannot violate the law because the manufacturer could not use the quality stabilization law.

Mr. DINGELL. Say there are two brands of washing machines, can both manufacturers of washing machines then fix prices under this bill?

Mr. MADDEN. If these brands are not competitive to each other, both usable for the same general purpose, they cannot; no.

Mr. DINGELL. In other words, if there are two manufacturers of washing machines, they both cannot fix——

Mr. MADDEN. Oh, yes; they can. If there are two brands of washing machines which are under quality stabilization but there is only one available in a particular area, this bill would not apply.

Mr. DINGELL. I say, if there are only two manufacturers of washing machines in the United States, only two lines of washing machines available to the public, can price fixing be engaged in under this bill?

Mr. MADDEN. It is only by the wildest imagination that one could assume there would be only two brands.

Mr. DINGELL. I am just asking the question.

Mr. MADDEN. If the manufacturer of washing machines is under quality stabilization and in this area there is not any other washing machine to buy, it would not come under the law.

Mr. DINGELL. Let us take a pharmaceutical product now. There are one or two manufacturers of certain pharmaceutical products. Does this language permit price fixing then?

Mr. MADDEN. If the drug manufacturer puts a competitive brand product under quality stabilization, that product is protected.

Mr. DINGELL. Let us say there is only one manufacturer of a new remedy for arthritis.

Mr. MADDEN. That could not come under this law.

Mr. DINGELL. Would that be price fixing under this bill?

Mr. MADDEN. They could not come under this law if there were only one article or product which could be used for that general purpose.

Mr. DINGELL. Let us say there are only two of a particular remedy for the treatment of diabetes.

Mr. MADDEN. If they both could be used for the same general purpose, if they are competitive, they both can come under quality stabilization.

Mr. DINGELL. Let us say there are two.

Mr. MADDEN. If there are two, same answer.

Mr. DINGELL. They can price it?

Mr. MADDEN. Yes.

Mr. DINGELL. They can both price it?

Mr. MADDEN. Yes.

Mr. DINGELL. Where is the consumer protected from the fixed prices under that?

Mr. MADDEN. The same condition that exists today. There would be dozens of others.

Mr. DINGELL. I am asking you a hypothetical question. I am not trying to trap you. I am trying to find out what this language means, because we are writing legislative history. There are two manufacturers, let us say, of an antiarthritic drug or antidepressant.

Mr. MADDEN. If there is no other article or drug for that general purpose, and they are not competitive, they cannot come under the bill.

Mr. DINGELL. If there are two?

Mr. MADDEN. That is right.

Mr. DINGELL. Let us say there are three. If there are three manufacturers of the same antiarthritic drug or the same antidepressant or the same antidiabetic agent, can the three price fix?

Mr. MADDEN. The same answer. "When goods usable for the same general purpose are available," and so on. They must be goods used for this same general purpose.

Mr. DINGELL. That is what I want to know. If there are three manufacturers of goods available for the same general purpose, three specifics against arthritis, is price fixing under this bill available to the manufacturer then?

Mr. MADDEN. You mean if there are three under quality stabilization?

Mr. DINGELL. If there are three other items on the market to do the same purpose.

Mr. MADDEN. And there is no other?

Mr. DINGELL. Yes.

Mr. MADDEN. The manufacturer cannot take advantage of this law unless there are competitive products available for the same general purpose.

Mr. DINGELL. He cannot.

Now let us go to four, because I want to find where the break is.

Mr. MADDEN. The same answer for four or five or six.

Mr. DINGELL. Let us say there are four manufacturers of an antidepressant. As the author of the bill, I want you to tell us whether or not this is available where there are four manufacturers, as fair as price fixing.

Mr. MADDEN. The manufacturer canot take advantage of it unless there are competitive products available for the same general purpose.

Mr. DINGELL. Where there are only four?

Mr. MADDEN. That is right.

Mr. DINGELL. Can the manufacturer take advantage of it where there are only five manufacturers of the same specific antidepressant?

Mr. MADDEN. Yes, and he can manufacture an article for the same general purposes, but not put it under quality stabilization, and put that in the store and, of course, they can buy that and it is not under quality stabilization.

Mr. DINGELL. So, in a situation where there are five manufacturers and five items on the market, they can price fix; but where there are four, they cannot. Is that correct?

Mr. MADDEN. No; I did not say that. I say if there is no product that is available for that same general purpose, the manufacturer cannot shut the purchaser out and he cannot qualify under quality stabilization.

Mr. DINGELL. Would you say where there are four items on the market, price fixing under this bill is available to the manufacturer? Where there are four manufacturers of a particular item, price fixing under this bill is available to the manufacturer of one of them?

Mr. MADDEN. Not price fixing. They would come under the quality stabilization if they elected to do so.

Mr. DINGELL. Let us say he establishes a fixed price here. Currently it is the established retail price. That is a fixed price, is it not?

Mr. MADDEN. That is right.

Mr. DINGELL. That is a fixed price. This bill does fix prices.

Mr. MADDEN. The manufacturer can elect to come under or stay out.

Mr. DINGELL. It is still fixing prices.

Mr. MADDEN. No; it is not.

Mr. DINGELL. What is it?

Mr. MADDEN. If the manufacturer has a quality article that he wants to put under a certain price and comes under this bill, and then he has an article for the same general purposes that is not the quality that he puts under quality stabilization because he cannot afford to manufacture a quality article at that price, he can put out another article and not elect to have it come under quality stabilization.

Mr. DINGELL. You are not answering my question at all.

Mr. MADDEN. That gives the public an opportunity to purchase outside of quality stabilization.

Mr. DINGELL. You are not answering by question at all. What does "currently established resale prices" on page 4, line 10, mean? It means fixed prices, does it not?

Mr. MADDEN. On what page?

Mr. DINGELL. Page 4, line 10. What is an established resale price? Is it a fixed price, or not?

Mr. MADDEN (reading):

that the person reselling such goods, with knowledge of the owner's currently established resale price or prices, has advertised, offered for sale, or sold——

Mr. DINGELL. Established means fixed, does it not?

Mr. MADDEN. Wait until I read it—

has advertised, offered for sale, or sold such goods at prices other than such currently established resale prices.

That is the quality stabilization price.

Mr. DINGELL. Yes, that is the fixed price, is it not?

Mr. MADDEN. For that particular article, just for that article, and it must be in competition with other articles for the same general purpose.

Mr. DINGELL. That is a fixed price.

Mr. MADDEN. Yes.

Mr. DINGELL. An established resale price is a fixed price, right?

Mr. MADDEN. That is the price for that quality article, and the retailer——

Mr. DINGELL. It is a fixed price.

Mr. MADDEN. Yes, under quality stabilization but there must be available to the purchaser other articles competitive to it for the same general purpose.

Mr. DINGELL. This bill gives the individual the right to fix resale prices.

Mr. MADDEN. No. Just for a quality article.

Mr. DINGELL. Let us say it happens to be an excellent quality article, he has the right to fix prices, does he not?

Mr. MADDEN. Yes, on a quality article if the manufacturer and retailer elects to come under the law.

Mr. DINGELL. If it happens to be a shoddy article, he also has the right to fix the price.

Mr. MADDEN. No, because as a practical matter there would be no good will in his brand name to protect.

Mr. DINGELL. You tell me where in this bill there is language which says a man can fix prices only on a quality article and he cannot fix it on a shoddy article.

Mr. MADDEN. It is up to the manufacturer.

Mr. DINGELL. I did not ask that question. I said: Where in this bill is there language which says a person can fix prices only in the case of quality items and not in the case of shoddy items? Read me the language of the bill which says that. Just read the language.

Mr. MADDEN (reading):

> The owner of a brand, name, or trademark shall be deemed to retain his property rights therein, and in the trade and goodwill symbolized thereby, regardless of any sale or transfer of the goods to which such brand, name, or trademark relates, and no such sale or transfer shall be deemed to diminish or extinguish any such rights. Any person who resells in commerce goods identified by distinguishing brand, name, or trademark, either on the label, container, dispenser thereof, or otherwise, may rightfully employ such brand, name, or trademark, but only in effecting the retail of such goods, and subject to the provisions of paragraph (8) hereof.

Mr. DINGELL. Now let me ask you another question.

Mr. MADDEN. In further answer to your question——

Mr. DINGELL. I am still waiting for you to tell me where in the bill there is language which limits this to quality items.

Mr. MADDEN. I just read it to you.

Mr. DINGELL. I think the record will show you did not.

Mr. MADDEN. Wait until I finish—go ahead and ask your question.

Mr. DINGELL. Will this power to fix prices be vested in a manufacturer who manufactures only identified items, or will it go to any item he manufactures, whether identified or not?

Mr. MADDEN. Any item that he deems of sufficient quality to place under this law, he can place under quality stabilization.

Mr. DINGELL. Does he have to have a brand name stamped on that item, or does he not?

Mr. MADDEN. Oh, yes.

Mr. DINGELL. In other words, there is no fair trading or price fixing under this bill, of items which are not identified by a brand mark or by a label.

Mr. MADDEN. That is right.

Mr. DINGELL. If a discounter is so minded, he can take the label off and he can discount it, is that right?

Mr. MADDEN. That is not damaging the brand name. If there is no brand name with it, he is not damaging the brand name.

Mr. DINGELL. This is substantially the same bill as the committee had up during the last session of Congress, is it not?

Mr. MADDEN. You mean the bill I introduced?

Mr. DINGELL. This bill is substantially the same as the quality stabilization bill which you sponsored during the last session of Congress, is it not?

Mr. MADDEN. In essence, it is.

Mr. DINGELL. In essence. There are certain specific differences from the previous bill, are there not?

Mr. MADDEN. I think generally, in essence, the same.

Mr. DINGELL. There are specific differences from the previous bill, are there not?

Mr. MADDEN. I cannot call them to your attention.

Mr. DINGELL. You are the sponsor of both bills, so I would assume you would know.

Was section (14) on page 6, beginning in line 22, in last year's bill?

Mr. MADDEN (reading):

> No exercise of any right or remedy provided in paragraphs (7) to (13), inclusive, of this subsection shall be construed to be a violation of any of the Antitrust Acts; and all such rights and remedies shall be so available * * *.

I am not clear. It might not have been in last year's bill.

Mr. DINGELL. Do you endorse the language?

Mr. MADDEN. It merely sets out it is not interfering with any of the existing Antitrust Acts.

Mr. DINGELL. Do you endorse this language?

Mr. MADDEN. I endorse it, yes.

Mr. DINGELL. You told us this bill does not vitiate or in any way militate against the effects of the antitrust laws. Am I correct?

Mr. MADDEN. That is correct.

Mr. DINGELL. Yet, herein we find language on page 6, line 22, which says:

> No exercise of any right or remedy provided * * * shall be construed to be a violation of any of the Antitrust Acts * * *.

Here we have a blanket exemption.

Mr. MADDEN. This bill has nothing to do with repealing or changing the Antitrust Act.

Mr. DINGELL. Then is this language necessary, in view of what you have told us?

Mr. MADDEN. I would say it is necessary, because I do not wish to have the Members of Congress think this bill is changing any of the existing laws. This is new legislation to protect the manufacturer, the retailer, and the consumer.

Mr. DINGELL. If I told you this was not in your last bill, would you be shocked?

Mr. MADDEN. It would not surprise me at all.

Mr. DINGELL. But it is in this bill.

Mr. MADDEN. Yes.

Mr. DINGELL. Why did you put it in this bill and not in the last bill?

Mr. MADDEN. For the simple reason the question was raised whether this would change the existing laws or not.

Mr. DINGELL. Suppose we get down to a discussion of this business of violations of the antitrust laws. Is it your interpretation that the rest of this bill would change the antitrust laws?

Mr. MADDEN. No, I do not see where it would change the antitrust laws in any way. This bill is merely to protect quality merchandise on the part of the manufacturer.

Mr. DINGELL. Then will you make the categorical statement to this committee that, with the exception of the language you just read on page 6, line 22, through page 7, line 4, there is nothing in the bill which will change or violate or vitiate the antitrust laws or authorize price fixing in violation of the antitrust laws?

Mr. MADDEN. I would say this bill does not in any way amend or change existing antitrust laws.

Mr. DINGELL. You are sure of that?

Mr. MADDEN. I am positive.

Mr. DINGELL. Are you prepared to stand on that statement?

Mr. MADDEN. I can be mistaken on a lot of things, but I am pretty positive of that.

Mr. DINGELL. If you are pretty positive this bill will not violate or infringe upon or vitiate the antitrust laws or repeal or amend them in any way, why did you put specific language in there and why should we not strike that particular language?

Mr. MADDEN. It was my thought that the question was raised the last time I appeared before your committee—I forget whether it was raised by a member of your committee or not—regarding whether or not this would change existing antitrust laws, and I thought possibly it might be well to put this in so there would not be any doubt about it.

Mr. DINGELL. Would it not be better, then, to put in specific language which would say this bill shall not be construed as amending, repealing, or otherwise impairing the effects of the antitrust laws of the United States?

Mr. MADDEN. I think that is about the same thing.

Mr. DINGELL. You would have no objection to that language?

Mr. MADDEN. That would mean about the same thing.

Mr. HARRIS. Will the gentleman yield on that point?

Mr. DINGELL. I am happy to yield to the gentleman.

Mr. HARRIS. Is it not a fact that some may want to construe these provisions to be in violation of the present antitrust laws, and this is to make sure that such erroneous interpretation would not be placed on it?

Mr. MADDEN. That is what I stated to Mr. Dingell.

Mr. DINGELL. You still have no objection to language which would state this bill shall not be construed to alter, amend, or impair the effects of the antitrust laws of the United States.

Mr. MADDEN. It practically states what you just said.

Mr. DINGELL. This bill affords to manufacturers some extraordinary remedies. We have heard it couched in terms of assisting and helping small businessmen. I was wondering, will this bill do away with the sale of private brands?

Mr. MADDEN. I did not get your question.

Mr. DINGELL. For example, Macy's own vitamins or Gimbel's own fountain pens or a line of haberdashery, and so forth.

Mr. MADDEN. No.

Mr. DINGELL. Would it do away with trading stamps?

Mr. MADDEN. No.

Mr. DINGELL. Would it affect trade-ins?

Mr. MADDEN. No.

Mr. DINGELL. Would it affect, for example, tie-in sales?

Mr. MADDEN. No.

Mr. DINGELL. Will you tell us what are bait or switch merchandising tactics?

Mr. MACK. The gentleman will proceed. As the gentleman knows, we have a limitation here in time.

Mr. MADDEN. I would like to answer the question, if I may.

Mr. DINGELL. I would like you to.

Mr. MADDEN. I devoted a little time in my statement a few minutes ago to give you an example of switch merchandising tactics on the retired retailer from down in Richmond, Va., and my own personal experience in going down to buy an article, where I was switched over to a foreign-made article. That was a shining example.

Mr. HARRIS. Mr. Chairman, as you know, it has been my policy to give everybody as much opportunity as we can to develop anything we have before us. I also would like to recognize the appearance of other witnesses, and particularly when we have the chairman of a great committee who I know, from my own experience, has tremendous responsibilities. I would like to ask if it would be all right with the gentleman from Michigan if Mr. Madden could suspend in order to give Mr. Celler an opportunity to present his testimony on this matter. He is chairman of a great committee. He has been here all morning. I think it is a right we owe the chairman of a committee.

Mr. DINGELL. I have no further questions, Mr. Chairman.

Mr. MACK. The Chair would like to ask if the witness would be available to answer questions.

Mr. MADDEN. I will be up on the fifth floor at any time the chairman desires to call me down, at any time during the week.

Mr. MACK. Have you any questions?

Mr. CURTIN. No questions at this time.

Mr. HARRIS. I have no questions at this time, Mr. Chairman. I think the gentleman has presented a very clear explanation of his proposal.

Mr. MADDEN. I wish to thank the committee.

Mr. MACK. I wish to thank the gentleman for his testimony this morning.

Mr. DINGELL. I also would like to thank my friend and express my warm good feelings. As he knows, we disagree on this bill. I hope he understands I have a deep and abiding affection for him.

(Off the record.)

Mr. MACK. Our next witness this morning is the very able and distinguished member of the Judiciary Committee and chairman of that

great committee. Chairman Celler, we are very happy to have you as a witness before this committee on a subject which we consider to be very important. We thank you for taking time to appear before us.

STATEMENT OF HON. EMANUEL CELLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. CELLER. Thank you very much, Mr. Chairman. I am deeply appreciative of Mr. Madden's yielding some time so I can appear before the bells ring.

I am sorry that I must disagree with the gentleman from Indiana, for whom we all have affectionate regard, but that is the democratic spirit.

House Joint Resolution 636 and companion bills are the latest version of that hardy perennial, a national fair trade bill which has come before the Congress repeatedly. Concealed as usual behind a fog of euphemisms, this old wolf is presented to you this session dressed up in the seductive sheep's clothing of a "quality stabilization" resolution. The hard-to-hide wolf's tail this time carries the label "price stabilization." Tug the tail, however, and a telltale price-fixing howl is emitted. Once again "fair trade" antics must rely upon semantics.

It is as plain as a pikestaff that this is a resale price maintenance bill. There's an old Turkish adage, "when a cat would eat her kittens she calls them mice." Call this bill what you may, it is still a resale price maintenance bill.

This bill is one of the most drastic "fair trade" price-fixing bills that has ever been presented to Congress. Before pointing out the particular features of this resolution which are the bases of my assertion, I propose to deal with the main thrust of the resolution; namely, resale price fixing. This is a bill for bigger and better markups for the retailer—a hoax against the consumer.

I have long been an opponent of the system of price fixing that is permitted by the so-called "fair" trade laws. Such price fixing flies in the face of our antitrust laws and the free competitive system which the antitrust laws are designed to protect.

"Fair trade" was spawned by wholesale and retail merchant associations, primarily the National Association of Retail Druggists, in the depression days. A powerful lobby was able to pressure 45 States into accepting the NARD's draft of a "fair" trade bill. Although manufacturers were comparatively inactive in this effort, the rallying slogan then as now was "protection of the manufacturers' trade name or trademark." Somehow all trade names and trademarks were elevated to Cadillac significance, subject to being sullied by association with anything but an artifically high price.

In 1937, however, the NARD lobby contended to Congress that the States had carefully considered the issues and had adopted "fair" trade to promote the public welfare. Congress nonetheless refused to exempt "fair" trade practices from the antitrust laws in a separate bill. The NARD was only able to secure enactment of the Miller-Tydings amendment to the Sherman Act through the device of attaching it as a rider to the appropriations bill for the District of Columbia. That act gave State-blessed "fair" trade contracts partial immunity from the Federal antitrust laws.

After World War II the proponents of resale price maintenance received one setback after another. In 1951, the U.S. Supreme Court in the *Schwegmann* case ruled that Congress in the Miller-Tydings amendment had exempted only those price-fixing arrangements which had been agreed upon by the parties. The coercive nonsigner clause was no longer available to enforce widespread price fixing.

By the McGuire Act Congress in 1952 granted an express exemption for the nonsigner clause from the antitrust laws.

The history of the last two decades has demonstrated that "fair trade" laws work to the detriment of both the consumer and the businessmen purportedly protected by them. Most impartial commentators have condemned them. In 21 States the courts have invalidated "fair" trade acts, or at least their nonsigner provisions. In an appendix to this statement I have attached excerpts from the opinions of a number of such courts. Some of the sponsors of these quality stabilization resolutions, I note, come from States where "fair" trade laws have been invalidated in whole or in part. These bills would impose a Federal fair trade law even on those States where fair trade has been rejected.

The principal evil that results from "fair" trade—the maintenance of artificially high consumer prices—has been exposed in State after State. After the Supreme Court of Ohio ruled the nonsigner clause unconstitutional, for example, prices on automatic coffeemakers quickly dropped from the $39.95 fair trade price to a $29.97 competitive price. Electric frying pans, which had a list price of $19.95 were reduced to $13.87. After an initial flurry of reduced price sales, in Ohio as in the case of other States that outlawed "fair" trade, the market soon became stable. The dire consequences that had been predicted by the "fair" traders—widespread business failures, increased concentration, and predatory excesses by monopolists—did not occur. The only result was that the consuming public received the benefit of having prices settle in the competitive market at about 20-percent lower than the former "fair" trade prices.

The Department of Justice in the past has presented to Congress several surveys which have demonstrated how much more the consumer must pay in fair-trade States than in non-fair-trade States.

In 1952, when the McGuire Act was being considered, I conducted a survey and brought into the House of Representatives three baskets. I had purchased 11 identical articles in 3 different Peoples Drug Stores. I purchased one basket of them in the District of Columbia, where there was no fair trade. I purchased the same articles in Bethesda, Md., where there was fair trade. I purchased another basketful in Arlington, Va., where there was fair trade, and compared the prices that I paid for these identical articles. My statement to the House of Representatives appears in the Congressional Record of May 7, 1952, at pages 4909 and 4910, as follows:

> I purchased 10 cubic centimeters of u. 40 protamine zinc Lilly insulin, used by diabetics. The price in the District of Columbia was 98 cents. The price in Maryland was $1.29. The Maryland price was 32 percent above the District price. In Virginia—in Richmond, for example—the same article, Lilly's insulin, was sold at $1.48. If you can tell me that the public is protected by fair trade, I would like to know why those differences in prices.
>
> I purchased a BD Yale 26-gage 1-inch hypo needle, used to inject insulin into a sick person's body. In the District of Columbia the price was 15 cents. In

Virginia the price was 20 cents—33 percent higher in Virginia. In Maryland the price was 23 cents—53 percent more in Maryland.

I purchased 100 Bayer aspirin tablets in Virginia, Maryland, and the District of Columbia. In the District of Columbia the price is 46 cents. What was the price in Virginia? The price was 59 cents. I paid 28 percent more for the same article in Virginia. What was the price in Maryland? Fifty-nine cents. Again I paid 28 percent more for the same article in Maryland.

I purchased some 12-ounce bottles of Phillips milk of magnesia. Here are the bottles. In the District of Columbia the price was 34 cents. In Virginia it was 14 percent higher, or 39 cents. Similarly, in Maryland it was 14 percent higher, or 39 cents.

I purchased some large tubes of Ipana toothpaste. See the difference in these purchases. I paid 27 percent more for the Ipana toothpaste in Virginia than I did in the District of Columbia. In the District of Columbia the price was 37 cents. In Virginia the price was 47 cents; and, likewise, in Maryland, it was 47 cents.

I purchased packages of 20 Gillette blue blades. In the District of Columbia the price was 87 cents, whereas in Virginia I paid 11 percent more, or 98 cents, and also 11 percent more in Maryland, namely, 98 cents.

I could go on and recite the other articles that I purchased and for which under fair trade I had to pay 20, 25, and 30 percent more for the identical articles. With the chairman's permission, however, I will submit an extract of the debate in the House of Representatives on May 7, 1952, for the record.

(The extract referred to has been placed in the committee files.)

Mr. CELLER. I am told, moreover, that in 1960 there were striking differences between fair-trade and non-fair-trade prices as follows:

In Columbia, S.C., a sick person could buy Achromycin V capsules and Declomycin for $7.20 instead of $7.65; Serpasil for $6.50 instead of $7.50; Orinase for $6.25 instead of $6.75; Coricidin for 75 cents instead of $1.08, and Neo-Synephrine for 65 cents instead of 90 cents.

In Houston, Tex., a sick person could obtain Achromycin V capsules for $6.96 instead of $7.65 and similarly as to Declomycin. Premarin could be bought for $6.73 instead of $8.25; Orinase for $5.25 instead of $6.75; Unicaps for $2.69 instead of $3.11; Theragran for $8.19 instead of $9.45. Incidentally, at the hearings on H.R. 6245 before my subcommittee, Senator Kefauver gave some very interesting testimony as to the spread between the price charged the druggist and the price paid by the consumer on drugs such as Serpasil.

In an appendix to this statement I have listed similar examples in other cities and States, including Miami, Fla.; Indianapolis, Ind.; Louisville, Ky.; St. Louis, Mo.; Seattle, Wash.; Spokane, Wash.; Huntington, W. Va.; Minneapolis, Minn.; and Cleveland, Ohio. Congressman Dingell, in his minority report on a similar bill in 1959, adduced many more instances of lower prices where fair trade did not prevail. Recently, at hearings on H.R. 6245 before my subcommittee, there was a great deal of testimony of the adverse effect on ill and elderly persons of the high price of drugs. I think each of us in Congress should hesitate to add to the burdens of these people by enacting legislation which must have the necessary effect of increasing the price of drugs they buy. How can you justify this legislation to them if it is passed?

This bill will increase prices to the consumr. In all probability, it will destroy the competitive bidding system under which most government purchases are made. This will increase the cost of our defense operations and of our other government operations. Federal, State, and local governments will be thus adversely affected.

And what did these "fair" trade laws do for the small businessmen? They promoted the use by big retailers of their own private brand goods which could be sold for less than the smaller retailers' trade name goods, purchased from the manufacturers. They favored the inefficient retailer over the efficient retailer. They facilitated the rise of the discount house. They deprived the retailer who wanted to use price as a means to compete with larger competitors of the right to do so. They made less service and less price an infraction of the law and insured that less service would not be accompanied by less price. They took away any incentive for retailers to urge manufacturers to lower high prices.

They incited manufactures to raise prices to insure manufacturers' markups.

And now the proponents of these bills, in the name of free enterprise, would impose upon businessmen and the public socialism in the form of federally supported price fixing.

Since references are often made to discount houses at these hearings, a few words on that subject are warranted.

As Mr. Bicks, former head of the Antitrust Division, explained to this committee in 1959—

> initially, fair trade gave discounters an unimpeachable nationally advertised price to cut. The buyer could clearly see the savings involved. Beyond that and more important, by attempting to stifle price competition, the "fair trade" laws created an economic vacuum into which the discount houses rushed.

Business writers have also pointed out that—

> Through the fair trade laws * * * and other devices, our legislators and courts have sought, in effect, to bottle up price competition, especially at the retail level. The discount house may be viewed as a manifestation of the explosive pressures which are likely to be generated as a result of an attempt to eliminate price competition in a competitive economy * * *.[1]

While I hold no brief for discount houses as such, they have been a means of curbing inflationary prices and affording the forgotten man, the consumer, the opportunity of purchasing his needs at lower prices. They have also helped relieve manufacturers of surplus stocks. To those who look askance at discount houses as price cutters, I would call attention to the fact that most new types of retailing, including the department store, the mail order firm, and the supermarket, have started as a price cutter.

I notice that the National Appliance & Radio-TV Dealers' Association is on record as favoring this bill. It is interesting to observe, therefore, a statement made by the president of that association in 1956:

> The discount house * * * came into being as a counterbalance to distorted retail margins. These margins weren't distorted until we came into volume retailing. The discount house was a natural development, and when you hear a dealer talking about his "rights" he's on his way out—because he hasn't any rights.

And how did the small businessman accept this fair trade "bonanza?" Well, many fought it and are continuing to fight it. Thus, Mead Johnson & Co., in a 3-month period in 1961, brought over 100 fair trade suits. These small businessmen wanted, presumably they still want, to sell at a price which leaves them with a profit and also

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[1] Alexander and Hill, "What To Do About Discount Houses," Harvard Business Review, 1955.

leaves the consumer with more money to make additional purchases. Out of this natural desire to compete has spouted a veritable torrent of litigation. One has to go back to prohibition days for a comparable number of lawsuits brought to enforce legislation so justly unpopular. To greatly augmented legal staffs of the large manufacturers engaged in policing their resale prices, there have been added commercial spies euphemistically called professional shoppers. And the cost of all this is borne, as always, by the consumer. Thus, in 1955, one company is reported to have announced it would spend $750,000 to enforce "fair trade" in just one of its departments. Sunbeam is reputed to have spent $1 million a year for such purpose.

And who have been the primary instigators of "fair" trade lawsuits? They have been drug manufacturers recently shown by the Senate Antitrust and Monopoly Subcommittee and my own subcommittee to have garnered unconscionable profits. Thus, in 1958, Mead Johnson & Co. made a net profit (after taxes) of 11.3 percent on drug sales. So, also, we find Parke, Davis & Co. suing a drugstore in New York City because a professional shopper purchased Myadec vitamin capsules for $5.75 whereas the "fair" trade price was $9.67, and Abdec vitamin preparation drops for $2.65 whereas the "fair" trade price was $3.51. Parke, Davis & Co. in 1958 had a 16-percent net profit on drug sales.[2]

Of all industries, with no exception, the drug manufacturers reap the greatest profits in the United States. They top every other industry. This case illustrates what the consumer loses by "fair" trade, the harassment of small business under "fair" trade, and the unreasonably high profits "fair" trade protects.

The "fair" trade cases in which an opinion is published are collated in the annual volumes of the Trade Cases series of the Commerce Clearing House. I had my staff review the "fair" trade cases in the last bound volume of that series, which covered 1960. In over 90 percent of such cases the "fair" trade violator, by any test, would be considered a small businessman. To mention some of them:

California: John F. Walker, a liquor dealer.
Illinois:
Topps of Niles, Inc.
Darby Sales Co.
Minnesota: Playtime Sporting Goods, Inc.
New Hampshire:
Max Dichter Co., Inc., operating a retail store in Manchester, N.H.
Man-Bur Sales, Inc., operating the hardware department in the store.
Louisiana: Robinson Wholesale Co., a partnership composed of Robinson, his wife, and brother-in-law. Among those alleged to have sold Bulova watches at less than fair trade prices were Daniels Jewelry Store, Davidsons Furniture Store, and Zales Jewelry Store.
Ohio: Norwood Vitamin & Cosmetic Distributors, Inc.
New York:
Janel Sales Corp.
Berner's Pharmacy Corp.
Mr. Less.
Mr. Falleta.
The Courtesy Drug Store in Hicksville, N.Y.
Pennsylvania:
Wright Motor Sales Co., a gasoline dealer.
Mr. Kostak, another gasoline dealer.

[2] Very recently this company announced it was no longer going to limit its sales to those observing its suggested prices. The president of Parke, Davis & Co. stated that the company's products would be placed on sale where people were buying them.

Proponents of this kind of legislation shift from arguing that it is necessary to protect the brand name of the manufacturer to urging that it is necessary to keep the retailer in business. The short answer to the first claim is that many brand names continue to be held in high repute despite the absence of any attempt to use resale price maintenance for such purpose. The shorter answer to the second is that the retailer in fair trade States has not been shown to have fared any better than the retailer in the non-fair-trade State.

There has been a great deal of loose talk about how the loss of "fair" trade protection would cause the failure of countless businessmen.

Let us examine the failure rate per 10,000 concerns in States without "fair" trade acts:

	Failures [1]			Bankruptcies [2] 1961
	1957	1958	1959	
Missouri	18.6	26.9	23.6	87
Texas	32.2	29.8	28.5	119
Vermont	19.0	23.0	20.1	11
District of Columbia	41.8	32.6	30.2	13

[1] Final report of House Select Committee on Small Business, 86th Cong., 2d sess., p .17.
[2] Administrative Office of the U.S. Courts, Tables of Bankruptcy Statistics, June 30, 1961, table F3.

Now, let us take some comparable fair trade States:

	Failures [1]			Bankruptcies, 1961 [2]
	1957	1958	1959	
Illinois	37.3	42.6	45.6	120
Maryland	44.6	56.7	41.0	18
New Jersey	59.9	81.9	67.5	179
New Hampshire	27.6	27.2	23.6	12
Wisconsin	37.3	55.0	51.9	139
California	123.9	118.9	112.5	286
Massachusetts	34.9	42.9	41.5	57
New York	111.4	129.3	127.8	424
Pennsylvania	43.5	48.1	43.4	307

[1] Source: Final report of House Select Committee on Small Business, 86th Cong., 2d sess., p. 17.
[2] Source: Administrative Office of U.S. Courts, "Tables of Bankruptcy Statistics," June 30, 1961, table F-3.

Now let us see the situation in some of the States which had the whole, or the nonsigner provision, of their "fair" trade law invalidated, 1956–58:

	Failures [1]			Bankruptcies 1961 [2]
	1957	1958	1959	
Colorado (1956)	45.6	20.7	32.8	142
Indiana (1957)	20.0	27.0	22.6	42
Kansas (1958)	28.2	26.8	20.6	39
Kentucky (1958)	13.4	19.9	14.8	54
New Mexico (1957)	14.6	8.4	5.1	15
Oregon (1956)	198.0	201.5	175.3	51
South Carolina	40.0	44.3	47.4	14
West Virginia (1958)	26.5	26.3	35.7	20

[1] Source: Final report of House Select Committee on Small Business, 86th Cong., 2d sess., p. 17.
[2] Source: Administrative Office of the U.S. Courts, "Tables of Bankruptcy Statistics," June 30, 1961, table F-3.

Let me read to you the statement of Judge Loevinger, head of the Antitrust Division, made recently to Senator Monroney in connection with an identical bill in the Senate. I am reading from a letter from Judge Loevinger of May 11, 1962.

For the entire post-World-War II period—1946 through 1961—retail failures average 48 percent of total business failures. Included in retail failures and accounting for almost one-fifth of such failures were eating and drinking concerns. As this class of trade would not be directly affected by this legislation, we have excluded it, thereby lowering the average retail trade failures to 39 percent. All other distribution failures, wholesale and retail, averaged 50 percent of all business failures. To determine the relationship between all business failures and retail and distribution failures the relationship or association between these series was established and measured by means of standard correlation techniques. The results obtained in each case are indicative of the extremely close relationship between the series mentioned.

Table 1 summarizes the distribution of business failures per 10,000 listed concerns in those States having fair trade and in those States in which the nonsigner provision only has been invalidated or where fair trade laws have been held invalid or have never been enacted. It is significant that for each year beginning in 1946 the faliure rate was higher in the fair trade States than in either States where the nonsigner clause has been invalidated or States in which fair trade laws have been held invalid or have never been enacted.

All this talk about the creation of business failures, to my mind, is nonsense. I heard the distinguished gentleman from Indiana speak of business failures in his State and other States, but he gave no correlation between those failures as to whether there was or was not a price stabilization law. So those figures, in my mind, are absolutely worthless.

Rejected by the courts of many States, foresworn by many a manufacturer, turned down by the legislatures of at least five States, bereft of economic rationale, unfair, "fair" trade is sought through House Joint Resolution 636 to be imposed, nationwide, on unwilling as well as on willing States. A basic national policy of free price competition is to be subverted into a policy of price fixing. The antitrust laws are to be gutted throughout. Missouri, Texas, Vermont, District of Columbia, which have rejected fair trade laws, will now have them rammed down their throats.

This legislation is a poorly disguised effort to camouflage a nationwide Federal price-fixing law beneath pious, but ill-defined, platitudes deploring unethical trade practices. Thus House Joint Resolution 636 refers to "store-traffic baiting" and "bait merchandising practices." I suppose that to a "fair" trade price fixer, the sale of goods at a reasonable price might be "store traffic baiting," but the vagueness of these undefined phrases might include any unusual advertising device.

The question was propounded as to trading stamps and as to coupling one sale with another sale. I do not know what the effect of those practices will be on a bill like this if it is passed. The language which is used is most imprecise, and there are punitive provisions in the bill. We must never forget that. Since there are punitive provisions, a bill of this sort must be set forth with exactitude. There is no exactitude in the language of this bill.

The first whereas clause in the resolution proclaims a desire to attack deceptive practices. But the Federal Trade Commission has been attacking just such deceptive merchandising practices, with ever-increasing vigor. Furthermore, there can be few States indeed which do not have their own laws dealing with deceptive practices.

In short, House Joint Resolution 636 would utterly confuse adequate, existing Federal and State laws dealing with unfair trade practices by superimposing upon them a loosely worded, probably preemptive Federal law.

I think it is a preemptive Federal law. It would supersede all the State laws.

The first whereas clause on page 2 of the resolution asserts that the manufacturer's incentive would be reduced "to maintain and increase, with relation to price, the value of such goods." It will indeed be a sad day when Congress passes a bill to encourage manufacturers to increase prices rather than to lower them. This is not my understanding of the policy of this administration. I doubt that it is an acknowledged policy of the opposition party. The same whereas implies that higher prices make for greater volume. I think that there would be few to buy this concept. The statement is pure malarkey.

The second whereas clause on page 2 states:

> Whereas substitutions of interior labor and materials forced by the downward spiral of unrestrained predatory pricing on popular identified products, in the fields of foods, drugs, and beverages, endanger public health, and in other fields, endangers public safety * * * .

This is an old bromide, indeed. There are laws, both Federal and State, to prevent unrestrained predatory price cutting. There is no proof that a price below a fair trade price has endangered public health and public safety. Such fearsome hobgoblins do not appear to have taken possession of such rock-ribbed nonfair traders as the District of Columbia, Missouri, Texas, and Vermont, nor of the States in which fair trade laws have been invalidated.

Such statements are as useless as trying to make hair grow on my bald head.

This bill assumes that high quality is the handmaiden of high price. On this assumption, low prices are the opium of the people. Under this theory, when the price of gasoline goes down the quality of gasoline goes down and our cars rebel; when the price of gasoline goes up the quality of gasoline goes up and our cars rejoice.

In the dreamworld of fair trade many such a canard passes for reality. To expose this canard—that the highest in price is the best in quality—I have had my staff spot check Consumers Reports, the publication of Consumers Union, a nationally known testing organization. The results stated in appendix C are taken from some 10 issues in 1961 and 1962. In brief, the highest priced product was not the highest in quality in one striking instance after another. Testifying recently before my subcommittee on H.R. 6245, Dr. Martin Cherkasky, director of Montefiore Hospital in New York City, stated:

> A series of tests recently conducted by Drug and Therapeutic Information of New York and published in their Medical Letter confirms the unfortunate fact that price and quality often are in no way related.

There is no necessary correlation between quality and price. It might be noted that according to a recent issue of Business Week, appliance makers are going all out in guaranteeing quality of products. This, of course, is an industry which has had price cutting.

As the Supreme Court of Oregon has noted:

> In substance, what is the real purpose of the Fair Trade Act? Regardless of how its true nature may be camouflaged by high-sounding terms such as "free

and open competition," "unfair competition," "protection of good will," etc., it is a matter of common knowledge that it is a price-fixing statute designed principally to destroy competition at the retail level. Protection of the "good will" of the trademark owner is simply an excuse and not a reason for the law * * *.

If high quality and high prices were synonymous the magicians of Madison Avenue would be out of work. It has been said:

In the light of the function of advertising as a creator of value increments of enchantment, it is not surprising to discover, as we have in the consumer testing field, that *there is slight if any correlation between the price and quality of many of the branded goods now offered on the market.*"[3] [Emphasis supplied.]

House Joint Resolution 636 would give the owner of a distinguishing brand or mark a property right therein as well as in the public good will associated therewith. This "property right" would be protected even after the transfer of the goods to which the brand relates. Those who have purchased the goods for resale under the manufacturer's brand or name, if there are "goods usable for the same general purpose" from other sources, may have that right revoked:

(*a*) For employing the goods in furtherance of "bait" merchandising practices;

(*b*) For advertising, offering for sale, or selling such goods at prices other than such currently established resale prices;

(*c*) Publishing misrepresentation concerning such goods.

The first and third practices thus listed are already unlawful under the Federal Trade Commission Act where interstate commerce is involved, and under many State laws. This leaves the telltale price-fixing provision forbidding resale "at prices other than such currently established resale prices."

I must take sharp issue, therefore, with the assertion in the statement filed with the Senate committee in connection with Senate Joint Resolution 159 by my colleague, Mr. Madden, that "This bill is not fair trade legislation and is not a price-fixing measure." He said that here this morning. I ask how could a price-fixing bill be more clearly expressed. To quote Mr. Madden: "The manufacturer who does elect to use the quality stabilization law will publish a specific retail price at which his trademarked product must be sold." Suppose a manufacturer of a branded product sells it to X, a distributor, who in turn sells it to Y, a wholesaler, who in turn sells it to Z, a retailer, who finally sells it to the consumer, will the manufacturer dictate the distributor's, the wholesaler's, the retailer's price all the way down the line? Hundreds of manufacturers, because of this inherent difficulty, have discarded the concept of fair trade; the laws under which they were authorized could not successfully be enforced. The manufacturers were sorely put to it by the essential multitude of cases brought. Will this substitute for fair trade be any less difficult or burdensome?

It has been contended by some of the supporters of this bill that it would not really restrict the retailer because he is free to take off the trademark and sell the unmarked goods at such price as he pleases. This is a fallacious argument. What does the retailer have left when he tears off the covering on a tin can? If the trade name is imbedded in metal or glass is he supposed to use a blowtorch?

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[3] Warne, "Advertising and Consumer Behavior" 10 Cartel 82, 85 (July 1960).

If the price he pays includes the goodwill of a trade name, must he throw away that value?

As to the "right" to return of goods by a nonconformer, as provided in this bill, the manufacturer may well find himself astride a Trojan horse, since he can never be sure that he has made a final sale. It is said that in 1954 the Sheaffer Co. spent $400,000 in buying back stocks of its own pens from price-cutting retailers.

Proponents of the bill assert that the retailer who wants to set his own prices is free to do so by turning to the products of a nonprice fixer. But the very purpose of this bill is to promote price fixing on the part of national advertisers, and the realities of business practice make it impossible for a retailer to shift readily from a nationally advertised fair-trade product to a nonnationally advertised nonfair-trade product. Moreover, this bill will prevent price competition by grocers, hardware store owners or druggists who must, as a practical matter, carry a wide selection of similar goods of different manufacture.

Under this bill manufacturers will be encouraged to cross-license each other on price-fixed terms and thus establish a nationwide large-scale network of fixed prices, since the bill provides a broad immunity from the antitrust laws with respect to resale price fixing at any level of business activities.

This bill would promote the very types of horizontal and vertical price fixing 70 years of antitrust legislation by Congress was designed to prevent.

You ask me why I am so enthusiastically opposed to this bill. It is because it violates the concept of our antitrust laws. That is the main thrust of my opposition to it.

The businessmen who could not agree to fix prices or agree to have one of them fix prices for all of them, may do so under this bill simply by procuring someone to send them a convenient price-fixing notice.

It is no coincidence, I believe, that some of the most ardent supporters of these resolutions have been involved in price-fixing violations under the antitrust laws. I might add that in a number of antitrust cases, the courts have found that "fair" trade has been used as a means for carrying on a price-fixing conspiracy.

In many of our basic industries "administered pricing" and "price leadership" have largely eliminated price competition. This legislation bids fair to abolish price competition altogether by authorizing, indeed encouraging, horizontal and vertical price fixing. Even in those areas where price competition still persists, this bill would countenance its abolishment. What lipservice then could the proponents of this bill pay at their annual conventions about our vaunted free enterprise system which has served this great Republic so well since its foundation? I would suggest that the proponents of this bill should practice what they so piously preach. Let them compete in a free market rather than to destroy it.

If the Congress is now to abolish price competition by Federal fiat, let it at least be candid about it, without resorting to hypocritical phrases about quality stabilization.

The sure losers in any such precipitate flight from free enterprise will be the consumers, the sick, the poor who cannot afford the extortionate prices which "fair" trade fosters. The workingman, too,

will be hard hit, but he at least may enjoy a measure of protection because so many collective-bargaining agreements today are geared to the cost of living. Yet this in turn would beget new dangers to the public interest. The creeping inflation which successive administrations, both Republican and Democratic, have been trying to rein in since World War II, would break into a gallop if these pernicious bills should become law.

The enforcement provisions of this bill also give me great concern as chairman of the Committee on the Judiciary. The violator is subject to a suit for damages and injunctive relief. The suit may be brought in any U.S. district court in the district in which the defendant resides or is found or has an agent. And the person who sells an item for 50 cents less than its fair trade price is subjected not only to the ordinary costs of the proceeding but to the cost of the plaintiff's attorney's fees.

The proposed statute would be applicable to "all acts and transactions in or affecting commerce which Congress may lawfully regulate, and to all acts and transactions in any territory of the United States or in the District of Columbia." The rights given under the bill are also available to owners of a brand, name, or trademark, competing at any level of distribution, with the reseller.

The bill expressly provides that it does not modify or repeal the Miller-Tydings Act, the McGuire Fair Trade Act, or State "fair" trade laws.

This proposed law, aside from the fault of its basic premise that from price fixing all blessings flow, creates a Mycenaean maze for businessmen, lawyers, and the judges.

Thus while creating a compulsory national "fair" trade law, it also seeks to preserve State "fair" trade laws. The merchant who sells below the price fixed by the manufacturer may find himself sued in a Federal court on one ground and in a State court on another ground. The courts may be widely separated, even in different States. What may be legal under State law may be illegal under this proposed law.

This bill proposes to override the decisions of the courts which have held that the price fixer may not avail himself of State "fair" trade laws if he competes on the same level of distribution as the retailer against whom he brings suit. This proposed law would flood our already overburdened Federal courts with countless pipsqueak "fair" trade cases. It would turn our Federal courts into small claims courts at a time when Congress has raised the jurisdictional amount in civil cases to $10,000 to avoid engulfing the Federal courts in a sea of litigation. This bill would take away from the States a right they have enjoyed these many years; namely, to adopt or reject fair trade laws. It would impose upon many States a Federal policy contrary to State policy. It would represent a nadir of States rights.

Legal rulings, moreover, have not been the primary causes that have led to the abandonment of fair trade in many areas. Consumer resistance to high prices, warehouses stocked with unsold merchandise and the relentless pressure of substitute merchandise from competitive distribution channels were equally as important. Fair trade simply doesn't work. The enormous costs involved in comparison shopping, legal fees, and policing fair trade enforcement, alone, have been major causes for its abandonment by the manufacturers.

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If, as this bill proposes, nonobedience to a "fair" trade price is an unfair, deceptive practice, the Federal Trade Commission would be asked to turn away from its weighty duties, indeed to reverse its own policy, and to engage its attorneys, economists, inspectors, and members in pursuit of those guilty only of selling to the public at reasonable prices.

Small wonder this bill is disapproved by the Department of Justice, the Federal Trade Commission, and the Department of Commerce. The American Bar Association has strongly disapproved bills of this type. The Attorney General's National Committee To Study the Antitrust Laws was opposed to fair trade legislation. Recently, I received a letter from the American Farm Bureau Federation commenting upon H.R. 6245, a bill before my subcommittee. Pertinent to this hearing are the following passages from that letter:

> Since 1947–49 wholesale prices of drugs and pharmaceuticals, as reported by the Bureau of Labor Statistics, have declined 8 percent. This has occurred during a period in which most wholesale prices increased and in which wages in manufacturing industries increased 80 percent. On the other hand, the retail price of prescriptions and drugs, as reported by the Bureau of Labor Statistics, increased 21.5 percent during the same period * * *.
>
> The divergence of these price trends strongly suggests that primary attention should be directed to the margins between wholesale and retail prices.
>
> The drug industry has been the major proponent of retail price fixing under the authority of so-called fair trade laws, and the major employer of fair trade pricing programs. We believe that retail price fixing by manufacturers should be regarded as a harmful restraint of trade, contrary to the public interest.
>
> We recommend that Federal laws designed to protect State fair trade laws from antitrust attack be repealed * * *.

This bill's reservation of property rights, even after a resale, would replace modern principles of law by the precepts of the Middle Ages. No principle and policy of the common law has been more widely and uniformly accepted and approved by courts and legislatures, by commentators and by the people, than the rule against restraints on the alienation of property. This is true of goods as well as of real estate. More than 50 years ago the Supreme Court in the celebrated *Dr. Miles* case held that the seller of a trade-name product could not fix its resale price. The product in question, I might note, was a drug product. Concern for the trader and for the consumer, under our competitive free enterprise system, has denied any such reserved "right" to the patent and copyright holder. Is a "trade name" to be deemed of such greater significance as to override this traditional concern, or is the next step to propose price-fixing powers for patentees and copyrightees? Mr. Lowell Mason, a former member of the Federal Trade Commission, testifying in support of a companion resolution pending in the Senate, made the frank admission that the aim is to reverse a number of Supreme Court decisions and restore the old *Colgate* case doctrine in all its vigor; namely, to deprive the retailer of the right to use his own judgment in determining the price to sell to the consumer. To me it is quite strange to find Mr. Mason, on the one hand, supporting these bills in the name of private property rights, and on the other hand, arguing that a person who has paid for an article should have something much less than private property rights.

Mr. Mason speaks of the right to meet a competitor's lower price as the Magna Carta of the free enterprise system, but he would deny

the businessmen the right to fix the prices of the articles which he sells or to set a price enabling him to meet a competitor's lower price on the latter's own branded article.

I would point out to retailers subjected to the propaganda barrage of the proponents of these bills that if legislation of this sort is enacted, they will have given to the manufacturer the right to fix their profit margins, and the greater the demand for a fair trade product, the more likely that the margin will be narrow. To quote from the testimony of a representative of the National Oil Jobbers Council, in reply to a question by Chairman Monroney of the Special Subcommittee on Quality Stabilization of the Senate Committee on Commerce:

> Do you know what happened to us in Pennsylvania when they tried fair trading up there? They cut the jobber's margin, gross margin, in a normal market, one-half cent per gallon. One-half cent doesn't sound much to you gentlemen, but one-half cent a gallon is the difference between a profit and going out of business. That is a specific instance.

Unlike the State fair trade laws, under this proposed law, a single undersell, subjects the offender to being denied the right thereafter to sell such goods even at fair trade prices.

As my colleague, Mr. Madden, has noted concerning this bill, "There is no provision for contracts; as the bill is wholly predicated on the owner's property rights in his good name there is no dependence on a nonsigner clause as is the case with fair trade." Mr. Madden is both right and wrong. Under this bill all the price fixer has to do is attach a price to a tradename goods and the reseller is bound. Or if the price fixer prefers he can announce a price and if the reseller knows of it, he is bound. On the other hand, in a fair trade State, a single contract would suffice to bring into effect the nonsigner clause to fix yet another straitjacket for the reseller.

There is no definition of "bait merchandising practices." The bill does not say whether knowledge of the required selling price has to be actual or may be constructive. It permits those holding a monopolistic position to price fix resale items, since unlike prior fair trade acts it protects the price fixer "if there are goods usable for the same general purpose." What that phrase means is anyone's guess but it would seem to be broader than goods of the same general class—the language generally used in State fair trade laws.

Many retail associations, I am sure, will register in support of these resolutions. In almost every instance, I believe, they will have been subjected to a one-sided argument in favor of such bills. I think it highly significant, therefore, that a recent poll by the National Federation of Independent Business, in which arguments both pro and con were summarized, showed a majority, slight as it was, was opposed to these bills.

I am encouraged to note, moreover, that not only have consumer organizations opposed the counterpart of this resolution at hearings before the Senate Commerce Committee, but also retailers, retail associations, and wholesale associations.

To the sponsors of this bill I commend the cogent words of Montaigne: "Men are most apt to believe what they least understand."

There can be no greater erosion of States rights than this bill; there can be no more all-enveloping attempt to sanction nationwide price-fixing; there could hardly be a more vaguely worded or more unnec-

essary bill. If you want to have Federal price control vote for this bill. I earnestly urge that it be rejected.

I am sorry I took so long, gentlemen, but I thought it necessary to unfold to you some of these facts.

Mr. MACK. Thank you, Mr. Celler.

Your entire statement will appear in the record.

Mr. CELLER. Thank you.

(The balance of Mr. Celler's statement follows:)

APPENDIX A

STATEMENT FROM SEVERAL STATE COURT OPINIONS DECLARING STATE RESALE MAINTENANCE LAWS UNCONSTITUTIONAL

(1) The Supreme Court of Florida declared:

"As we have stated before, the real effect of the nonsigner clause is anticompetitive price fixing; not the protecting of the goodwill of trademarked products as other courts have held. Goodwill, it has been said, should be determined by the price which the goods can command in a competitive market, and not by the ability of the manufacturer to sell at a pegged retail price, which he himself selects, Corey, 'Fair Trade Pricing: A Reappraisal,' 30 Harvard Business Review 47, 60. Except in times of economic emergency such inflexible price arrangements which the act sanctions are not in line with our traditional concepts of free competition, which have traditionally been the 'yardstick' for protection of the consuming public. The real vice of the nonsigner clause is the absence of that standard, and the decisions of this court stated herein so hold. * * *" *Miles Laboratories Inc.* v. *Eckerd*, 73 So. 2d 680, 682 (Fla. Sup. Ct. 1954).

(2) The Supreme Court of Colorado:

"The general assembly may validate resale price maintenance contracts between contracting parties within constitutional limits but when the effect of the act * * * is to make such price schedule binding upon noncontracting parties, the act is nothing more or less than price fixing by legislative mandate. An unwilling citizen cannot be thus bound.

"Any act of the general assembly which arbitrarily destroys or impairs the right of the individual to the free use and enjoyment of his property, lawfully acquired, and permits the fixing of prices for the benefit of a special group, is opposed to the constitutional concept of a free people and should not be allowed to stand. Legislation of this kind evidences the ability of organized minorities to induce legislation for their special benefit at the expense of the unorganized purchasing masses * * *. We have not yet arrived at the place in America where the many must yield to the few, so that the latter may make ever increasing profits at the expense of those who still believe in the principle of free and competitive trade and commerce, untrammeled by legislative fiats." *Olin Mathieson Chemical Corp. v. Francis*, 134 Colo. 160, 186, 301 P. 2d 139, 152 (Colo. Sup. Ct. 1956).

(3) The court of appeals in Kentucky (highest State court) held:

"This statute, we think, is a legislative invasion of the broad constitutional liberty of the people to acquire and protect their property and engage in free trade.

* * * * * * *

"What is wrong with a man selling his own property for what he pleases? We think the statute is the antithesis of 'fair trade.' It forces price fixing.

* * * * * * *

"On balance, the overwhelming public interest and welfare is the right of free people to engage freely in competitive trade in commodities that may not be injurious to the general safety and welfare, such as are within special regulation under a proper exercise of the police power. We agree * * * that the overriding purpose of that statute is to sanction price fixing and that the protection of a brand name or symbol of the producer seems to have been incidental * * *." (*General Electric Co.* v. *American Buyers Cooperative* (Ky. Ct. of App. 1958), 316 S.W. 2d 354, 361).

(4) The Supreme Court in Minnesota:

"* * * The Unfair Practices Act (sec. 325.04) is designed to protect the public from predatory or below-cost trade practices. On the other hand, under the

apparent purpose of protecting the goodwill of the manufacturer of the brand commodity, the nonsigner provision (sec. 325.12), in reality, eliminates competition in price honestly based on differences in selling costs as between merchants whose costs of business may differ as a result of normal and natural competitive practices.

* * * * * * *

"In examining the grant of authority to the trademark owner it must be conceded that he is given the privilege to place the law in effect and to amend or alter it at his will. He may do this without regard to the interest or welfare of nonsigners or the consumer who represents the public. The law does not provide for any standard or condition as to the necessity for the act. It gives to the trademark owner carte blanche authority to make that determination alone. He is not required to consult with anyone. There is no one to review his act.

"In considering the justification for reposing this authority in the trademark owner, the real character and purpose of the Fair Trade Act should be examined. Its ostensible justification is to compel adherence to fixed prices so as to protect against debasement the goodwill of trade-name commodities. Although this property right may be constitutionally protected, as witness the *Old Dearborn* decision, an examination of the great number of authorities and the vast literature by way of reviews and reports dealing with the subject compels the conclusion that the real impact of the law is in the area of price fixing. The protection of the property right in trademarks and goodwill attendant to them is of interest to a limited number of persons and constitutes legislation for their exclusive benefit.

* * * * * * *

"* * * The record in this case contains the testimony of a respected economist to the effect that resale price maintenance under the so-called Fair Trade Act is detrimental both to the consumer and to the economy. He was of the view that the producer of the commodity who invokes the act is usually a member of a monopoly or oligopoly, because if there were numerous producers of a competing commodity few would abide by the pricing practices of one or two. His opinion that the policy of the act makes possible a price monopoly inimical to the public welfare is clearly borne out by the record. There is in force a fair-trade contract in respect to Remington shells produced by plaintiff. The major competing shells are manufactured by Olin Mathieson Chemical Corp. under the name of 'Winchester.' Olin Mathieson's shells are also fair traded. These two manufacturers control 87 to 90 percent of the production of shells in the United States. It appears from the record that for almost all types of shells produced by each of these manufacturers, in fact for every type which is common to the production of both of them, the price is identical to the penny. This is significant considering that the elaborate price lists of both manufacturers were printed and published 3 days apart. It is apparent the record here establishes that the act, rather than regulating and controlling monopoly power, creates a climate where monopolies may flourish. Their views are in accord with the thought of authorities who have written and reported on the subject of retail price maintenance in the past few years" (*Remington Arms Company, Inc.* v. *G.E.M. of St. Louis, Inc.* (Minn. Sup. Ct. 1960), Trade Cases 69,673).

(5) The Supreme Court of Arkansas stated:

"It is a generalization, but not an overstatement, to say that the effort to 'fix prices' is made by groups who desire to sell something for more than the sponsoring group believes that the purchasing public would pay for that 'something' without an enforced fixed price. It would seem apparent that the principal objective of minimum price maintenance is the protection of profit margins for retailers and distributors unable or unwilling to meet the pressure of competition." (Quoted with approval in *Remington Arms Co., Inc.* v. *Skaggs* (Wash. Sup. Ct. 1959), Trade Cases 69,520.)

APPENDIX B

COMPARISON OF FAIR-TRADE AND NON-FAIR-TRADE PRICES

In Miami, Fla., a sick person could buy Achromycin V capsules for $6.40 instead of $7.65; Orinase for $5.25 instead of $6.75; Declomycin for $6.40 instead of $7.65; Unicaps for $1.79 instead of $3.11; Coricidin for 97 cents instead of

$1.08; Johnson & Johnson baby powder for 54 cents instead of 59 cents; Johnson & Johnson cotton for 33 cents instead of 39 cents.

In Indianapolis, Ind., the sick could buy Orinase for $6.25 instead of $6.75; Serpasil for $6.50 instead of $7.50; Diuril for $7.65 instead of $9; Unicaps for $2.83 instead of $3.11; Ben-Gay for 79 cents instead of 89 cents; Anacin for 99 cents instead of $1.19. The parent could also obtain Johnson & Johnson baby oil for 89 cents instead of 98 cents.

In Louisville, Ky., a person could buy Unicaps for $2.39 instead of $3.11, and One-A-Day Multiple for $2.36 instead of $2.94; Coricidin for 79 cents instead of $1.08; Dristan for 63 instead of 98 cents; and Orinase for $6.25 instead of $6.75. Colgate dental cream could be obtained for 53 instead of 69 cents, and Johnson & Johnson baby powder for 47 instead of 59 cents.

Additional examples are found in St. Louis, Mo., where one could buy Serpasil for $6.50 instead of a fair-trade price of $7.50; Orinase for $6.50 instead of $6.75; Madribon for $4.35 instead of $4.90; Unicaps for $2.19 instead of $3.11; Poly-vi-sol for $2.49 instead of $3.59; Similac for 89 cents instead of 99 cents; Bayer aspirin for 49 cents instead of 69 cents; Colgate dental cream for 55 cents instead of 69 cents.

In Seattle, Wash., a sick person could buy Declomycin for $7.20 instead of $7.65; Ilosone for $10.60 instead of $11.43; Madribon for $4.79 instead of $4.90; Bufferin for 99 cents rather than $1.23. He could also buy Colgate dental cream for 49 cents instead of 69 cents.

In Spokane, Wash., he could buy Unicaps for $2.63 instead of $3.11 and Theragran for $7.99 instead of $9.45.

In Huntington, W. Va., the hard-hit diabetic miner could buy Orinase for $6.25 instead of $6.75. A sick person could buy Serpasil for $6.75 instead of $7.50; Madribon for $4.50 instead of $4.90.

In Minneapolis, Minn., a sick person could buy Achromycin V capsules and Declomycin for $7.20 instead $7.65, Orinase for $6.25 instead of $6.75, Clor-Trimeton Maleate for $4.50 instead of $5.58, Coricidin for 76 cents instead of $1.08, and Absorbine, Jr., for $1.25 instead of $1.45. He could also pay 54 cents for Colgate's dental cream instead of 69 cents.

In Cleveland, Ohio, the sick could have the benefit of a price of $5.88 for both Achromycin V capsules and Declomycin instead of a $7.65 price. He could purchase Orinase for $4.99 instead of $6.75, Gantrisin for $3.97 instead of $4.90, Kynex for $2.70 instead of $3.55, Unicaps for $2.51 instead of $3.11, Dristan for 72 cents instead of 98 cents, and Ben-Gay for 70 cents instead of 89 cents.

Appendix C

Price Quality Comparisons

Frozen shrimp.—("Raw" breaded) two brands rated "very good" were less expensive than at least one brand rated as "good," four rated as "fair," and three rated as "poor." Of eight brands of frozen raw peeled shrimp only the cheapest brand received a very good rating.

Upright freezers.—The three top-rated brands were comparable in price to most of those tested. Of the four highest priced, none was top rated, one was in the third quality bracket, and one was rated "not acceptable." There was also a considerable price range on identical models.

Kitchen scales.—The two best rated were the highest priced.

Twenty-three-inch TV consoles.—Two makes were top rated. One was priced at $350, the other at $279.95. There were at least four other lower rated brands selling for $279.95 or higher.

Steam irons.—The six top-rated models ranged from $10.88 to $19.95. The highest priced model, $27.95, was "acceptable" but not top rated.

Seat belts.—The price range of seven top-rated models was $10.95 to $14.95. Two models, one at $6.95, the other at $9.95, survived the highest-speed crash test but showed incipient failure. Seven $12.95 and one $14.95 models failed the highest-speed crash test. A number of $12.95 and $10.95 models failed all crash tests.

Tank vacuum cleaners.—Of the four rated "very good," three were price at $89.95 and the fourth at $99.75. Of those rated "good," two were the highest priced, $119.95 and $139.

Nineteen-inch portable TV.—The highest rated were priced at $199.95 and $209.95. A number of others not so rated were also priced at $199.95.

Transistorized electronic flash units.—Of 10 brands tested the only unacceptable one was the highest priced (along with one which was acceptable).

Dehumidifiers.—A number of the higher priced brands were not among the top rated.

Suntan preparations.—The two top-rated brands were among the lowest priced. Three of the highest priced were among the lowest rated.

Built-in electric ranges.—The three top rated were priced $89.95 to $114.95. Many lower rated were higher priced.

Black and white film.—The two brands rated "very good" and the three rated "good" were identically priced.

Mr. MACK. Mr. Dingell?

Mr. DINGELL. Mr. Chairman, I want to commend my old and valued friend for a very fine statement.

Mr. CELLER. Don't emphasize the "old" too much.

Mr. DINGELL. I mean to imply our friendship is old. In a sense, the gentleman from New York is vigorous and young of mind and body. He is one of our most valued Members and I am glad to have him before us.

Mr. MACK. The committee will stand in recess until 2 o'clock this afternoon.

AFTERNOON SESSION

Mr. MACK. The committee will come to order.

Our first witness this afternoon is the Honorable Catherine May.

Mrs. May, we would be very happy to have your testimony.

STATEMENT OF HON. CATHERINE MAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mrs. MAY. Mr. Chairman and members of the subcommittee, I have presented this committee with copies of my full statement. In the interest of time, and because I realize the subcommittee has other witnesses to hear this afternoon, I would ask your permission to perhaps do a precis of my full statement for you and comment on some of the more cogent points I wish to bring out.

Following my statement I would like to ask the permission of the Chair and the committee to include some letters and telegrams from interested people in my congressional district; that is, persons who have a direct interest in the bill that is before you.

Mr. MACK. Your entire statement will be included in the record at this point.

(Mrs. May's statement follows:)

STATEMENT OF HON. CATHERINE MAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. Chairman and members of the subcommittee, I am Representative Catherine May serving my second term in Congress from the Fourth Congressional District of Washington.

My business experience before coming to Congress involved me in the wonderful process of bringing to market the products of our free competitive economy. We used radio, television, and other audiovisual techniques to stimulate a demand for these products.

In so doing I became impressed with the determination of the great majority of businessmen to bring to market the finest possible products. I learned to appreciate the great wealth of experience behind their efforts. Over and over again, I received a behind-the-scenes insight into the dedicated drive that was necessary to take a new product from the research and development stage into mass production, then on into the channels of distribution.

I know from firsthand experience that research, development, and production on the scale that exists today is only possible because of carefully planned and coordinated demand-creating activities on the part of manufacturers, advertising agencies, distributors, retailers, and all of the many segments of business that provide services that assist these activities. In the latter group, I am thinking of newspapers, printers, artists, radio, and TV stations, etc.

I became keenly aware that a very high percentage of this activity was tied irrevocably to brand names and trademarks. I found that a very important part of the small business community of my hometown of Yakima had geared its daily tasks to the advertising, promotion, and distribution of brand name and trademarked products. The ability of businessmen to identify themselves with famous brand names, with honored trademarks, had helped to motivate them to establish their businesses, invest their savings, build buildings, expand, remodel, increase employment, and embark on a long-range plan of operation. When I pursued my career in the larger cities of the country I found the same conditions to exist.

The right to protect these trademarks has played a major role in providing incentives to resellers and those who serve resellers—that's just about everyone in a town like Yakima, Wash. Add the producers and developers and you'll find a very high percentage of the population in each and every trading area in the United States is dependent upon our brand name system of distribution.

That's why I became alarmed (and I use the word "alarmed" instead of "interested") when I became increasingly aware of the dishonest and price-cutting practices that are destroying the goodwill symbolized by brand names and trademarks. I am desperately concerned to find that parasitic practices are on the increase.

With the emphasis in marketing shifting to the price and the gimmick, I find that the "leech" is attaching himself to the main bloodstream of business, and he gets his strength from his misuse of brand name and trademarked products. It gets particularly serious when the resellers who have helped the manufacturers to establish these brand names and trademarks find that they must shift their emphasis to coping with price and gimmick selling in order to stay alive.

My alarm is for the consumer, the housewife, who prefers an emphasis on quality instead of price, and who is the greatest loser in the current cannibalistic marketplace.

My alarm is for the resellers who prefer to engage in demand-creating activities that emphasize quality and service at a fair price.

My alarm is for the manufacturers who desire to produce quality trademarked products and prefer to have them sold and serviced on a quality basis at a fair price.

My alarm is for the preservation of our distributive economy that has had such an important role in building our country to the position that it has reached today.

From the Air Force I borrow the term "May Day" to broadcast the threat to our future. The danger exists now. Countermeasures must be undertaken now. It's May Day for our distributive economy on June 11, 1962.

It was the businessmen up and down the main street of Yakima and from other communities of eastern Washington that called my attention to the best available remedy. From my own constituents, I first learned about the importance of the quality stabilization bill. Subsequent studies have convinced me that legislation is needed, that the quality stabilization bill provides the remedy, that Congress has the responsibility to act to protect the economic interest that manufacturers, resellers, and consumers have in honored brand names and trademarks.

I found that businessmen in every category know about this proposed law and want it enacted. The small businessmen who call themselves retailers are in the forefront; the hardware merchant, the office machine dealer, the furnitureman; there's the sporting goods dealer, the jeweler, and the stationer; we must not forget the service station operator, the bicycle dealer, and the specialists who operate stores featuring children's and baby apparel; there's the corner druggist, and on the opposite corner the man behind the counter in the tobacco store; there's the shoeman and the clothier; the camera store operator, the appliance dealer, and the department store—and all need this legislation. I've checked into it in my district; you can easily check into it in yours, if wires, phone calls, and letters have not already told you of the desperate need.

These retailers realize that the cry is "May Day" as they rally behind this proposed legislation.

These same retailers have a long-range interest in serving the needs of the consumer—the homemaker. And we must be even more concerned here with the wishes of the homemaker.

How does the homemaker view this proposed legislation giving the brand-name owner the right to control the use of his trademark in the channels of commerce?

An organization very much in the forefront of this fight for enactment of the quality stabilization bill has provided me with an authentic answer. There has been made available to me the results of a poll of 15,295 homemakers in this country—with an equal sample of homemakers in every congressional district, including my own, being polled.

Question six of this survey was of most interest to me, because all of the elements of the quality stabilization bill are contained in that question. It read:

"Do you believe that the manufacturer who really wants to give you the highest quality, highest dependability, and highest value in his trademarked product should be permitted to protect that quality, and value, for you and protect his own good reputation by lawfully preventing any change, either up or down, by a storekeeper in the retail price such quality manufacturer may name to be paid for his quality product everywhere?"

Response to that question in my district showed that 81.8 percent of the homemakers prefer the enactment of the quality stabilization bill. The percentage for all seven districts of the State of Washington was 79.4 percent in favor of the quality stabilization bill and for all 437 districts of our 50 States the percentage was 81.1 percent. Thus 8 out of 10 homemakers said, in effect, they want a law like the quality stabilization bill permitting the manufacturer of a trademarked quality product to establish and enforce a specific retail price to be paid for that product.

This survey is notice to Congress that the majority of the homemakers of America want to know more about where they stand when they go to market; that the individual homemaker wants assurance that she gets the same top quality and price as any other consumer and that her chances are far better when the manufacturer is permitted to stabilize his prices.

Quality Brands Associates of America, Inc., was responsible for this survey. To avoid prejudicial reactions to the name "quality stabilization," American Issues Press made available its name as sponsor of the survey.

A total of 15,295 homemakers, selected at random in every congressional district in the United States, were interviewed by telephone. This work was done for American Issues Press, Inc., by Manpower, Inc., skilled in the work of taking such polls, through its more than 200 offices throughout the United States. The survey was conducted under the most rigid conditions by interviewers of Manpower, Inc., who were specially trained for the assignment so that questions would be asked without interviewer bias.

The 15,295 homemakers were selected in equal number from each of the 437 congressional districts of the United States, the boundaries of which districts are determined by population distribution.

The total surveyed is about 10 times the number customarily required by opinion survey organizations as adequate to provide a dependable cross sectional result.

To preclude any possibility of challenge of the integrity or accuracy of the final reports of the survey, Manpower mailed all reports direct to Ernst & Ernst, nationally known certified public accountants in Chicago. Ernst & Ernst tabulated and certified the results. Ernst & Ernst is holding all pollsters' reports in confidence.

Reflected throughout the survey is an awareness by the consumer of factors—discounting, quality deterioration, price as related to value, and so forth—that call for enactment of the quality stabilization bill. Seven questions were asked in this massive survey of homemaker's opinion and in capsule form, here are the results:

More than 9 out of 10 housewives are loyal to a favorite brand.

More than 9 out of 10 also "consider both quality and price" in their purchases.

Again, more than 9 out of 10 say the price-cut downgraded product gives less in value for what they pay.

Six out of ten believe storekeepers should not determine the retail price, even on low-grade trademarked products.

More than 8 out of 10 believe that low-quality products cheapened to meet a limited need for a limited budget should continue to be available.

Upon analysis, the results of this survey are not surprising because the marketplace in the past few years has degenerated to that resembling an oriental bazaar. The consumer has been the victim of come-ons, has been baited, has been switched, has been gouged, and has been subjected to repair bills that many times have approximated or surpassed the original cost of the product.

Yes, these consumers are puzzled. They are hesitant purchasers; they wonder what is going on as they see the emphasis shift more and more from quality and service to the price and the gimmick. The consumer is becoming more and more frustrated as their basic knowledge that "one gets what one pays for" is challenged by a marketplace filled with trickery and deceit.

There we have it. The quality stabilization bill will provide a big step toward the continuance of marketplace sanity. It provides an immediate answer to the May Day call from consumers, resellers, and quality manufacturers.

The quality stabilization bill provides an immediate answer to the May Day call from citizens and from businessmen who have had such an important role in building our country and are so important to its future.

Mr. MACK. We shall also insert such documents as are pertinent and we will duly evaluate statements and matters filed for the record.

(The material mentioned is as follows:)

[Telegram]

SEATTLE, WASH., *June 7, 1962.*

Hon. CATHERINE MAY,
U.S. House of Representatives,
Washington, D.C.:

The 1,200 members of the Washington State Pharmaceutical Association in convention assembled in Yakima, have just voted unanimously to request your active help and support in bringing Senate Joint Resolution 636 (Quality Stabilization Act) to the floor of the House of Representatives for a vote. We share a widely held feeling that unless this legislation is passed the very existence of small independent business is threatened and we also share the belief that our country is better off with many small businesses rather than a handful of giant enterprises. We earnestly ask your wholehearted support.

REED BEMENT,
Executive Secretary, Washington State Pharmaceutical Association.

[Telegram]

MOSES LAKE, WASH., *June 5, 1962.*

Hon. CATHERINE MAY,
Washington, D.C.:

We urge your support of quality stabilization bill as vitally necessary to survival of small business.

J. R. STARR,
S. & M. Hardware, Moses Lake, Wash.

[Telegram]

TOPPENISH, WASH., *June 8, 1962.*

Hon. CATHERINE MAY,
House Office Building, Washington D.C.:

We need your help. Quality stabilization bill deserves your support.

CITY HARDWARE & PLUMBING.

MIDDLETON'S PHARMACY.
Selah, Wash.

Hon. CATHERINE MAY: I would like to ask your support of the quality stabilization bill. Independent druggists feel this law would be fair to both retailer and consumer. The present setup will end in more monopoly if not checked. Thank you.

JOHN COLLITON.

HARRAH DRUGS,
Harrah, Wash., May 17, 1962.

Hon. CATHERINE MAY,
U.S. House of Representatives,
Washington, D.C.

DEAR MRS. MAY: As owners of a smalltown business we are very interested in Senate Joint Resolution 159 and H.R. 10335, pending at this time before Congress.

We feel that legislation of this type is an absolute "must" for the survival of the home-owned small retail business. If such legislation is enacted it will be of great help to us in competing with large discount houses.

We sincerely urge you to support this legislation when it comes to a vote.

Sincerely,

H. E. HUNTER.
MARGARET E. HUNTER.

PINNELL, INC.,
Yakima, Wash., June 8, 1962.

Hon. CATHERINE MAY,
House of Representatives,
Washington, D.C.

DEAR CONGRESSWOMAN MAY: I certainly hope that you will use your influence in getting passage of the quality stabilization bill, H.R. 10335.

This bill, I feel, is a very important piece of legisation for the small businessman. You are one person that is certainly aware of the problems of the small businessman because this congressional district is made up of a large number of these companies and their survival is important to the economy of our Nation.

I would certainly appreciate any efforts on the behalf of the small businessman that you will make to get passage of this bill.

It was certainly wonderful to see you when you were in Yakima, especially nice that we had an opportunity to talk over a few problems and I am certainly looking forward to seeing you after adjournment of Congress.

Sincerely yours,

GEORGE L. PINNELL.

JESS BARBER'S READY-TO-WEAR,
Yakima, Wash., June 5, 1962.

Hon. CATHERINE MAY,
House of Representatives,
Washington, D.C.

DEAR CATHERINE: Knowing your interest in small businesses it was thought you may like to hear from one about the bill in Congress relating to quality stabilization.

It is my impression this bill would deter retail firms from using branded items as loss leaders. As you know, many small firms have been forced to curtail quality brands due to price cutting of the discount-type operations.

If some type of brand protection could be afforded small firms it would certainly improve the business climate of these establishments.

It would be appreciated if you could help out in anyway you can.

Sincerely yours,

WILLIAM W. PATTERSON.

YAKIMA HARDWARE CO.,
Yakima, Wash., June 4, 1962.

Hon. CATHERINE MAY,
House of Representatives,
House Office Building, Washington, D.C.

DEAR MRS. MAY: We in the hardware business in your district want to commend you and thank you for your efforts on the quality stabilization bill, H.R. 10335.

We at the Yakima Hardware Co., as wholesalers calling on all the small hardware stores in this area, hear constantly of the plight of our small customers because of unscrupulous use of the backbone of their business; namely, nationally known and advertised trade name products. We are seeing a number of actual business failures, and in every case this problem of control of quality brands has been one of the mentioned factors in the liquidation or failure of such business.

If these small dealers are to perform their essential function of being a source for consumers in convenient locations and to properly service the products after they are once sold, it is essential that they be given some protection to cover their expenses and show at least a modest profit.

It is our belief that this quality stabilization bill will do more to stabilize these small merchants than any other act. Therefore we want to encourage you to continue your efforts on this bill and to let you know how strongly we are behind your endeavors.

Yours very truly,

DICK MARBLE,
Vice President-General Manager.

HAROLD H. SCHULTZ DISTINCTIVE HOME FURNISHINGS,
Yakima, Wash., June 7, 1962.

Hon. CATHERINE MAY,
House of Representatives,
House Office Building, Washington, D.C.

DEAR MRS. MAY: I wanted to drop a letter to you expressing my own personal as well as my fellow merchants' sincere feeling toward the quality stabilization bill, H.R. 10335. After studying this legislation I feel as though this is definitely good for American business as a whole. Indeed I urge the passage of this law.

I understand that you are going to be doing some of the debate on this particular bill and while you on the floor you can rest well assured that you have the contingent of Yakima merchants firmly on your side.

Thank you again for your kind cooperation in regard to the above matter, I remain,

Sincerely yours,

ROBERT H. SCHULTZ.

BROAD'S,
Yakima Wash., June 1, 1962.

Hon. CATHERINE MAY,
House of Representatives Building, Washington, D.C.

DEAR CATHERINE: Your interest and activity in cosponsoring the quality stabilization bill is, in my opinion, most commendable.

Small retailers—the backbone of the merchandising industry—are being forced out of business by unscrupulous discounters who are trading on nationally known trade names to sell their shoddy merchandise. In the meantime, John Public is fooled into thinking he is getting more for his money than he is getting.

Provision must be made so that brand names can be protected and the public given a break for its money. It seems to me, that from what I know now, your quality stabilization bill will help to accomplish this.

Best personal regards,

BERT BROAD.

SUMMITVIEW GARDEN CENTER,
Yakima, Wash., June 2, 1962.

Re House bill No. 10335.

Hon. CATHERINE MAY,
House of Representatives,
Washington, D.C.

DEAR MRS. MAY: Because of the increased difficulty of the small businessman to operate at a profit and because he must meet competition of the large firms who have much money to back their operation, I am hoping that House bill 10355 concerning quality stabilization will be passed.

Sincerely yours,

WM. J. SERR.

ANDERSON'S CAMERA & SPORT SHOP,
Yakima, Wash., June 7, 1962.

Hon. CATHERINE MAY,
New House Office Building,
Washington, D.C.:

It is with a great deal of pleasure I write this letter to commend you in your efforts to enact the quality stabilization bill you are now presenting to the Congress.

Such legislation, I believe, is not only essential to the principles of Americanism but necessary for the survival of small business. It is very democratic in that it permits a manufacturer (if he desires) to maintain the quality of his products by insisting the price of his merchandise be the same from store to store and from town to city. And to state it is necessary for the continuation of small business is almost an understatement. I am positive I cannot compete with the larger corporations in a price war, since I do not enjoy the advantage of volume buying power and the resultant lower net prices. In addition, I cannot sustain a battle in "near-cost" or "loss-leader" retail prices (an example—last year a Northwest film processing corporation went into competition to us directly by offering a product which we normally pay wholesale $1.10 for 9 cents to our competitors). Large, chain organizations can take a loss in one area and make it up elsewhere.

Therefore, I congratulate you on your fine work. This legislation is vital to the continuation of all small business. In fact, without it I doubt seriously I will last long against the various cutthroat companies whose main product for sale is price. From the discussions I have had with my fellow small businessmen, I am sure they feel the same.

I request you let me know if there is any way I may be of assistance to you in your fight. If there is anything I can do, please do not hesitate to contact me. Meanwhile, thank you for your work.

Sincerely,

HARVEY M. ANDERSON, *Owner.*

H. O. WILSON CO.,
Bickleton, Wash., June 7, 1962.

Congresswoman CATHERINE MAY,
Washington, D.C.

DEAR REPRESENTATIVE: I would much appreciate your support of the Capehart-Madden quality stabilization bill.

I believe this bill would be of benefit to the retail trade and customers alike and am much interested in this bill's passage as I am among the small retail businessmen.

Thank you.

Yours truly,

H. O. WILSON.

GILLENWATERS, INC.,
Goldendale, Wash., June 7, 1962.

Mrs. CATHERINE MAY,
U.S. Representative,
Washington, D.C.

DEAR MRS. MAY: Please enact the Madden quality stabilization bill to protect manufacturers, dealers, and consumers. We, as independent dealers, are in need of some kind of protection soon, as we are going out very fast due to the present methods of cutthroat pricing, inferior quality, and also the high cost of doing business.

Very truly yours,

DEAN GILLENWATERS.
FLORENCE GILLENWATERS.

LEE SEMON,
Yakima, Wash., June 4, 1962.

Hon. CATHERINE MAY,
House of Representatives, Washington, D.C.

DEAR CATHERINE: I have just had the opportunity to read H.R. 10335 referred to as the "quality stabilization bill." We, like other retail establishments that handle quality brands, ask that you support this bill as a firstline defense against those businesses that would undermine the independent merchant.

Through the years, those firms whose name has been synonymous with quality, will find defamation rather than respect if the present trend of "baiting" is continued. In these days when every other word is "discount" or "sale," it is difficult to convince the consumer what true value or quality are and the passage of the quality stabilization bill may assist in this goal.

Kindest personal regards.

Sincerely,

STUART SEMON.

WILLIAMS PAINT & GLASS CO.,
Yakima, Wash., June 7, 1962.

Hon. CATHERINE MAY,
House of Representatives, House Office Building,
Washington, D.C.

DEAR MRS. MAY: I am writing you an urgent letter in regard to H.R. 10335, quality stabilization bill, a bill I feel is in dire need of the support of all small businessmen such as myself. Being a small paint dealer in our town of about 50,000, I am weathering right now a price war such as I have never seen on a nationally known brand of paint that the Fair Trade Act removal has caused. I can no longer afford to carry this quality, nationally known brand of paint because of the price cuttings. I cannot handle it for it costs me $4.35 a gallon and is being sold by cutrate and chainstores for $4.95 a gallon. I have merchandised this line of paint for the past 17 years, but now unless something is done at the legislative level, myself and most all of the small independent paint and hardware dealers will have to abandon this merchandise to the price cutters and discount houses.

Please do something if you can, Mrs. May about this H.R. 10335. Thank you.

Sincerely,

HOWARD WILLIAMS,

Mrs. MAY. Mr. Chairman and members of the subcommittee, I am Representative Catherine May serving my second term in Congress from the Fourth Congressional District of Washington.

My business experience before coming to Congress involved me in the wonderful process of bringing to market the products of our free competitive economy. We used radio, television, and other audio-visual techniques to stimulate a demand for these products.

In so doing I become impressed with the determination of the great majority of businessmen to bring to market the finest possible products. I learned to appreciate the great wealth of experience behind their efforts. Over and over again, I received a behind-the-scenes insight into the dedicated drive that was necessary to take a new product from the research and development stage into mass production, then on into the channels of distribution.

I know from firsthand experience that research, development, and production on the scale that exists today is only possible because of carefully planned and coordinated demand-creating activities on the part of manufacturers, advertising agencies, distributors, retailers, and all of the many segments of business that provide services that assist these activities. In the latter group, I am thinking of newspapers, printers, artists, radio and TV stations, and so forth.

I became keenly aware that a very high percentage of this activity was tied irrevocably to brand names and trademarks. I found that a very important part of the small business community of my hometown of Yakima had geared its daily tasks to the advertising, promotion, and distribution of brand name and trademarked products. The ability of businessmen to identify themselves with famous brand names, with honored trademarks, had helped to motivate them to establish their businesses, invest their savings, build buildings, expand, remodel, increase employment, and embark on a long-range plan of operation. When I pursued my career in the larger cities of the country I found the same conditions to exist.

The right to protect these trademarks has played a major role in providing incentives to resellers and those who serve resellers—that's just about everyone in a town like Yakima, Wash. Add the producers and developers and you will find a very high precentage of the popula-

tion in each and every trading area in the United States is dependent upon our brand name system of distribution.

That is why I became alarmed (and I use the word "alarmed" instead of "interested") when I became increasingly aware of the dishonest and price-cutting practices that are destroying the goodwill symbolized by brand names and trademarks. I am desperately concerned to find that parasitic practices are on the increase.

Then in my statement I have put into categories the alarm which I share on the part of various people who are such an important part of our economy.

It was the businessmen up and down the main street of Yakima and from other communities of eastern Washington that called my attention to the best available remedy. From my own constituents, I first learned about the importance of the quality stabilization bill. Subsequent studies have convinced me that legislation is needed, that the quality stabilization bill provides the remedy, that Congress has the responsibility to act to protect the economic interest that manufacturers, resellers, and consumers have in honored brand names and trademarks.

I found that businessmen in every category know about this proposed law and want it enacted.

These same retailers have a long-range interest in serving the needs of the consumer—the homemaker. And we must be even more concerned here with the wishes of the homemaker.

How does the homemaker view this proposed legislation giving the brand name owner the right to control the use of his trademark in the channels of commerce?

An organization very much in the forefront of this fight for enactment of the quality stabilization bill has provided me with an authentic answer. There has been made available to me the results of a poll of 15,295 homemakers in this country—with an equal sample of homemakers in every congressional district, including my own, being polled.

Question 6 of this survey was of most interest to me, because all of the elements of the quality stabilization bill are contained in that question. It read:

> **Do you believe that the manufacturer who really wants to give you the highest quality, highest dependability, and highest value in his trademarked product should be permitted to protect that quality, and value, for you and protect his own good reputation by lawfully preventing any change, either up or down, by a storekeeper in the retail price such quality manufacturer may name to be paid for his quality product everywhere?**

Response to that question in my district showed that 81.8 percent of the homemakers prefer the enactment of the quality stabilization bill, the percentage for all seven districts of the State of Washington was 79.4 percent in favor of the quality stabilization bill and for all 437 districts of our 50 States the percentage was 81.1 percent. Thus 8 out of 10 homemakers said in effect they want a law like the quality stabilization bill permitting the manufacturer of a trademarked quality product to establish and enforce a specific retail price to be paid for that product.

My statement also shows how this poll was handled because I think this is important in determining that this was a true response in the

way of a survey which provided notice to Congress that the majority of the homemakers of America want to know more about where they stand when they go to market and the individual homemaker wants to be assured she gets the same top quality and price as any other consumer and her chances are far better when the manufacturer is permitted to stabilize prices.

Upon analysis, the results of this survey are not surprising because the marketplace in the past few years has degenerated to that resembling an Oriental bazaar. The consumer has been the victim of comeons, has been baited, has been switched, has been gouged, and has been subjected to repair bills that many times have approximated or surpassed the original cost of the product.

Yes, these consumers are puzzled. They are hesitant purchasers: they wonder what is going on as they see the emphasis shift more and more from quality and service to the price and the gimmick. The consumer is becoming more and more frustrated as their basic knowledge that "one gets what one pays for" is challenged by a marketplace filled with trickery and deceit.

There we have it. The quality stabilization bill will provide a big step toward the continuance of marketplace sanity. It provides an immediate answer to the "Mayday" call from consumers, resellers, and quality manufactures.

The quality stabilization bill provides an immediate answer to the "Mayday" call from citizens and from businessmen who have had such an important role in building our country and are so important to its future.

I thank the chairman and the subcommittee for allowing me to present this statement in support of the quality stabilization bill and in behalf of those in my own area as well as throughout the country who are supporting it.

Mr. MACK. Thank you, Mrs. May. I would like to commend you on a very forceful statement today.

I respectfully call to your attention the consumer protection which would be afforded if this bill were to be enacted.

Questions?

Mr. DINGELL. I would certainly like to join our chairman in commending you for a very excellent statement. I think the committee has been considerably helped by your kind comment.

I notice you are a sponsor of H.R. 11778. Is that correct?

Mrs. MAY. I am pretty sure that is the companion bill here.

Mr. DINGELL. Is that identical to House Joint Resolutions 636 and 637?

Mrs. MAY. My bill is identical to the bill of the chairman of this subcommittee.

Mr. DINGELL. I would like to ask some questions about that bill, if I may.

First, does this bill amend the antitrust laws in any way?

Mrs. MAY. Mr. Dingell, I am not prepared to answer the legal implications. I sorry that I was not able to attend the hearings this morning on this. I understand that you asked questions concerning that.

May I say that I certainly would not want to prejudice expert witnesses that I know are following me today in their presentation of the legal and technical interpretations of this bill.

I did not draft the bill. It is a companion bill to that introduced by the chairman of this subcommittee.

I do not have a legal background to give a correct answer as to what its particular implication might be as to present law on the book. Any attempt I might make I am afraid might be legally incorrect.

I have heard some of the discussion when I was able to attend the Senate hearings, but, as I say, I know I will be followed by men who can answer some of the legal technicalities on this far better than I can do.

Mr. DINGELL. Don't you think this is an essential element of knowledge to have before you sponsor a piece of legislation?

Mrs. MAY. I couldn't agree more. On any piece of legislation I think that these questions proposed by you or any other member of the subcommittee as to legal technicalities and where the bill might be improved or changed certainly should be brought up before not only your committee but any committee in Congress.

Mr. DINGELL. Do you feel that this bill should be construed as amending the antitrust laws or as not amending the antitrust laws?

Mrs. MAY. I cannot answer that.

Mr. DINGELL. Let us take this specific situation: Do you feel it is appropriate that Esso, for example, should be permitted to establish a retailing operation to large accounts and at the same time that it should be permitted to fix the resale prices for its merchants who sell in competition, usually small businessmen, jobbers, and small gas station men, who sell in competition? Do you think that is an appropriate situation?

Mrs. MAY. With your statement and with your question are you saying that this would be the natural followup of the passage of such legislation, Mr. Dingell?

Mr. DINGELL. I am saying that that is inherent in the enactment of this bill. I will refer you to specific language in this bill, page 7 of your bill.

Mrs. MAY. I am aware where the language is. The point is that I understand there are other people who are in disagreement with you as to what would happen here, and I am not in a position to judge.

Mr. DINGELL. If I am correct would you favor that being in the bill?

Mrs. MAY. I cannot answer that at this time because I don't know.

Mr. DINGELL. Would you favor having a large integrated operation like Esso being permitted to sell to accounts and at the same time fix the retail price and the profit margin for the small retailer who sells in competition with Esso?

Mrs. MAY. As far as I am concerned this is already going on in many areas today.

Mr. DINGELL. As a matter of fact it is clearly a violation of the antitrust laws under many cases which have been enacted.

I am merely asking you whether you favor that as a matter of public policy.

Mrs. MAY. It depends entirely on what the results of the public policy are.

Mr. DINGELL. Do you think that is consistent with the best interests of the little businessmen of this country?

Mrs. MAY. Again there are many cases going on which I do not consider consistent with the best interests of the——

Mr. DINGELL. Assume we are selling Esso gasoline as an example. Say I were to initiate a program of fair trade and fixed your prices. If I were at the same time to initiate a program of selling to free accounts, your free accounts, at a price a half cent above your tank car price, would you say I was behaving fairly?

Mrs. MAY. I certainly would not.

Mr. DINGELL. Would you endorse such legislation as that?

Mrs. MAY. As I understand it, and I want to hear both sides of this, I do not think that you are keeping to the point of this bill because those practices are going on right today. I am trying to decide what this legislation would do to make that situation worse or better.

Mr. DINGELL. If I told you that that practice would be held to be a violation of the antitrust laws at this moment, would you say that this practice was then going on at this time, and then would you endorse the bill which had this provision in it?

Mrs. MAY. Basically if you are asking me whether I would endorse anything which was—any kind of operation that was in violation of present antitrust laws naturally my answer would be no.

Mr. DINGELL. Then do you feel that this particular section of the present antitrust laws should be repealed by your bill, H.R. 11778?

Mrs. MAY. I cannot answer that until I know what the implications are as to the present antitrust laws. I do not agree with your findings on it until I have heard both sides of the question.

Mr. DINGELL. Would you endorse this practice, then?

Mrs. MAY. I have just answered I do not endorse any practice which violates present antitrust laws.

Mr. DINGELL. Assuming that my interpretation is correct, assuming that the Attorney General of the United States, or the Assistant Attorney General in charge of the Antitrust Division, says that my interpretation of this particular legal situation is correct, would you then endorse the bill?

Mrs. MAY. At that time I shall be glad to answer you, when I see the findings of the Attorney General and what his findings are based on.

Mr. DINGELL. Let us talk a little further about this particular bill. Do you construe this bill as applying only to devices which bear an identifiable trademark?

Mrs. MAY. To devices, did you say?

Mr. DINGELL. Do you construe this bill as applying only to items in trade, that is merchandise in trade, which bears an identifiable brand name or trademark?

Mrs. MAY. As I understand this bill, it refers to those things, brand names and trademarks, in which the manufacturer, whoever it may be, has put his capitalization, his advertising, his investment to make the brand mean something in the marts of trade—something of real value as a trademark and brand.

Mr. DINGELL. Let us take a specific situation. When the trademark or label is removed, do you feel this bill then would apply to that situation?

Mrs. MAY. No; if the trademark is removed the bill does not apply to that situation because, as I understand it, the seller can then, as

long as he does not try to fool the customer coming in. For instance, if this was a brand name bathing suit, or something else, he has made his purchase, it is his article, but without the brand name he can use it as a come-on.

Mr. DINGELL. The language on page 3 appears as follows:

When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark—

Let us take a specific instance here and let us say that a new prescription pharmaceutical comes on the market which will help arthritis, and there is only one of this particular prescription pharmaceutical available to the public.

Do you feel that that one item then can be price fixed under this bill by the holder of the trademark?

Mrs. MAY. Of course, in the first place, I do not want the gentleman to put words in my mouth. I do not think this is price fixing.

Secondly, a big single item, I understand what you mean. It would be a brandnew brand name, in other words.

Mr. DINGELL. Let me repeat my question so we understand. Let me make it perfectly plain I am not putting words in your mouth. I am simply asking the questions.

Mrs. MAY. You said price fixing.

Mr. DINGELL. Let us understand one other thing. I did not sponsor this bill. You sponsored it. I assume when you sponsor a piece of legislation—at least I know what a bill means and what it does when I sponsor it, and I am prepared to defend it.

Getting back to the same issue here, "When goods for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark," do you construe this language as authorizing the sole manufacturer, the sole producer of a prescription pharmaceutical to trademark and then fix prices on that particular item?

Mrs. MAY. I do not know, Mr. Dingell. I would hope your committee would discuss the implication of this language, but I could not tell because, frankly, you have put forth a particular instance that I had not thought of before.

Mr. DINGELL. Would you consider it good public policy that a manufacturer who is the sole manufacturer of the goods, with no one manufacturing that same thing in competition with him, should be authorized to price fix on that one commodity under the language of this bill? I am trying to get an interpretation from one of the authors of the bill.

Mrs. MAY. I think you certainly should. I am sure there is somebody following me who can discuss that. I did not draft the bill, Mr. Dingell. I have been told that it will accomplish the purpose which I am certainly supporting, but I cannot answer you in a way that would clarify and answer your question, because I do not know what the implication of certain language is here, line by line, as relates to present law. I am not familiar with the legal history.

Mr. DINGELL. I notice you enthusiastically endorse the bill. I had hoped you would be able to assist us.

Mrs. MAY. Mr. Dingell, I enthusiastically endorse a bill once in a while, not too oftetn. I am not bill happy. I also serve on a committee where a bill may be presented to us and we all are in basic agree-

ment with what it intends to accomplish, but then we recognize our responsibilities as subcommittee members to go over it word by word and find out the implications. Of course, it must be up to this committee to make those needed changes.

Mr. DINGELL. I was wondering if you could tell us this—this amends section 5(a) of the Federal Trade Commission Act, I note on page 3, line 5—I wonder if you could tell us whether this will cause, or require, the Federal Trade Commission to come in and enforce the provisions of this bill?

Mrs. MAY. I do not know.

Mr. DINGELL. Do you regard that as an important question to be considered by the committee?

Mrs. MAY. I think it should certainly come before the committee, and obviously it is.

Mr. DINGELL. I note at the middle of page 4 there are sections (a), (b), and (c), dealing with practices which would constitute, under the language of the antitrust laws, unfair methods of competition in commerce or unfair and deceptive acts in commerce. I was wondering if you would want to tell us what bait-merchandising practices are, so we will be able to construe this particular statute.

Mrs. MAY. I am familiar with the way that actually works because I am a housewife and a buyer. I pick up a paper in my own hometown or in Washington, D.C., and I see, whether it be a grocery store or a women's clothing store, a brand name which is very familiar to me, and I notice on Saturday morning at 10 o'clock so many pairs of shoes by a famous name manufacturer or so many White Stag slacks, first come, first served, will be available at, say, $12.95, where I have, for many years, known this particular item sold for considerably more, maybe as much as $3 or $4 more. Without background and experience in this type of bait merchandising, I might make an attempt to get there early the next morning, and probably in 9 cases out of 10 I will be very much fooled. I am going to find out there were one or two of these items, and then a large table of similar items but without brand name, without the quality, and so forth. I recognize this and I feel cheated. I have been what I call baited, just as when I go fishing. The customer has been lured on a basis that is not honest.

Mr. DINGELL. Does this bill provide for retailer suits?

Mrs. MAY. Are you speaking of the manufacturer-owner?

Mr. DINGELL. The retailer.

Mrs. MAY. I see nothing in here on the part of the retailer. I know the brand-name owner, the manufacturer, has legal recourse.

Mr. DINGELL. Thank you very much.

That is all, Mr. Chairman.

Mr. MACK. Mrs. May, I would like again to commend you for your very fine statement.

Mrs. MAY. I apologize for taking the committee's time by my inability to answer legal and technical questions on the implications of certain parts of the bill. I know there are further witnesses who will do a good job in answering these questions to your and the subcommittee's satisfaction.

Mr. MACK. You appear as a housewife and a homemaker as well as a Member of Congress, and we most certainly are interested in the views of women, because they constitute a very large percentage of the

purchasers in our country. We very much appreciate having your testimony this afternoon.

Mrs. MAY. Thank you, sir.

Mr. MACK. Our next witness is the distinguished gentleman from California, Mr. Holifield.

STATEMENT OF HON. CHET HOLIFIELD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HOLIFIELD. Thank you, Mr. Chairman, and Mr. Dingell.

You gentlemen are accustomed to thinking of me as being one of your colleagues in the House of Representatives, and for 20 years now I have enjoyed your association.

Today, although I appear as a congressional witness before your distinguished committee, I would like to have you consider my testimony not as a Congressman but as a businessman.

For 15 years before I was elected to Congress, I was engaged in the wholesale manufacturing of men's clothing and in the retailing of men's clothing and furnishings. Since my election to Congress in 1942, I have maintained my ownership and operation of my men's clothing business, and today own and operate a very nice clothing store in the city of Norwalk, Calif. My gross sales run between $300,000 and $400,000 a year. I have a total of 7 permanent employees, and in rush periods I have as many as 25 employees.

I am speaking to you today on the provisions of the Quality Stabilization Act, of which I am a sponsor. I introduced H.R. 10340 which is a companion bill to the Madden bill, and also companion to Mr. Harris' bill, Senate Joint Resolution 636.

I speak, therefore, from the background of actual experience in the field of retailing men's wear.

For 35 years I have featured nationally known brands of men's wear.

I will give you a few names which I am sure you will recognize as both of you are gentlemen of sartorial splendor—Hart Schaffner & Marx suits, Mallory and Dobbs hats, Arrow shirts, Interwoven socks, Nunn-Bush shoes, Hickok belts, and so forth. These are some of the national brands I have sold for 35 years, and there are many others.

I built my retail business on such lines of nationally known brand merchandise. If discount houses continue to acquire such brand merchandise and slash normal retail prices, I am threatened with destruction to my traditional way of doing business.

Court decisions have practically nullified the protection of the so-called fair trade laws. It is evident that the independent merchant, to survive and prosper, must reexamine the legislative possibilities in order to protect himself from these unfair, cutthroat practices.

The quality stabilization bill seems to offer a carefully considered new approach. It seeks to establish a more complete property right in the brand name so that the manufacturer can:

(*a*) Specify conditions under which the brand name can be used in the final sale to the consumer; and

(*b*) Reclaim merchandise at no actual loss to the seller, in the event the latter offers the merchandise in violation of the manufacturer's specified conditions of sale to the ultimate consumer.

Let us be more specific. What would the bill do? Basically, it would provide three reasons for which a manufacturer who chooses to act under the terms of the bill could revoke the right of the reseller to use the brand or trademark of the manufacturer in selling the branded merchandise. These three reasons are:

1. Bait merchandising practices;
2. Sale or advertising at other than the manufacturer's currently established resale prices; or
3. Intentional misrepresentations as to make, model, size, age, and so forth.

The reseller whose rights to use the brand name are revoked can either dispose of his remaining stock in accordance with the manufacturer's conditions, or sell the stock at cost to the manufacturer.

Now let us come back to the first reason, bait merchandising practices. What do we mean by that? We mean where a discount house, for instance, obtains a dozen or 2 dozen Arrow shirts, and puts a big two-page ad in the paper and says $5 Arrow shirts will be sold on next Monday at $4.19 or $3.69. The public knows that the Arrow shirt is a real value at $5. It is established in the marketplace. They see this ad. The women come in to buy the Arrow shirts. The chances are there may be a few there, which may be in offsizes, which may be in shelf-worn condition or something like that. There are very few of them. They sell those out at the sale price. But hundreds of women who come in to buy that Arrow shirt, to get that bargain, which would be a bargain at $4.19 if it is commonly sold at $5, find that they do not have any more, that they have run out of these shirts. There is a big table there, maybe 50 feet long, stacked four feet high with white shirts that look just like Arrow shirts, and these are on sale for $4.19 or maybe even $3.99. The woman customer who has come in to get her husband a shirt does the natural thing. She goes over. Not being a real good judge of merchandise—and she cannot be a good judge of every type of merchandise—she takes one of these no-name-brand shirts. This shirt that she buys may have five buttons on the front of it, two buttonholes to the button, in the place of seven, like an Arrow shirt. It may be a single-stitch shirt instead of double-stitch. It may have a count of 30 percent less threads to the square inch, the balance being made up of starch which disappears as soon as the shirt is first laundered. It may be a shirt that will shrink a size or half a size or a size and a half because the cloth has not been sanforized as the Arrow shirt material has been. The result is that that woman gets an unsatisfactory article, and she wastes her money because she does not get 100 percent on the dollar value for what she buys for this shirt which she bought because she was brought in to buy an Arrow shirt.

That is what we call bait merchandising practices. It is a common thing. It goes on all the time. There are some illegitimate merchants who will even go out and buy Arrow shirts or other brand name merchandise at retail and bring it in and cut the price on it just in order to legitimatize their advertising and not be accused of fraudulent advertising, by having some Arrow shirts on hand at the beginning of the day's sale.

What do we mean by sale or advertising at other than the manufacturer's currently established retail prices? We mean this: If the

manufacturer says $5 for this shirt which you have paid $3 for wholesale, you have a 40-percent markup on it. Remember, this 40 percent takes care of all of your expenses. You are paying union wages, fixed wages, I let you know, over which you have no control, to the members of the Retail Clerks' Union who work for you. You are paying fixed prices for your utilities—your gas and your lights. You are paying fixed prices for the freight on those Arrow shirts. You have nothing to say about it. These are all fixed prices. You are paying fixed prices for your insurance. You are paying fixed taxes which you have nothing to say about. So, you have all of these items of expense, which are fixed, which must come out of that 40-percent gross profit. You are lucky, I tell you as a private merchant, when you get to the end of that dollar to get the last 5 cents of it as net profit before taxes. You might have a good year and you might get 6 or 8 percent, but you are likely to get not more than 5 percent net out of your gross sales in the men's wear business, and I know what I am talking about. I have been paying income tax for 35 years in this business. I know what my gross is and I know what my fixed charges are. I know what kind of markup I must have in order to be able to sell satisfactory merchandise to my customers and have them come back in and ask for another item of the same kind a month from now, because you have to depend upon repeat customers. I cannot depend upon getting someone in my store in my small town and cheating him and then advertising on the radio and by other means of advertising and get a new sucker in the next day.

What do we mean by intentional misrepresentations as to make, model, size, age, and so on? This is another means that is often used to get people in. They will advertise a make or model. In one place in the ad they will have in big letters, "1962 models," and then you go on down and there will be an item for sale, a refrigerator or something else, which will not be a 1962 model. There will be a 1962 model on the page of advertising to keep from being prosecuted for fraudulent advertising, but many of the articles on that page will not be 1962 models. Neither will the ad say they are 1962 models. But the size of the headline which says 1962 models will make the unwitting buyer, the nonexpert buyer, think that all of those models on the page, are 1962 models. They may be discontinued models or they may be a year or 2 years of age.

Then there are other ways of cheating on size, and so forth.

The reseller whose rights to use the brand name is revoked under this bill can either dispose of his remaining stock in accordance with the manufacturer's conditions—I shall stick to Arrow shirts because it is an easy thing to talk about. He can sell the rest of his Arrow shirts, if they are the $5 quality, at $5, or he can sell the stock back to the manufacturer who sold it to him, at the wholesale cost that he paid for it, in other words, $36 a dozen. If the manufacturer does not choose to buy the stock, the reseller can sell this remainder at any price.

Why is that put in the bill? That is put in so the man who bought this shirt in the first place will not lose any money on it. If he paid $3 wholesale for the shirt, he has a right to have that $3 back.

But if he does sell it at less than the suggested retail price, he must put a notice in his advertising connected with the sale, that he does

not have a franchise or a right to sell Arrow shirts in the future, that he is selling out the remainder of his stock.

If the reseller violates the provisions of the revocation order, or makes further attempts to exploit the brand names or trademarks of the manufacturer, what happens? The manufacturer can sue for damages. We are not depending upon the Federal Government now to institute suit. The manufacturer can sue for damages, and he can go into the court and get an injunction to enjoin this particular reseller from violating the terms of this Stabilization Act. He can sue in any Federal court, and he can recover the costs of the suit, including reasonable attorney's fees.

No governmental administrative action is required to supervise or enforce the quality stabilization bill.

There are several safeguards in the bill. For instance, the manufacturer must give notice of an established resale price, and keep such notice current. Second, the manufacturer must be vigilant, because the reseller has a defense if the manufacturer has not used due diligence in revoking the rights of all other persons in substantial competition with the reseller.

I mean by that that a manufacturer who lets one reseller cut prices on his product when the other resellers are trying to hold the price, is not in a good position. He must be vigilant and he must treat everybody the same. There cannot be any discrimination.

I will get right now, Mr. Dingell, to your question of Mrs. May in regard to the selling of gasoline at a half-cent-a-gallon less to a certain buyer as against others. This is discriminatory pricing and it is not allowed under the present law.

Mr. DINGELL. I agree with you it is not allowed under the present law.

Mr. HOLIFIELD. Nor would it be allowed under this bill, because this does not allow discriminatory pricing. All other laws prohibiting discriminatory pricing and the other unfair practices which are set forth in section 5(a) of the Federal Trade Commission Act, false and deceptive advertising, and all those others, are still in the law. This does not give any leeway for the manufacturer to do unfair things. In fact, it is another prohibition against his doing it.

Mr. DINGELL. Are you telling me, then, this bill does not repeal the *Esso* v. *Secatore* decision in the Federal Trade Commission, and it does not repeal the *McKesson & Robbins* decision in the Supreme Court of the United States?

Mr. HOLIFIELD. That is completely something else.

Mr. DINGELL. Those are the two cases I was referring to in my questions to Mrs. May. I think this is a very important question which we ought to explore very carefully. I would like to pursue this further with you, but I want you to know that I am keenly aware of this particular situation.

Mr. HOLIFIELD. This amends by adding to the present act a certain number of things which the manufacturer can do. In the last provision on page 7, it plainly says it does not contravene a number of acts: The Lanham Trademark Act, the Miller-Tydings Act, Public Law 314, and the McGuire Fair Trade Act. This has nothing to do with those. This is a new piece of legislation, a new approach to this

thing. It does not repeal, in my opinion, those acts which you mentioned.

There are several safeguards in the bill. For instance, the manufacturer must give notice of an established retail price and keep such notice current. Second, the manufacturer must be vigilant because the reseller has a defense if he is not.

Third, the bill could not apply unless competitive products are available to the consumer. Therefore the gentleman's question of Mrs. May in regard to the pharmacuetical products that he mentioned would not come under the protection of this bill, because in the case which he mentioned it was a monopoly possession, and there were no competitive goods available in that classification. Therefore I can say to the gentleman that this bill would not give any protection to anyone who has a monopoly product.

If you want to know why, look down in section (8), lines 19 and 20, on page 3:

> When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark—

And then it goes ahead.

But these rights do not pertain if the manufacturer has a monopoly position in any line of merchandising and seeks to put a trademark on it and a brand on it and thereby perpetuate his monopoly or obtain monopoly advantages. He obtains at the present time advantages because of his monopoly ownership of this pharmaceutical item which you spoke of, but it has nothing to do with this legislation. He obtains that advantage because there has not yet been developed a competitive product.

But we are not talking about this kind of product. We are talking about brand merchandise which has been accepted by the public, and I challenge the gentleman to give me the name of any brand merchandise such as I have listed in my testimony here, in which there are not similar goods offered to the public.

Take the Arrow shirt, for instance. The Manhattan shirt, the Van Heusen shirt, and you could go on down the line. You do not have to buy the Manhattan shirt or the Arrow shirt or any of these other shirts. Then when you get to the end of national brand merchandise, you have thousands of producers of men's shirts all over the United States making men's shirts. Therefore you are not in a monopoly position. Therefore you are not making it necessary for the ultimate consumer to buy that quality brand product. He only buys that quality brand product if he wants it. If he does not want it, he gets a shirt from somebody else. That is all there is to it.

Why should this be done? Certainly the manufacturer should have the right to protect his distribution system and his brand merchandising from the cannibalistic practices of the loss-leader and the price-gimmick operator whom I have described. If small businessmen do not get such protection, we are doomed.

Why do you think I put Arrow shirts in my small men's wear store? I was competing against firms in my home city of Los Angeles as big as the local big Washington firms here—Silverwoods, Desmonds, and many others—stores with millions of dollars worth of inventory. When I laid an Arrow shirt on the counter, size 14½ with a 33-inch sleeve, in the Dart model, and sold it it to the woman for $5, she bought

from me rather than get on the bus and go downtown and spend the same $5 downtown with the big operator who could outinventory me, who could outadvertise me, who could outdo me from the standpoint of extending credit, and all of that. But as a matter of convenience, the woman came into my store because her husband wore that particular type of shirt and he did not care whether she bought it from Desmonds downtown Los Angeles or from Chet Holifield's little store in Norwalk, Calif. She got the merchandise she wanted, and he got what he wanted. Why did he want it? Because he had bought it year after year and he found it was a good product and it was worth the money. He did not want to gamble on some no-name shirts. She probably went out and gambled a few times and saved a dollar and bought herself a pair of stockings, and then the shirt shrunk and the old man gave 'er—I will not say what he gave her for it, but it was not pleasant remarks, and he said, "Next time, buy an Arrow shirt."

Manufacturer and retailer collectively spend millions of dollars in advertising national brand name merchandise. What do I mean? Cluett, Peabody, who puts out the Arrow shirt, buys full-page ads in the Saturday Evening Post, the New Yorker, and other magazines like that. I buy advertising in my hometown newspaper, and I pay for that advertising. I advertise Arrow shirts. Over the 35 years I have spent thousands of dollars advertising Arrow shirts. Of course, Cluett, Peabody has spent millions. Why do we do this? We have a product that we believe in. It is a good product. It is worth the money. We want people to know that we have it.

I have spent my money advertising, my 3 percent allowance in my total budget, not only Arrow shirts but all the other national brand merchandise, and therefore I have a stake in that brand name. The manufacturer has a stake because he is distributing it to retailers. That is the way he is moving his merchandise. He has an up-to-date plant, paying union wages, operating under sanitary conditions, and he is paying good wages. Who is he in competition with, really? He is in competition with the slick operator in the little town which is paying substandard wages, working in unsanitary conditions. Some States do not impose as strict laws on sanitation as New York, California, and some of the other States. That is what we are talking about now. We are talking about the difference between a standard of merchandising which is fair and honest and pays legitimate wages to the people who work for it and gives them legitimate working conditions, and the slick operator on the manufacturing level who makes a piece of merchandise for a price, and the slick operator on the retail level who sells at a cutrate price or uses some other kinds of fraudulent and deceptive gimmick in order to sell that kind of merchandise made under those unsatisfactory conditions, made by unsatisfactory labor, and so forth. This is what we are talking about. We are talking about a really substantial principle in our system of doing business.

Once having spent this money in advertising, the resulting consumer recognition and acceptance of brand-name merchandise is a real tangible business asset to both manufacturer and retailer. When a woman comes in and says, "I want an Arrow shirt," and I lay it on the counter and she puts a five-dollar bill on the counter, she is satisfied and I am satisfied, and I do not have to stand there and argue with her for

30 minutes to get her to buy it. She has what is known as consumer acceptance already in her mind, based on merit.

This joint asset cannot be misused and dissipated by others if we are to stay in business as small businessmen and if America is to remain economically healthy.

But it is being misused.

Americans really do not want a cheaper product. They want an expensive product for less money. That is natural. On that fallacy, the debaser of quality brands is creating ever a cheaper product which is not wanted. As he cheapens the products, he puts people out of work, people who are getting the standard wages, union wages in our cities that guarantee them at least a halfway reasonable living standard. He is putting them out of work and forcing unnumbered thousands of small businessmen into bankruptcy because of these slack methods.

This bill, when enacted, will enable the manufacturers to stabilize the quality of their brand names or trademarked products in all States through the stabilization of their prices.

But, under the act, no manufacturer will be restrained from building the cheapest product he thinks he can sell, or from offering it without a suggested retail price. He does not have to offer it at a suggested retail price unless he wants to. No manufacturer will be restrained from building a quality product if he chooses that method of competition. And no price may be stabilized—this is very important—unless the product is in free and open competition with other products intended to serve the same purpose.

As always, prices, when lawfully determined by the manufacturer, must be established independently by the manufacturer, abstaining from collusion. For instance, Cluett, Peabody cannot go to the makers of Manhattan and Van Heusen and Jayson shirts and say, "We will make a shirt which is exactly the same quality at the same price." He cannot indulge in that. Present law prohibits him from doing this. This would not let him do what present law prohibits.

A bunch of retailers in the same town cannot go into collusion together and agree to sell a $5 Arrow shirt for $6 by taking the name off of it, for instance. If you think this is farfetched, I know of one brand of suits where the manufacturer is having all kinds of trouble because certain types of specialty shops are pricing his suits, a suit nationally advertised at a certain price, anywhere from $15 to $25 higher than his suggested retail price.

So, this thing works both ways. You have protection against overpricing as well as underpricing.

Naturally, no retailer or wholesaler will be required to stock or sell any particular brand of quality product or price product unless that product suits his ideas of what he wants to stock and sell.

Nobody can come to me and force me to sell Arrow shirts if I do not want to. If I want to, then that is a different problem.

The consumer, under such comprehensive competition, will be free to choose whether he will buy a quality product or whether for some reason he prefers to buy a product to "sell at a price."

That is the quality stabilization bill, my friend.

Some of my friends may be afraid that this legislation will run afoul of the principle of competition in the marketplace.

In order to allay the fears of those who may at first glance take such a position, I believe we should first define the word "competition" as it applies to present procedures in business.

What do we mean by competition? I do not know whether you gentlemen have ever been in business or not. I do not even know whether you have ever met a payroll or not.

Mr. DINGELL. For the benefit of the gentleman, I have been in business and I have met payrolls and I am doing so now.

Mr. HOLIFIELD. All right, that is fine. I am glad, because you and I can speak together.

Does competition mean an absolute struggle between business entities, without rules, without ethics, which is carried on ruthlessly until all opposition is destroyed? Is that what we mean by competition? Does competition mean a struggle to the death in which ruinous price wars bring economic chaos to victor and vanquished? Is that what we mean by competition? Does competition depend on the price alone?

There was a time in the industrial revolution during the age of scarcity that almost unlimited methods of competition were the order of the day. I can remember one time in my youth when the railroads got into a fight over selling tickets to California, and it got to the point that you could buy a ticket from Chicago to California for a dollar. That was in the days of ruthless, dog-eat-dog, cutthroat competition. But as the age of mass production of goods became a reality, we entered the age of abundance, not scarcity. We are in the age of abundance, ability to produce abundantly. In a changed economic society, we were forced to place controls and limits on competition.

Fair prices in the field of basic utilities and transportation were guaranteed by public commissions based on their costs and reasonable profits for the owners.

If I buy a ticket to California on an airplane line, I pay the same whether I buy it from TWA, from United, or from American. I pay the same price if I get the same kind of service, tourist or first class. It is the same way on the railroads.

Let us consider labor for just a few minutes. There we found it necessary to guarantee the right of collective bargaining so that the human rights to a fair standard of living could obtain. The competition between men to sell their labor in bidding for wages was modified. It was practically eliminated. If a man goes up to the gate of the Ford Motor Co. today and says, "I want a job with the Ford Motor Co.," and the employer says, "What kind of a job do you want?" and he says, "I want a job working at a certain type of machine; I know you are paying a friend of mine who is working here $113 a week, and I will do it for $100 a week," that is not allowed any more. But that would be competition. That is what we had in the wage market before we had unions. We had competition between individuals, selling the only thing they had to sell, which was their labor upon which their families depended for a decent standard of living. We eliminated competition in the labor market. We did the same thing in carpentry, in bricklaying, in painting, and every other line of endeavor that is unionized in this country. Where it is not unionized, you know the condition and the wages the people get.

What did we do? We eliminated competition between the members of that union. No man can underbid the other man and get his job. No unemployed man could come in and underbid him and get his job. When that situation existed, you had a chaotic condition in labor and in production.

The competition between men to sell their labor in bidding for wages was modified to their collective benefit and to the overall benefit of society.

When we support the principle of a uniform wage for the autoworker, the textile worker, the steelworker, the carpenter, the machinist, we remove the destructive, ruthless competition between men engaged in the same field of work, we endorse the establishment of fair wages, we regret competition in its absolute and ruthless sense.

In departing from absolute competition in these fields, and many more that I have not mentioned, we are engaged in establishing fixed costs to the producer and the retailer, costs which are not truly competitive. When we fix the price of labor to make that shirt, when we fix the price of the freight on that shirt from Troy, N.Y., to Norwalk, Calif., when the utilities fix the cost of my lights and gas, and my landlord fixes the cost of my rent on a percentage basis, these are fixed costs. There is no competition there. I cannot do a thing to cut down one penny on any of those expenses. When I hire a man to go to work in my store on wages, I pay him the Retail Clerks' Union wage or I do not get him. I could get people to work for half that price in California, but I do not. As a matter of fact, I pay every man who works for me higher than the union wage, and I find it pays to do it. It pays in satisfaction to me as a human being because I know his family needs it, and I get better people by paying more money for them.

When we talk about competition, let us look at it as it is, not as it is in the storybooks.

The producer of goods does compete in efficiency of service, in style of the article being sold, in design, in advertising his lines of merchandise to the retailer and to the consumer. These are all elements of competition. Salesmanship is an element of competition. These are the things that we are competing with.

More important, the manufacturer competes to make a quality product which he can proudly affix for identification his label, his brand. That brand is in fact a pledge to the buyer that the quality of the product has been maintained to a high standard of value.

Do you think there is competition between the Arrow shirt people and the Manhattan, Jayson, and Van Heusen people? I tell you there is plenty of competition between them. Where does that competition lie? In price? No, their price lines are about the same. Each of them makes a $4.50 shirt, each one makes a $5 shirt, and each one makes a $6 shirt. But they are competing in the quality of their product and in their design and advertising to get consumer acceptance. These are the areas of legitimate competition.

As long as that quality is maintained, the customer continues to buy, not because he is attracted by a cut-price sign, but because he has found satisfaction in the product in the past and he believes he will get satisfaction on his current purchase. There are a number of brand-name articles in the same classification of quality and price

in every field that I know of in the national brand field. They are similar in quality and similar in price. They may be identical in quality and price, but that does not remove all competition. They compete on the same level without ruinous pricecutting. If the customer wants a cheaper shirt or even a more expensive shirt, he can find an almost unlimited access to other lines of shirts. They can be higher or lower in price.

We find, then, that competition is not absolute in meaning. It has its modification in every facet of our economic system of production and distribution.

We find that it has been necessary to temper the element of competition from that of the price only, cutthroat, destructive type of economic war without quarter, to that of rivalry within the bounds of overall benefit to our type of society, the worker, the producers, the consumers, and the distributors. We have had to modify competition in all of those areas in order to sustain our way of life.

In this quality stabilization bill we seek to establish Marquis of Queensberry rules which will insure a fair and decent contest in the marketplace, not a brass knucks, broken pop bottle type of battle in the barroom or the gutter, but and upstanding, clean fight in a ring where rules of fair conduct are established and enforced. That is what we are asking for in this stabilization bill.

Our society has found that the law of the jungle, the use of the fang and the claw to the death, is not the rule for civilized people on any level—social, moral, or economic.

Therefore, we seek to preserve a healthy competition which will operate under fair and just rules of contest.

We know that unlimited, ruthless competition will end in the economic death of all contestants.

We know that beneficial levels of competition can be maintained for the overall benefit of society, if just and fair rules control the contest.

That is what we hope to do in this Quality Stabilization Act.

Mr. MACK. Thank you, Mr. Holifield. You have given us an excellent analysis of the bill. I am sure you have answered many of the questions that might normally have been raised at this time.

Mr. Dingell, have you any questions?

Mr. DINGELL. Thank you, Mr. Chairman.

I join you in commending our good friend and colleague for a very helpful statement today.

You are one of the valued Members of this body. You have distinguished yourself by your ability and devotion to the published interest. You have been very helpful today.

I was interested in the gentleman's comment when he referred to the language on page 3, line 19, of H.R. 636 and similar bills. As the gentleman knows, this section concerns me greatly. It reads:

> When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark, the right of any person to employ such brand, name, or trademark in effecting resale of goods so identified may be revoked—

and so forth.

As you notice, I have been discussing this from the standpoint of pharmaceuticals because there is a great deal more competition in most other areas of marketing.

Mr. HOLIFIELD. I am not wedded to this language as being the last word. For instance, instead of "for the same general purpose" you could say "When goods which are in free and open competition are available to the public." In other words, when there are goods for the same purpose. That is the intent of it. I am sure language could make that a little clearer. I do not subscribe to every word in the bill. I am sure the committee has had more experience with this than I have. If you would want to make this clearer, I want only to say we are only talking about non-monopoly-type goods, goods which are available to the public in the same general classification. A Mallory hat, for instance. You could not say that is a monopoly hat because you can buy Knapp, Dobbs, and many other brands of hats. You do not have to buy a Mallory hat.

In the case of the pharmaceutical discovery you spoke of, that would be a monopoly product, if I understood your explanation of it.

Mr. DINGELL. Let us go into it a little bit. Let us take a pharmaceutical that is the only palliative of this particular kind of arthritis or perhaps a unique antidepressant which is manufactured by only one manufacturer. Obviously, this would not be susceptible to price fixing under this particular bill. Am I correct?

Mr. HOLIFIELD. No; but it is susceptible to price fixing now under the law of competition, because no one else has it and the manufacturer can put the price he wants to on it and he does until some competition comes into the field.

Mr. DINGELL. I recognize this. Now let us go a little further. Let us say there were two who manufactured the same specific item under this bill, the same unique antidepressant. Would they be able to utilize the price-fixing sections of this bill to fix prices?

Mr. HOLIFIELD. I would not think so, because they still would be in a monopoly position. Two people who are in a monopoly position are, in my opinion, just as susceptible to the law of monopoly as one.

Mr. DINGELL. Let us take where three manufacture the same item, are they able to avail themselves of the price-fixing sections of this bill?

Mr. HOLIFIELD. In my opinion, when you get to the point where there is no competition, our way of life gives anyone who controls a monopoly a right to charge all the traffic will bear. Our way of life is that way now, and the same situation would obtain under this bill, in my opinion, that obtains now.

Mr. DINGELL. Let us take the situation where there are three manufacturers of a specific pharmaceutical, an antidepressant aimed at a particular condition, would they be able to take advantage of the price-fixing sections of this bill?

Mr. HOLIFIELD. I would not think so, because they would be in a monopoly position, not under this bill.

Mr. DINGELL. Now let us take four.

Mr. HOLIFIELD. Let us take 400. Let us go on up to 400.

Mr. DINGELL. Let us take four first.

Mr. HOLIFIELD. Let us go up to 400, because I see the point of the gentleman's argument. The point of the gentleman's argument is that a monopoly is a monopoly if one person has it, but it is not a monopoly if 4 or 5 or 10 persons have it.

Mr. DINGELL. I am not making the point. I am asking the gentleman to interpret the bill. I am not trying to dig any pits for my old friend to fall in. I want to know whether, if there are four manufacturers of a unique antidepressant or a unique antiarthritic or a specific for diabetes, or something of this kind, if they are able to utilize the advantages of this particular bill insofar as its price-fixing sections go.

Mr. HOLIFIELD. I do not think they could do it without collusion, because they would have exactly the same article. This is a highly hypothetical case that the gentleman has brought about. I know of no such case in the history of industry where such a thing as that exists.

Mr. DINGELL. Let us just assume, for the sake of argument, that it does exist.

Mr. HOLIFIELD. I find it hard to assume an unreasonable situation for which I know no precedent.

Mr. DINGELL. I want this committee to know what this bill does, and when the bill gets on the floor when it comes out, I also want the Congress to know what the bill does, and I want the courts to know, for they will have to construe this. The gentleman has told me in instances where there were four, it was inconceivable to him that four could establish resale prices without doing it collusively. I ask the gentleman what about five?

Mr. HOLIFIELD. I am not going through the complete list of numbers with the gentleman. I can say that my subcommittee made an investigation of the Salk vaccine which was sold to the Government, and we found there was follow-the-leader price fixing. Although there was no written agreement or anything else, there was the so-called follow-the-leader line of price fixing. We found, however, that in arriving at that, they made certain mistakes.

Mr. DINGELL. Would the gentleman want to tell us about some of those mistakes in price fixing?

Mr. HOLIFIELD. Yes. The representatives of these firms met in a hotel in Florida, and a former Member of Congress, who was then a counsel in the Department of Agriculture, told them specifically that they could not agree among themselves on a specific price for 9 centimeters of Salk vaccine. There was a dominant pharmaceutical house at that time which was making this Salk vaccine, and they set a price—don't hold me to this—somewhere near $6.71 for three doses amounting to 9 centimeters, I believe, of the vaccine. The other two companies which were in on the deal set the same price, although they had had no experience at all in making the Salk vaccine. In fact, they had to be taught how to make it.

Mr. DINGELL. They were actually licensed to make it, is that correct?

Mr. HOLIFIELD. No. The Salk vaccine was developed by Dr. Salk in a foundation, and it was actually given to the dominant company to manufacture. The processes and all that were not developed by a pharmaceutical house but by Dr. Salk. It was given to this company and to three or four additional companies. Some of them were successful in making good Salk vaccine, and some of them were not.

When they got to selling at the same price, they came under scrutiny and it was soon determined that these people who had no cost figures at all were following an arbitrary price which had been set on

the basis of the cost of production and what the first company considered was a reasonable profit. They were just following the leader.

Mr. DINGELL. Was there any collusive price fixing found in that situation?

Mr. HOLIFIELD. There was no conviction for collusive price fixing, but as a result of our investigation the price was sharply reduced, and the profit margin was knocked away down. It was not long, of course, until a lot of companies were making it, and it went down further. There was no collusion there, but I point out this happened under the present system of business which prohibits identical bids and all that sort of thing.

Mr. DINGELL. I am not a champion of the evils which exist under the present law, I assure the gentleman. I have great faith in the antitrust laws, and hope they will be adequately enforced.

Does the gentleman favor exemption from the antitrust laws in this bill for follow-the-leader price fixing of the type which the gentleman has just described?

Mr. HOLIFIELD. No.

Mr. DINGELL. We have the Salk situation today. If all three or four or six of the manufacturers were to fix their price under this particular statute simply by follow-the-leader price fixing, arbitrarily done on quality brands, would the gentleman endorse this kind of situation? Whether it be a fair trade or fixed price or quality brand price or anything else the gentleman may want to call it, it would be fixed.

Mr. HOLIFIELD. A bricklayer's price is fixed when he charges $3.50 an hour.

Mr. DINGELL. I am not talking about that. I would just like to know if my good friend would endorse this.

Mr. HOLIFIELD. I would not endorse any kind of price fixing where a monopoly product was involved. The bill plainly says, "When goods usable for the same general purpose are available to the public from other sources," and the gentleman completely ignores that language.

Mr. DINGELL. I do not ignore it. I merely asked the gentleman if he would favor having the price-fixing sections of this bill available to the manufacturers of the Salk vaccine for utilization. I ask the gentleman. The gentleman is more familiar with the situation than I. I just want to know if he favors it.

Mr. HOLIFIELD. I do not favor the fixing of prices in any area where there is not a competition from other sources of the same type of product for the same purpose. The gentleman has imagined a situation in which there is no competitive article offered.

Mr. DINGELL. Let us go a little further. I wonder if the gentleman would like to shift to the field of gasoline retailing——

Mr. HOLIFIELD. Yes; I will be glad to do that.

Mr. DINGELL. And to discuss this from the small businessman's viewpoint. In this case, say a gentleman is a small retailer of gasoline with certain large accounts. He happens to be an Esso dealer. Esso moves in and begins selling fleet accounts in competition with the gentleman while he is bound to a fair trade or price-fixed contract, the same difference under this bill and under the fair trade. It makes no difference, because the price is fixed to the retailer. They sell in

competition with the gasoline retailer at half a cent a gallon above the retailer's tankcar lot.

Mr. HOLIFIELD. You cannot do that under the present law.

Mr. DINGELL. I recognize you cannot do that, but if I were to tell you that that is in this legislation, would you favor it?

Mr. HOLIFIELD. No; I would not favor discriminatory wholesale pricing. In other words, if I were selling Arrow shirts and paying $36 a dozen, I would expect, under this bill, my competitors would not buy those shirts for $34.50 or $33; they would buy them at $36.

Mr. DINGELL. Do you favor Arrow retailing in competition with you?

Mr. HOLIFIELD. Of course not, because that is not their method of distribution.

Mr. DINGELL. Would you be in favor of their setting up next door to you and setting up a retail outlet?

Mr. HOLIFIELD. Again the gentleman is imagining a situation which will not obtain because it would be suicide. I can give you an actual case in point where this same thing that you have envisaged happened in the case of a certain shirt company in Los Angeles which made the Hendon brand shirt. They had a suggested retail price for that shirt and they started putting in their own chain of stores and selling it, and every independent merchant threw out the shirt line and the company went broke.

Mr. DINGELL. Except it didn't happen in the case where Esso pulled this stunt nor has it happened in the case of McKesson & Robbins where they were held to be violating antitrust laws.

Mr. HOLIFIELD. They were practicing discriminatorily, were they not?

Mr. DINGELL. Yes, discriminatory price fixing. At the same time they were retailing manufacturing and retailing in competition with the retailers.

I shall point out the specific section, line 25, page 6, through line 4, page 7. This is in the gentleman's bill.

Mr. HOLIFIELD. Line 25, page 6?

Mr. DINGELL. Yes—

*** * * all such rights and remedies shall be available to an owner of a brand, name, or trademark who, in the resale of goods identified by such brand, name, or trademark, shall compete, at any level of distribution with any reseller offering such goods.**

I would say that is a specific repealer of the *Esso* v. *Secatore* case and *McKesson & Robbins* decisions. I would ask him if he endorses that.

Mr. HOLIFIELD. I don't endorse the gentleman's question if he wants to put it that way.

Mr. DINGELL. Would you endorse that particular language in the bill and that construction of it?

Mr. HOLIFIELD. I endorsed this language because it states all rights and remedies contained in this bill shall also be available to any owner of a brand, name, or trademark who is in the resale of goods identified by such brand, name, or trademark shall compete at any level of distribution with any reseller offering such goods.

In other words, if a manufacturer came in as you envisaged and put in a store next to me he could be enjoined. If he had notified

his retailers that they should sell that shirt for $5, the manufacturer could be enjoined for not doing the same thing as far as price is concerned.

Mr. DINGELL. Who would enjoin the manufacturer?

Mr. HOLIFIELD. Any injured person.

Mr. DINGELL. No, there is no retailer suit in this. The only holder of power to initiate a lawsuit is the manufacturer. This has been testified to by other sponsors of the bill and I would urge the gentleman to read his own bill.

Mr. HOLIFIELD. All right——

Mr. DINGELL. Do you still want to endorse that language in view of that fact?

Mr. HOLIFIELD. Which line are you on now?

Mr. DINGELL. I am telling you that nowhere in this bill is there a retailer suit. I challenge the gentleman to show me where a retailer can initiate a suit and where anyone other than the owner of a brand, name, or trademark has any right to do so. I want you to show me one place where anybody other than the brand owner has any right at all in this bill. I would be very happy to see it.

Mr. HOLIFIELD. The point I am making is that the manufacturer would have to sell at the same price as the reseller, the retailer.

Mr. DINGELL. Tell me why he would have to. Who will sue him? Who will force him to sell at the same price?

Mr. HOLIFIELD. There are other means of pressure other than suit. Of course, the gentleman is envisaging a case where a manufacturer may have 10,000 distributors of his product, and he is depending upon distribution, his business is not selling to the public directly but his business is selling to wholesalers and then to retailers who do the job of carrying inventory and selling to the people.

If the manufacturer wants to go into the retail business there is nothing to keep him from going into the retail business. Under this bill there is nothing to keep a retailer from throwing his article out.

Mr. DINGELL. I recognize that. Let us assume this is a desirable article, such as Esso gasoline, where the individual happens to be a licensee and a franchised holder of Esso. What protection does that franchise holder have?

Mr. HOLIFIELD. The gentleman knows the Standard Oil Co. under certain laws has been forced to divest itself of its retail outlets.

Mr. DINGELL. In certain instances.

Mr. HOLIFIELD. This comes into conflict with other laws on the books against perpendicular lines of monopoly.

Mr. DINGELL. Then I would cite this:

> No exercise of any right or remedy provided in paragraphs 7 to 13 inclusive in this section shall be construed to be a violation of the Antitrust Act.

Do you endorse that exemption in view of your concern over vertical and horizontal price fixing?

Mr. HOLIFIELD. Certainly. From 7 to 11 I say this is not a violation of any of the Antitrust Acts. It is an outlining of additional protections to people who own trade brands they have spent a lot of money on to establish their property rights, and I say that sections 7 to 11 are not in disobedience of the present antitrust laws.

Mr. DINGELL. What do you say about the language down here—

and all such rights and remedies shall be available to any owner of a brand, name, or trademark who, in the resale of goods identified by such brand, name, or trademark, shall compete at any level of distribution with any reseller offering such goods.

This means we give the large manufacturer who wants to sell, wholesale and retail, exemption from the antitrust laws and expressly repeal the decision I mentioned earlier, *Esso* v. *Secatore*, and expressly repeal thereby *McKesson & Robbins*. Do you endorse that sort of thing in this legislation?

Mr. HOLIFIELD. The gentleman quit reading too soon:

Provided, That such owner shall sell such identified goods at any level of distribution at the price established for that level of distribution.

There if they want to sell shirts at $5 there next to me that is all right with me.

Mr. DINGELL. Let us assume that that is true. Let us say, then, that Arrow chooses to fix your margin of profit at so low a point that you are not able to make a profit.

Mr. HOLIFIELD. Then I do what I did with a certain line of underwear, I threw it out, and bought a line where I could get a decent margin of profit so I could keep paying decent wages to my people. They pretty soon came around to the point where they saw that their blackjack methods wouldn't work on the retailer.

Mr. DINGELL. Let us take a situation mentioned in the Senate committee where the retailers of petroleum products in Pennsylvania had their margin of profit fixed so low under resale price fixing of this kind that they were not able to make a profit. They had no alternative sources of supply and were forced out of business. Would you endorse that?

Mr. HOLIFIELD. If any man goes into business and sets his profit so low that he cannot pay the expense of his business and make a reasonable profit I think he ought to go out of business.

Mr. DINGELL. I refer to the small retailer forced out of business and not the manufacturers and jobbers forced out of business.

Mr. HOLIFIELD. I don't know who you are talking about.

Mr. DINGELL. Do you endorse that?

Mr. HOLIFIELD. I don't know who you are talking about.

Mr. DINGELL. I refer to testimony in the Senate committee.

Mr. HOLIFIELD. The gentleman has an advantage of me. I haven't read that testimony.

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

Mr. MACK. Mr. Curtin?

Mr. CURTIN. I want to join my colleague in congratulating Mr. Holifield on a very good statement.

There is one thing I desire to ask of you. Do you think quality stabilization is synonymous with fair trade?

Mr. HOLIFIELD. I do not.

Mr. CURTIN. How does it differ?

Mr. HOLIFIELD. I think it differs in that the McGuire Act, as I understood it, had a provision in it whereby the manufacturer notified one retail establishment of a resale price and this was binding on all retail establishments which sold that same article. I cannot remember the legal term but it in effect established the fair trade

price by notification to one distributor in an area. Therefore it was not a manufacturer-to-distributor arrangement.

Every distributor here would have to be notified by the manufacturer of the retail price, suggested retail price, and it would be upon his willingness to accept the goods and sell them at that price that he would be shipped the goods.

Mr. CURTIN. Quality stabilization is price fixing; is it not?

Mr. HOLIFIELD. The term "price fixing" has received a bad name because it is used, as a rule, in the sense of monopolistic price fixing in which a monopoly advantage is taken in a field where there is not competition. It is based, as a rule, on collusion between a group of manufacturers or a group of retailers getting together in a town saying "None of our gas will sell for less than a certain amount per gallon." That is what I consider price fixing within the term of an undesirable type of price fixing.

However, if you talk about price fixing in terms of establishing a fair price for a service or an article, then that is a different situation.

The gentleman was not here when I spoke on this phase of it.

Mr. CURTIN. I am sorry about that; I had a call that took me away for a time.

Mr. HOLIFIELD. I went into that at some length. I shall repeat to this extent and say that the use of words which have received general acceptance in certain meanings is meaningless in terms of what we are trying to do.

I went at some length to explain that competition does not have a fixed meaning. If you take the true meaning of competition in the marketplace you would have chaos. You would have price cutting to the point where either one company would obtain all the business and the others would be knocked out, or everybody would be knocked out, and I took the word "competition" in a reasonable sense. In our society you have to take it in a modified sense. You cannot take it in the law-of-the-jungle sense but in a modified sense.

There is competition between the gas companies and the light companies, but within the gas company there is no competition for the benefit of the people in this area. They all pay the same for the gas.

The same thing applies to the lights. These are fixed prices, but they are fixed by a public utility commission, as a rule, based on the costs of the company to do business, including its capital investment and a reasonable yield to stockholders, and therefore we have condoned the elimination of competition in area after area of our economy to the point where no longer does competition in the sense that it once existed still obtain.

Today competition is a word which is modified, and it is modified by law in certain areas and it is modified by the cost of doing business and the quality of the product in other areas.

I am sure in a competitive field with which I am very familiar, in the manufacture of shirts, that Arrow shirts, Manhattan shirts, Van Heusen shirts, and Jayson shirts are all sold at about the same price. They are all in the same quality range.

There are certain distinctive differences in design, in styling, in amount of money spent by the manufacturer in advertising. These are the areas of competition which obtain, but they are not cutting prices on each other.

If I buy a Van Heusen shirt at $36 a dozen or an Arrow shirt at $36 a dozen or a Manhattan shirt at $36 a dozen, I pay the same price and resell it at $5, the same suggested price.

There is no competition pricewise there among these three shirts but that doesn't mean there is complete absence of competition.

You might say, "That is price fixing on the part of these companies."

What does this bill do in a case like this? This bill says only that an illegitimate merchant—I would say illegitimate because he is doing business on a nonregular type of basis, doing business as a discount house does business—hires cheap labor and stacks the merchandise on wooden carpenter horses, planks, and in many instances uses fraudulent methods of advertising. They use gimmicks to get people in and sell them a different article and that sort of thing which a legitimate merchant cannot afford to do.

Mr. CURTIN. Is my friend and colleague saying there is good price fixing and bad price fixing?

Mr. HOLIFIELD. That is right.

Mr. CURTIN. But this bill is price fixing.

Mr. HOLIFIELD. This is price fixing in the sense that you are protecting a man's brand, on which he spent a lot of money advertising, and you are protecting the price he has to have in order to do business and maintain the quality of his product, just as you are price fixing when you allow a union to set its wages at $3 an hour for certain performance.

Mr. CURTIN. Is that not what the fair trade bills sought to do?

Mr. HOLIFIELD. Fair trade was a different approach.

Mr. CURTIN. It was seeking to accomplish the same thing.

Hr. HOLIFIELD. That doesn't necessarily mean the end result is not a good result. If I went to the Capitol on my knees or walked, I get there, but it is a matter of walking or crawling.

Mr. CURTIN. Since you consider this a price-fixing bill, as I think you said it is, do you consider it a good price-fixing bill?

Mr. HOLIFIELD. It is price fixing within the bounds of a reasonable return to the whole chain of production and distribution, but it is not price fixing in the sense that it gives monopoly advantage to any manufacturer or any retailer because he is not dealing in a monopolistic article.

Mr. CURTIS. That is all, Mr. Chairman.

Thank you.

Mr. MACK. Other questions?

Mr. DINGELL. As a mattter of fact, my good friend said price fixing guarantees a reasonable return. Would you want to tell us where in the bill there is any language which guarantees that this price fixing will be limited only to a fair return?

Mr. HOLIFIELD. I think your competition in the marketplace, as long as it is a competitive article, will take care of that, and as long as there are many manufacturers of these products in the marketplace the competition for the consumer's dollar will take care of that.

Mr. DINGELL. You pointed out the shirt manufacturers with whom you are familiar all market a similar grade of shirt at almost exactly the same price. Am I right?

Mr. HOLIFIELD. That is right.

Mr. DINGELL. Is this true also in the case of hats?

Mr. HOLIFIELD. Yes.

Mr. DINGELL. I believe it is true in the case of men's socks?

Mr. HOLIFIELD. Yes.

Mr. DINGELL. Is it true in the case of men's underwear?

Mr. HOLIFIELD. Yes.

Mr. DINGELL. Is it true in the case of large numbers of other items in men's furnishings, such as garters and belts?

Mr. HOLIFIELD. Yes.

Mr. DINGELL. It is also true in the pharmaceutical field, generally prices tend to seek almost exactly the same level for the same particular item?

Mr. HOLIFIELD. I am sorry, but the gentleman has me in a field I am not familiar with.

Mr. DINGELL. It is true in the field of men's haberdashery, with which you are familiar?

Mr. HOLIFIELD. Yes.

Mr. DINGELL. Hat A is marked by the manufacturer and hat B will be marked by the manufacturer and it is generally the same price. It is $4.95 for a shirt and $5.95 for a shirt and almost every manufacturer manufactures a shirt at this particular price. Is that right?

Mr. HOLIFIELD. That is right.

Mr. DINGELL. There is no price competition at all in these items. Am I right?

Mr. HOLIFIELD. In the particular items there is not competition pricewise between an Arrow shirt and a Manhattan shirt which sells at $5.95. There is competition in other areas.

Mr. DINGELL. There is competition, for example, in advertising.

Mr. HOLIFIELD. In design, and there are people who will say there is a difference in quality.

Mr. DINGELL. The simple fact of the matter is that price competition is eliminated and this bill's function is to sanction that kind of elimination of price competition in the men's retail haberdashery field. Is that correct?

Mr. HOLIFIELD. Within a specific brand item. For instance, it is not a bill to eliminate competition between a Manhattan shirt and Arrow shirt. They set their prices on the basis of their costs of doing operation and on the basis of what society will pay——

Mr. DINGELL. What the traffic will bear?

Mr. HOLIFIELD. Wait a minute.

Mr. DINGELL. What the traffic will bear?

Mr. HOLIFIELD. No.

Mr. DINGELL. What is the price, then? If it is not that what it is?

Mr. HOLIFIELD. There are certain levels of price at which, due to many causes, you can sell an article. For instance, you can sell a great many articles at $5 to the average wage earner. You can sell very few $10 shirts to the average wage earner.

It so happens that $5 is a price, $4.50 or $5 is a price, at which you can make a good shirt, pay decent wages, and you can sell it so that the manufacturer makes a reasonable profit, and the retailer makes a reasonable profit. They cannot make an exorbitant profit because if they did there would be a competitive factor introduced which would take that profit away from him because there is an abundance of capacity to make shirts.

Mr. DINGELL. Let us assume for the purpose of the argument that this is true in the case of the retail haberdasher. Let us talk now a little bit about retail pharmaceuticals.

Mr. HOLIFIELD. I cannot talk to you about pharmaceuticals because I am not qualified in that field.

Mr. DINGELL. Let us say all manufacturers in the retail pharmaceutical field among the large ones manufacture and market at a substantially fixed price and there are only two or three.

You indicated to me before that this is a situation which is proper to compare with collusion. Is that correct?

Mr. HOLIFIELD. Where there is a limited control of an item of production there is a chance under our present system and under any system I know of of monopoly.

Mr. DINGELL. Would it not be well, then, to put in this bill some specific protection against collusive price fixing and to put in some specific guarantee that the Antitrust Division of the Department of Justice and the Federal Trade Commission would be able to protect the American consumer from this peril-fraught condition?

Mr. HOLIFIELD. You already have laws against collusion and this does not affect the laws against collusion.

Mr. DINGELL. Except insofar as it authorizes the fixing of prices. Is that right?

Mr. HOLIFIELD. No.

Mr. DINGELL. Is it not a fact, though, that there is nothing to stop Mr. Mallory and Mr. Stetson from sitting down at lunch and agreeing there that they will fix their hat prices at $10.95 or $12.95 or $16.95 or $19.95?

Mr. HOLIFIELD. There are other laws on such behavior which are not affected by this legislation.

Mr. DINGELL. There is nothing to stop them from doing it. They would then initiate a program——

Mr. HOLIFIELD. That is the Justice Department. This bill would not change the situation of collusion whether it is done surreptitiously or openly.

Mr. DINGELL. But it would be impossible to catch them under those circumstances.

Mr. HOLIFIELD. It is impossible now, or almost impossible to catch secret collusive price fixing, but certain things can be brought into evidence to show——

Mr. DINGELL. That is correct, such as letters to bring recalcitrant retailers into line and things of this sort which would not have to be done because they would simply write the retailer and advise him that the price was fixed at a certain level, and that would be all they would have to do. They wouldn't have to withdraw their merchandise or anything else. They would enforce a collusive price-fixing agreement with another manufacturer. Am I right on that?

Mr. HOLIFIELD. I don't think so.

Mr. DINGELL. One last point I would like answered here. Would you not favor some language in this bill which would guarantee that the consumer will be protected so that the markup would not be excessive?

Mr. HOLIFIELD. I don't know how you would do that. If you did that who would you set up to establish what is excessive and what is not excessive in markup and merchandising?

Mr. DINGELL. The Federal Trade Commission. This would amend section 5(a) of the Federal Trade Commission Act, and it would authorize the Federal Trade Commission to initiate proceedings for violation of this law.

Mr. HOLIFIELD. This does not nullify any present provisions of the Federal Trade Commission Act. It adds other items to the present items which are already prohibited under the Federal Trade Commission Act.

Mr. DINGELL. And would require Federal Trade Commission action under section 5(a) to halt actions which are unfair methods of competition, or unfair practices in competition.

Mr. HOLIFIELD. They are obligated to do that now.

Mr. DINGELL. They would be authorized and obligated to halt any practices violative of House Joint Resolution 636; is that correct?

This imposes upon the Federal Trade Commission certain responsibilities?

Mr. HOLIFIELD. This gives to the owner of a brand name certain rights, property rights in his brand which he has developed, and which he has spent money for. It gives him certain rights. He is entitled to such protection as the law would give him either in his own action in a Federal court, or through independent action of the Trade Commission.

Thank you, gentlemen, for the long time that you have given me. I did not expect to be on the stand this long. I have a subcommittee meeting to get out a bill, so if you will excuse me, I will leave.

Mr. MACK. Thank you for your fine statement.

The next witness is our distinguished colleage on the subcommittee, the Honorable Milton W. Glenn, of New Jersey. Mr. Glenn, we will be glad to hear you at this time.

STATEMENT OF HON. MILTON W. GLENN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. GLENN. Mr. Chairman, in my State of New Jersey, there are a good many people who would join me here today in expressing support of House Joint Resolution 679. These people have had some grueling experience with marketplace conditions with which this bill deals.

You will recall that perhaps the worst gasoline price war in our modern history took place in my State. The time was just a few years ago. Month after month, for more than a year, gasoline was being sold at subbankruptcy prices. There was an outcry from the independent gasoline station owners who saw their livelihood, their savings, and their businesses rapidly disappearing. One might say motorists had a field day. They did. They got gasoline cheaper by far than the dealer could buy it from the refiner, cheaper perhaps than the refiner could produce it.

The constructive good offices of the Senate Select Committee on Small Business were brought into play to stop the gasoline price war—and in the nick of time, too. I shudder to think what might have happened to the independent gasoline dealers, to gasoline distribution, in New Jersey if the price war had not stopped when it did. The independent gasoline dealer would surely have disappeared. Would

we have wound up with gasoline distribution in the hands of two or three great distributors? And thus exposed ourselves to monopoly pricing—that most dangerous threat to the welfare of the consumer?

Unfortunately, it is not only the gasoline dealer who has suffered from a kind of selective, monopoly-producing price cutting known as customer-bait pricing. Independent retailers in all fields are being relentlessly liquidated.

What is happening to independent retailing will, I am sure, be brought out in the hearings before the Senate committee. I have had called to my attention a few statistics which tend to show what is happening and what may likely happen to independent retailers.

A comparison of independent and chain drugstores shows that in 1955 the independents accounted for 81 percent of drugstore sales volume, in 1961 they accounted for only 76 percent. This is not good for independent druggists. It can get worse, however, if the experience of independent grocers is any guide. In 1955 the independent grocers accounted for 60 percent of total grocery store sales, in 1961 they accounted for only 52 percent. And even this figure does not quite tell the full story because a substantial portion of this 52 percent was accounted for by giant, independent supermarkets.

Concededly, there are any number of reasons for the decline of independent retailing. But I think the inability of the small storekeeper to sell—at a fair profit—the famous brand-name products which are his bread and butter, must come at, or near, the top of these reasons.

House Joint Resolution 679 won't cure customer-bait pricing entirely, but its enactment will help to curb it.

In urging approval of this legislation, may I say that the bill reflects free enterprise at its enlightened best. It enables manufacturers, if they wish, to guard the reputation of their trademarks, brand and trade names. In so doing, the bill, if enacted, would restore fair competitive pricing in the marketplace. House Joint Resolution 679 would cost neither the Government nor consumers a single penny.

Mr. MACK. Are there any questions? If not, we appreciate your testimony, Mr. Glenn.

Mr. GLENN. Thank you, Mr. Chairman.

Mr. MACK. The next witness is our colleague from Indiana, the Honorable Ralph Harvey. Mr. Harvey, we will be glad to hear from you at this time.

STATEMENT OF HON. RALPH HARVEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. HARVEY. Mr. Chairman and members of the committee, the President, in feeling that a proposed increase in the price of steel was unjustified, took action to discourage steel companies from raising their prices. Through all of this action the American people were introduced once again to the word "profit." Today we are here to listen to testimony on House Joint Resolution 636, which is, directly or indirectly, related to the same word.

The retail businessman in the United States today is the forgotten man. While many belong to trade associations and local chambers of commerce, the majority are of the single-proprietorship type of operation who do not have the millions of dollars at their disposal—

such as that of labor organizations—to press for their needs; we here in Congress are their only answer, and I am confident the Congress will not fail them.

Enactment of this resolution is a "must" piece of legislation. I was so impressed by the needs of the entrepreneur that I introduced a companion proposal myself, and that is why I appear before you here today to state my views publicly.

Both large and small business establishments are in dire need of this legislation because we find business today in a cost-price squeeze never before witnessed in the history of our economy. What do we find small business doing to solve the predicament they are in today? First of all, there is little that it can do unless enactment of this legislation is realized. Businessmen are taking, and have been some time, a closer look at their fixed costs and expenses. They find that in order to do the same amount of business volume each year they must increase their advertising allowance, modernize their business establishment, pay increased taxes—both Federal and State—and meet the demands of their employees for higher wages and salaries.

At the same time the retailer is expected to cut his prices to compete with the unscrupulous retail establishments that make it a practice to cut prices in order to induce the confused buyer into the clutches of the so-called discount house. Particularly on items where a service may be required, we find the manufacturer representative trying desperately to explain to a long and valued customer—who became a victim of a discount purchase—why it is unfair to expect the established factory representative merchant to serve the item free of charge.

Many of our citizens today, I think, should be reminded that the merchandise that they like to see displayed when they go shopping just doesn't appear there by chance. They sometimes forget that the owner or buyer purchased these items, in anticipation of the needs of his customers, with a great deal of care and understanding.

One of the sad things that I see when I return to my district in Indiana is the number of vacant business buildings and rooms in my cities. It is true that many concerns have moved to more modern facilities, with parking, in the outlying suburbs, but I think many have decided that with competition as it is, and taxes as they are, it it easier to just close their business.

Picture if you will what will happen in years to come if corrective legislation is not passed. Retail business needs a more favorable climate and this legislation is a step in the right direction. Our friends in business must be given every opportunity to realize a profit, for without a fair margin of profit there can be no business.

In conclusion permit me to say that I appreciate this opportunity to share by views with you on this legislation. In this age of electronic computers and complicated data-processing machines, I am reminded of a remark a friend of mind made in New Castle, Ind., about businesss projections. He said: "Ralph, you can always tell how much business the fellow down the street is doing by looking at your own cash register." I mention this because it is time the Congress took a look at the problems of small business. Some here in Washington have forgotten how to keep track of the pulse of the economy, because the small businessman has been forgotten.

Mr. MACK. We appreciate your appearance and testimony, Mr. Harvey.

Mr. HARVEY. Thank you for opportunity, Mr. Chairman.

Mr. MACK. The next witness is our colleague from California, the Honorable James Roosevelt. Mr. Roosevelt, you may proceed.

STATEMENT OF HON. JAMES ROOSEVELT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. ROOSEVELT. Mr. Chairman, I welcome this opportunity to add a note of urgency to these hearings on the quality stabilization bill, H.R. 10335 and House Joint Resolution 646 in the House, and Senate Joint Resolution 159 in the Senate. It is imperative that this 87th Congress enact this legislation.

As a member of the Select Committee on Small Business of the House of Representatives, I have gained a valuable insight into the small businesses of our country. I have lent support to the program of the Small Business Administration. Only recently I had the honor along with the distinguished Congressman from Texas, the Honorable Wright Patman, of introducing a measure designed to assist small businesses obtain lease guarantees. These measures are important and of assistance to the small business community. They help make possible the survival of the American small business community. So does the quality stabilization bill.

The frightening statistics developed by the Small Business Administration show the 1961 business failures as 17,075, the highest figure since 1933. Perhaps more frightening, the failure rate per 10,000 businesses is the highest since 1939. One other factor, which has given those of us intimately concerned with this problem great pause, is the knowledge that for each recorded statistic approximately 20 businesses go out of existence without being so recorded. In other words, it is a fair estimate that over 300,000 businesses went out of business last year alone.

And current figures supplied by Dun & Bradstreet indicate that for the first quarter of 1962 the failures are running numerically higher than last year. Federal legislation uniformly applicable to and in all States is essential in this area. Otherwise a checkerboard pattern of State laws will prove—as it has proved—ineffective. Without this legislation boundary lines will continue to be crossed with impunity and render isolated State laws meaningless.

The service establishment, the backbone of the American shopping community for generations, is in desperate danger. The local hardware store, the shoe retailer, the jewelry shop, the independent gasoline dealer to mention just a few, are on the ropes. Unless this Congress takes some definitive action, this vital segment of our economy might pass forever from the business scene.

Statistics alone do not tell the whole story though they are frightening enough. Back of the figures is the certain knowledge that the backbone of the small community across America is in danger of being radically altered—and for the worse. It is no exaggeration to say that if you examine the leadership of the local churches, the

local Red Cross, the Boy Scouts, the Girl Scouts, and the innumerable service organizations that make America the wonderful family country that it is, you will find prominently in that leadership the local store owners.

The local merchant has deep roots and a real sense of devotion to his local community. Replace the time-honored retailer with the absentee ownership of the mass merchandiser and you have substituted expediency and the fast buck for stability and integrity in the marketplace, and in the community.

Because of my work on the Small Business Committee, I am intimately familiar with the problems of the retail gasoline dealer in my State, and I am sorry to say that this portion of our small business community is on the verge of chaos. I know also that the same frightening conditions prevail across our land insofar as this vital segment of the petroleum industry is concerned.

In the State of Massachusetts, for instance, the annual turnover rate for independent gasoline dealers for the past 3 years has been 37 percent. One wonders how long our economy can continue to prosper in the face of such frightening business loss.

Because of the basic instability of retail gasoline sales, the loss-leader practices, and discriminatory pricing practices of the industry, it is fair to say that the Nation's dealer-operated gasoline service stations give a frightening picture of what is happening to small business in this country.

(1) More than 200,000 businesses are in economic jeopardy today because of the chaotic pricing practices in the retail gasoline industry.

(2) More than 600,000 jobs are at stake. The Nation's dealer-operated gasoline service stations employ 400,000 employees in addition to the 200,000 working proprietors and partners. These jobs and the livelihood of the families related to them are in serious financial peril today.

(3) There is no calculating of the danger to the public that is represented in the loss of experienced men to man the gasoline service stations for our Nation's highways. The reduction in dealer margins to below cost level is depriving motorists of essential services which are vital to the safety of the motorists and highway users of our country.

The frightening specter of business failures in the retail gasoline industry is repeated in industry after industry in the service field. The retail hardware owner, the retail druggist, the retail jeweler—to name but a few—are faced with business disaster unless we in Congress show our responsibilities to remove the jungle of predatory pricing from the small business community.

In its simplest terms, it is survival or failure. As one who has labored for the small business community, I urge this committee to give quickly a favorable report to the quality stabilization bill to speed this bill into law in 1962.

Mr. MACK. Thank you for your testimony, Mr. Roosevelt.

Mr. ROOSEVELT. Thank you, Mr. Chairman.

Mr. MACK. The next witness is our colleague from Idaho, the Honorable Ralph R. Harding. Mr. Harding, we will be glad to hear you at this time.

STATEMENT OF HON. RALPH R. HARDING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. HARDING. Mr. Chairman, I appreciate this opportunity to appear before your subcommittee on the quality stabilization proposals. The urgency of the problem to which this legislation is addressed can scarcely be overstated. It is my understanding that the problem exists nationally, but I shall confine myself primarily to its impact within the district which I have the honor to represent.

Southern Idaho is an area of small cities and towns. The backbone of our Idaho communities is the group of independent merchants serving the people residing in the town and surrounding areas. While, of course, many groups contribute to the functioning of these communities, I believe that it may be said that the leadership of the local churches, the Red Cross, the Boy Scouts, and other youth organizations, and the various service organizations which give our communities their character and make them such an outstanding place to raise families consists, primarily, of the independent merchants of these towns.

Of late we have seen more and more locally owned, independent businesses encountering serious financial difficulty. Much of this has been caused by unfair competition on the part of chain and other discount establishments. Frequently, well-known, brand-named merchandise, bearing a time-honored trademark, is offered for sale to the public at a retail price which is far less than the price at which the independent merchant can obtain the same product at wholesale. These dratically discounted brand-named items then are used as bait merchandise to attract the public. Followup sales of other merchandise, often of a shoddy and inferior unbranded variety, are then made to the buyer thus attracted.

My district is far from unique in this. I know that in 1961 there were in America over 17,000 business failures. The failure rate of small businesses is the highest since 1939. It has been estimated that as many as one-third of a million businesses ceased to exist last year.

I believe that if something is not done to protect our independent merchants from these predatory tactics the main streets of our smaller towns and cities throughout America will be in serious danger of extinction.

It is not only the interest of the merchants that these bills seek to protect. As I have already pointed out, the merchants are an integral part of their community and we are, in a sense, seeking to preserve the entire community when we move to preserve the structure of the communities' main street.

There is another aspect, however, to these bills which goes directly to the question of protecting the individual consumer. A very high proportion of trademarked merchandise is of a kind that requires continuing service on the part of the retailer. I think that all of us are familiar with the shabby tactics of many discount organizations that saddle the purchaser with a piece of goods which does not operate properly or, perhaps, with a perfectly sound piece of merchandise, which in the normal course of operation requires maintenance and service. In either instance, too frequently the "quick buck" mer-

chant simply is not there to give the consumer the maintenance and service backup that he deserves.

The independent smalltown merchant can be depended upon to give this service. He is a part of the community. These are his friends and his neighbors with whom he is dealing. His relationship with his customers is not one that is based on the profit motive alone. I, personally, feel that a very real and important part of America is drawing near to extinction unless the Congress acts to protect and preserve our independent businessmen from these "quick buck" discount tactics that are driving so many of them to the wall.

I strongly commend the quality stabilization bills to this subcommittee and respectfully request your careful consideration of them.

Also another approach to this problem which I would like to urge your committee to consider carefully is House Resolution 8830, introduced by Congressman Tom Steed, of Oklahoma. This legislation provides for the issuance of temporary cease and desist orders to prevent harmful business activities until they can be investigated and determination made as to their legality.

Mr. MACK. Are there any questions? If not, we appreciate your testimony, Mr. Harding.

Mr. HARDING. Thank you, Mr. Chairman.

Mr. MACK. The next witness is our colleague from Utah, the Honorable David S. King. Mr. King, we will be glad to hear you at this time.

STATEMENT OF HON. DAVID S. KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. KING. Thank you very much for giving me the opportunity to express my views to this committee on the quality stabilization bills. I think it is most significant that the author of one of these bills, House Joint Resolution 636, is the distinguished chairman of the House Committee on Interstate and Foreign Commerce. Representative Harris' association with the bill speaks well for it. The objectives of the bill—and the companion bills introduced by Representatives Madden, Mack, and others—are clearly set forth as follows:

> * * * to amend the Federal Trade Commission Act, to promote quality and price stabilization, to define and restrain certain unfair methods of distribution and to confirm, define and equalize the rights of producers and resellers in the distribution of goods identified by distinguishing brand names, or trademarks, and for other purposes.

These stated objectives add up to a goal that is clearly in the national interest. That goal is the protection, preservation, and advancement of independent retailing in America.

I appreciate that certain agencies of the Government, among others, oppose the bill. They have opposed legislation comparable in principle though different in techniques whenever such legislation has been proposed. For example, quite a few agencies opposed the McGuire Act in 1952. Notwithstanding their views, the House of Representatives voted for the McGuire bill, 196 to 10; the Senate voted for it 64 to 16; and President Truman signed that bill into law.

It is no accident that a vast majority of independent retailers in America are petitioning Congress to enact the quality stabilization

bill. Some 70 or more national trade associations favor it. Their members are appliance dealers, booksellers, clothiers and furnishers, druggists, filling station operators, grocers, hardware dealers, jewelers, auto accessory dealers, photo supply dealers, sporting goods dealers—as well as wholesalers in these distributive trades.

Note the word "equalize" in the objectives of the bill. The use of the word implies that certain trademark owners already enjoy certain rights which others do not. This is a fact. And this bill would correct this inequity.

The right of a manufacturer to establish the retail price of an article identified by his brand or trademark is already held and utilized by trademark owners who employ certain specialized methods of distribution. They include chainstore organizations which control their own brands and sell them in their own outlets, manufacturers who own retail stores or distribute house to house through canvassers, manufacturers who sell on consignment, and others. If it is lawful for some people in America to stabilize and make uniform the prices of their respective branded products, then it should be lawful for others to do the same thing. Ironically, it is these others whose mass distribution network includes most of the independent retailers.

I hold that a manufacturer has the right to protect his brand against price exploitation. I hold that he should exercise that right to help the 2 million independent retailers in this country who symbolize—more than any others—the opportunity for small business to prosper in our free enterprise society.

I appreciate it is argued that House Joint Resolution 636 would destroy free competition. It is curious that such vigirous objections are not raised when the retail price is set by trademark owners who own or control the means of distribution for their respective branded products.

The fact is that the quality stabilization bill would intensify competition rather than impair it, by assuring the existence of numerous competitors. Every brand utilizing the provisions of the bill would continue to compete for the consumer dollar with all other goods and all services in the entire economy. Every brand would continue to compete with all other brands, as well as with unbranded merchandise, in its same general class.

The only competition that the quality stabilization bill would eliminate is the competition of a brand with itself, and nothing in the Constitution or in any of our laws requires an institution to compete with itself, or a person to compete with himself or herself.

I urge adoption of House Joint Resolution 636 because: (1) It gives trademark owners, whose distribution system includes most independent retailers, the opportunity to protect their brands and their distribution systems, while it does not impose its terms on any trademark owner; (2) it gives the independent merchant the opportunity to compete effectively against giant retail corporations in the sale of national brands which are his bread and butter; but it does not impair the ability of any retailer to pass on to the consumer the benefits of his efficiency; (3) it gives the American consumer complete freedom of choice as to what brands he will buy and in what type of store the purchase will be made.

The Harris bill is a good bill—good for business, good for small business, good for the consumer, good for the country. It deserves to become law.

Mr. MACK. Thank you for your appearance and testimony, Mr. King.

Mr. KING. Thank you, Mr. Chairman.

Mr. MACK. The next witness is the distinguished Senator from the State of Minnesota, the Honorable Hubert H. Humphrey. Senator, we welcome you to the committee and will be glad to have your testimony.

STATEMENT OF HON. HUBERT H. HUMPHREY, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator HUMPHREY. Mr. Chairman, as the sponsor in the Senate of Senate Joint Resolution 159, the companion measure to the joint resolution offered by Representative Oren Harris, I appreciate this opportunity to testify in support of the Quality Stabilization Act.

In essence, House Joint Resolution 636 is carefully designed to strengthen our antitrust laws by suppressing certain unfair methods of competition generally acknowledged as promotive of monopoly in distribution.

Toward this end, the resolution empowers the owner of products identified by his trademark or brand name to prevent distributors handling his products from using such methods in reselling the trademarked or branded products, and thus damaging the mark or brand and associated goodwill. Whenever a trademark or brand-name owner discovers his products being used by a distributor in any scheme involving (*a*) misrepresentation, (*b*) bait merchandising, or (*c*) sales at other than the established price, he may revoke the offending distributor's right to use his mark or brand in reselling such goods. In addition, the trademark or brand-name owner is entitled to injunctive relief, if the offending distributor disregards the notice of revocation and continues the challenged sales practices.

In legal theory, too, the proposed legislation is easily understandable. Basically, no more is involved than recognition of (1) the property values inhering in business goodwill and in the trademark or brand name adopted to maintain and extend it, and (2) the need to protect by appropriate remedies such property rights from marketing practices producing injury.

In this light, House Joint Resolution 636 is seen as merely an extension of our trademark and copyright laws—an extension enabling a trademark or brand owner to protect his property rights through the channels of distribution. Certainly, if we accept the right to own property and the corresponding right to protect such property—which are basic rights of every American citizen—then we must accept the objective of the quality stabilization resolution—protection of valuable investments in trademarks, brand names, and goodwill from ruinous marketing tactics. We seek to establish in the marketplace fair competitive practices.

It should be noted that nothing in this resolution would bar a distributor from removing the trademark or brand name from the product—thus separating the physical property, which he owns, from the

goodwill, which is another's property—and then selling the commodity at his own price or in his own way, so long as he does so without making use of the goodwill of the latter to reach his end.

In reviewing the nature and purpose of the proposed legislation, I would like to stress the permissive character of its provisions. There is no obligation upon the trademark or brand-name owner to avail himself of the rights accorded him under the proposed legislation. It is conceivable that the owner may not be interested in protecting his goodwill, trademark or brand name from the unfair methods of competition defined in this bill. But whatever his decision, it will be his own. No one may force him to decide either way. Whether he does so or not act is his own decision, provided his products are in free and open competition with other similar products. Similarly, those engaged in merchandise distribution, that is, the wholesalers and retailers, are not in any way obliged to handle trademarked or branded merchandise subject to the quality stabilization resolution. As always they will decide for themselves what products they will stock and offer for sale. American consumers, too, enjoy full freedom of choice under this measure—they are free to accept or reject all merchandise, to pick and choose between protected and unprotected products.

It is in the interest of consumers that we encourage independent retailing and fair competitive practices.

Our huge productive capacity turns out a tremendous amount of goods which provides us with a standard of living higher than that of any other country in the world. In order to distribute efficiently, our free enterprise system needs hundreds of thousands of independent retail dealers as well as chainstore outlets. We need retailers who are responsive to the needs and wants of their customers. A system which includes hundreds of thousands of independent retailers protects will continue to be available. As the late Associate Justice Holmes the consumer against monopolistic tendencies and resultant higher prices.

The fair competitive practices which are promoted under this proposal assure the consumer that quality tested and reliable products once said:

> I cannot believe that in the long run the public will profit by permiting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not destroy, the production and sale of articles which are assumed to be desirable that the public should be able to get.

Also, in terms of the economic health of the independent business community, this legislation is long overdue. According to Dun & Bradstreet's annual report on business failures, more small firms failed last year than in any year since 1933. Over 17,000 concerns, almost all small, failed last year, reflecting an 1,190 increase over 1960's bankruptcy total.

Dun & Bradstreet reported:

> Wholesalers suffered the steepest rise in casualties, with building materials, chemicals, and drug fields bearing the brunt of it * * *. An upturn in retailing failures appeared in all major lines except appliances and television. Drugstores, general merchandise stores, auto dealers, and service stations had tolls running from 16 to 23 percent higher than in 1960.

Enactment of this legislation is essential to the competitive survival of hundreds of thousands of independent businessmen in all parts of

the country. Most importantly, its enactment will make possible the advancement of independent retailing and, thereby, add significant social and economic values to our free enterprise society. I know most Americans agree that independent business in America is worthy of preservation. It is the key—the strength—of a free economy based on healthy and fair competition.

At the same time, this measure can do much to restore the confidence of the American consuming public in the quality standards of available merchandise and the fairness of applicable prices. No longer will the ethics of the marketplace be determined by the price-juggling operator who cuts prices on the "stars of the merchandise world" and recoups his losses by selling lesser known, higher profit margin goods. Replacing such practices of the "oriental bazaar" will be fair, honest, and vigorous competition for the favor of the consumer.

With these considerations in mind, I respectfully urge this subcommittee to approve House Joint Resolution 636.

Mr. MACK. Are there questions? If not, we thank you for your appearance and testimony, Senator.

Senator HUMPHREY. Thank you for the opportunity to appear, Mr. Chairman.

Mr. MACK. The next witness is the distinguished Senator from the State of Wisconsin, the Honorable William Proxmire. Senator, we will be glad to hear your testimony at this time.

STATEMENT OF HON. WILLIAM PROXMIRE, A. U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator PROXMIRE. Mr. Chairman, I say as chairman of the Small Business Subcommittee of the Senate Banking and Currency Committee, which is primarily responsible for the small business legislation, that while previous Congresses have enacted excellent small business legislation, none has significantly assisted that vast area of small business that constitutes easily the great majority of independent proprietorship—the retail merchant. Here is the small businessman who is most seriously in trouble. He is the one who most urgently needs congressional action. And I am confident that no measure before the Congress this year or last year or in the past 20 years would do more for the benefit of more small businesses than Senate Joint Resolution 159, the Quality Stabilization Act which I am supporting this afternoon.

Mr. Chairman, first of all I want to emphasize that this is a resolution that helps small business not by weakening or destroying competition but by strengthening it; not by eliminating any area of competition between competing retail establishments, but by strengthening competition.

This resolution protects competition. It also provides solid assistance to small business and, Mr. Chairman, small business—which is in serious trouble—desperately needs that protection.

Of all the areas of American business, the retail stores have been the most characteristically small business. The overwhelming majority of stores and shops all over America are still small business, usually family business operations. The vast majority of American

small businessmen are retail merchants. The independent proprietors, the free-enterprise businessmen, can be said to be the backbone of American economic democracy. Here in the retail business is where the backbone of American democracy really is; in American small cities, towns, and villages, he represents the social, political, and moral leadership. In most American communities he provides the community spirit that builds our towns, the chambers of commerce, Kiwanis Clubs, Lions Clubs. The leadership, the time, the energy, and the money come from him.

Behind this vital community leadership is the wonderful family life that the "mom and dad" store provides. Like the family farm, the family business offers an ideal moral climate for the development of the invaluable qualities of character and morality. The energy-demanding work of the family store virtually eliminates juvenile delinquency. The qualities of thrift, industry, business sense, are developed and nurtured in the family atmosphere. The family store is an immensely valuable American institution. If any economic institution can be said to deserve preservation, certainly the family store is it.

Even if it were an economically inefficient operation, the argument for preserving and protecting the family store would be a strong one. But like the family farm, it is not inefficient. It is efficient. It has proven itself repeatedly. It lacks one important survival asset in our competitive economy, however, and that is capital, just like the family farm lacks capital. This lack of capital means that the large competitor, the chainstore or massive supermarket, even if less efficient, can engage in price-cutting operations until the little business is driven out.

The record is plain. Business failures in 1961, according to Dun and Bradstreet, totaled 17,075, the highest number since 1933 and the highest rate of failure since 1940.

The latest FTC report on acquisitions and mergers shows that they stand at 1,234 for 1961 as compared with 1,012 in 1960; 1,050 in 1959, and 899 in 1958. The figures for 1961 represent a postwar high. The increase is due primarily to mergers in the retail and wholesale trade which are at an all-time high.

Cutthroat competition for the small businessman is increasing. The trend is toward more and bigger discount chains. While the pricing policies of the discount houses have a deceptive attractiveness, the long-range result is almost certain to be reduced competition, greater economic concentration, and higher prices.

The Quality Stabilization Act protects the consumer against higher prices and poor service by encouraging independent retailers and strengthening fair competitive practices.

The decline of fair competitive practices would lead to a decline in the number of independent neighborhood stores and specialist shops.

The consumer, so far as service is concerned, would lose some convenience in the decline of these neighborhood stores. Also, he would have less of the specialized services he now enjoys from retailers. In particular, the service and repair facilities at present available for several makes at the same place, the store or the independent repair shop, would be curtailed.

So far as prices are concerned, almost every study has shown that where fair competitive practices have been abandoned, it has not meant any reduction in the average level of retail prices. There are some indications that average prices decline when fair competitive practices are instituted.

One famous study by H. F. Ostlund and C. R. Vickland compared retail prices in a period of time (March to September 1939) when retail price maintenance was effective in most States with a date immediately before it was introduced. Their research covered 50 well-known brands sold in drug stores in 48 stores. The result was an average drop of 0.9 percent in the retail prices of those brands after fair competitive practices became effective. Chainstores tended to raise their prices and other stores to reduce theirs.

Mr. Chairman, I would like to suggest that in addition to these economic considerations, there are some serious social questions involved. I do not believe that inefficient small businesses should be protected. I do feel very strongly, however, that when we look around the world and see the revolutionary results which flow from those social practices which concentrate economic power in the hands of a few gigantic companies or corporations that we should be thankful for our small business community.

I am sure every member of this committee is aware of the fact that in every small town you go, the backbone of the community, the people who really provide the community responsibility and the leadership in the community in every kind of drive and every kind of community effort are the small business people—the local druggist, the local hardware merchant, the local grocer—the local people who own their stores. These are the people who take pride in their community and are so tremendously important in that community.

Today we are concerned with the small business retailer and I respectfully suggest that Senate Joint Resolution 159, the Quality Stabilization Act, is a sound way to insure that we will continue to have diversification and competition in retailing by strengthening the small business community.

In conclusion, Mr. Chairman, thank you for this opportunity to appear before your subcommittee. I intend to work hard for the passage of this resolution and I urge you to give it favorable consideration in your subcommittee at the earliest possible date.

Mr. MACK. Senator, we appreciate your appearance and your interest in this legislation.

Senator PROXMIRE. Thank you, Mr. Chairman.

Mr. MACK. The next witness is the distinguished Senator from Indiana, the Honorable Homer E. Capehart. Senator, we are glad to welcome you to the committee.

STATEMENT OF HON. HOMER E. CAPEHART, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator CAPEHART. Mr. Chairman and members of the subcommittee, permit me to express my gratitude to the distinguished chairman of this subcommittee for permitting me to submit my statement on quality stabilization legislation.

I am sure the members of the subcommittee are aware of the fact 10 Senators, including myself, are coauthors of Senate Joint Resolution

159 on which hearings were conducted some time ago by a subcommittee of the Senate Commerce Committee.

I want to lend such support as I may to the 12 quality stabilization measures introduced in the House of Representatives and which are the subject of the current hearings before your distinguished committee.

I have been asked why I am devoting so much time and energy to this subject, particularly in such a busy session of Congress.

The quality stabilization bills comprise important pieces of pending legislation. They are bipartisan. Passage is essential to restore orderly marketing and healthy competition. Until recently it has been too little known by the public and has been misunderstood by many who have heard of it.

The quality stabilization bills, with added sponsorship, remain the same bill for which I have long been fighting. It is a bill to halt the race to destruction being forced on small retailers. It is the same bill to aid materially in stability of employment and the protection of quality to consumers without removing their voluntary right of purchasing articles of their own choice.

Quality stabilization is not a slogan. It is a prescription. It is meticulously prepared as a complete remedy for a known malady. The American economy is not only suffering from a circulatory blood clot; its very survival is being threatened if quality stabilization is delayed.

There are many reasons why I would like to have this legislation enacted this year.

The businessmen of Indiana, among others, are worried about the plight of small business. They are not asking the Federal Government for a subsidy or a handout. They ask only for legislation to promote fair competition.

The small retailer is in trouble today because he is not becoming a party to unfair competition. He will not deceive his customers by joining the ranks of the destructive loss-leader operator. This loss-leader operator travels a parasitic road of distribution.

Unjustly he enriches himself by using someone else's property to attract more customers, all to the detriment of his honest competitors and to the ultimate detriment of the consumer.

Another reason for my support of quality stabilization is that I know this story from the point of view of the manufacturer. I was proud enough of the products that I built that I put my own name on those products. The theorists allege the manufacturer has no real interest in the orderly distribution of his products—that he "gets his profit" so why should he kick how the sale is made to the customer.

Nothing could be further from the truth.

The bulk of my distribution of "Capehart" products was through small business. Most manufacturers prefer it that way. When he depends on a handful of outlets for his sales, he's in trouble. He is subjected to all kinds of pressure for a lower and lower price, and if he can't deliver, some other manufacturer gets the order. So to meet such pressures, the manufacturer must sacrifice quality. Instead of attempting to find ways to add quality to his products, his research and development department for all practical purposes is closed. All emphasis is on cost cutting in production. Quality materials, quality la-

bor are sacrificed. The consumer is hurt, because he is going to get less and less value per dime he invests in the products.

The loss-leader operators have created a mercantile monster that threatens to destroy the American economy. By squeezing the incentive to make high-quality products, these houses force manufacturers to make increasingly greater cuts in quality to meet further demands for additional price cuts.

Thus begins a vicious cycle—a cycle that encourages manufacturers to make unrealistic reductions in labor costs and the quality of their products; a cycle that prompts manufacturers to disable their distribution system by eliminating the valuable services rendered by their wholesalers; a cycle that forces retailers to curtail traditional customer services in an effort to cut prices further; a cycle that ultimately gives the consumer less and less value for his dime or dollar invested in the product.

The consumer, the honest retailer, the wholesaler, the manufacturer, the American economy, need a solution—and in my opinion, we have it only in the quality stabilization bill.

I hold that it will be a deep tragedy to our country if this bill is not understood by all of us in Congress for precisely what it is—a prescription to remove a blood clot in our distributive system, not a panacea to be misunderstood and condemned in prejudice of any other legislation.

Mr. MACK. Are there any questions? If not, we thank you for your appearance, Senator.

Senator CAPEHART. Thank you, Mr. Chairman.

Mr. MACK. The next witness is the distinguished Senator from the State of South Dakota, the Honorable Karl E. Mundt. Senator, you may proceed.

STATEMENT OF HON. KARL E. MUNDT, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator MUNDT. Mr. Chairman and members of the subcommittee, I represent a proud State—a State of small business people who know they help form the strong backbone of this Nation.

My interest was drawn to the quality stabilization bill when I read the results of a national poll. Not usually taken in by surveys or polls, this one caught my eye in the uniqueness of having been undertaken in each and every congressional district of the 50 States. When I found an average of over 80 percent of the American housewives interviewed want quality stabilization, as this bill stipulates and without additions or changes, I became interested. These, after all, are the people I am pledged to represent, who have reposed their trust in me by electing me to the Senate.

My interest in this legislation was further heightened by the fact that many independent retail businessmen in my State have conveyed to me their growing concern over their increasing inability to compete in the retailing of quality products with the discount and mass volume merchandisers. These independent retailers, all of them small businessmen, are the heart and soul of the business community in South Dakota. These individuals contribute greatly to local leadership in my State, and when they are backed against the economic wall the entire State suffers their loss with them.

The parallel interest of the independent businessman and his customers in the quality stabilization bill caused me to review the provisions of this measure with the result that I decided to cosponsor this legislation when it was reintroduced in the Senate on February 21, 1962, as Senate Joint Resolution 159.

With your permission I now wish to briefly report my own convictions and set forth a few of my reason for supporting Senate Joint Resolution 159 and the companion House bills which are before this subcommittee.

Manufacturers of popular trademarked products normally receive their business from ethical resellers, who compete for public purchases by delivering product quality and dependable service—at fair prices.

When discounters raid the establisher popularity of a trademarked product, they create unfairly the idea that the ethical reseller has been deliberately overcharging for that product. The result is understandable.

The ethical reseller rather than submit to the discounter's unfair purpose of making him look like a profiteer, stops selling that product. So the manufacturer almost at one loses these smaller resellers as the outlets that normally sell most of his production.

The retailer suffers for the obvious reason that retail business growth in large measure stems from the offering of quality merchandise. The consumer suffers through the loss of a retail outlet for the quality product involved, where the consumer cannot only receive quality merchandise but also sound, dependable, personalized service. To the discriminating consumer, dependable service is quite nearly as important as a trustworthy product.

With the loss of the ethical reseller the hard-pressed manufacturer must sell most of his seriously shrunken output through a comparatively few professional discounters. These discounters demand constantly lower prices from the manufacturer—so that their bait of sensationally lower and lower prices can be offered the public.

You have only to look about and you can see once-honored trademarked products, whose quality their manufacturers have had to cut pitifully as the only way to meet discounters' demands to stay in business. Those discounters are now the manufacturers principal outlets.

When a manufacturer's sales drop, his workers, buildings, and machinery are idled. He faces serious losses that may force him out of business.

But the discounter has only to sell out his inventory of a product when he has sapped its vitality as a store traffic lure and bled the available consumer market, then shift to plunder another product, with no concern for the manufacturer's losses.

The consuming public has perhaps been too slow in understanding that reduction of a product's quality to make possible even a 10-percent reduction in factory price to meet vicious price cutting, reduces the product's value to the consumer by much more than 10 percent. It's that last 10 percent of a product's prime production cost that carries to the consumer a far greater proportion of that product's value than does any other 10 percent. Sometimes cheapening a product's prime cost of manufacture by 10 percent, or less, reduces its value to the consumer by 50 percent or more.

Authentic reports by reputable organizations show vividly how they get hurt as the crucifixion of an honored trademarked product continues. Forced to cut his prices, first the manufacturer tries desperately to "make 15 workers do the work of 20." His expert quality-control people are laid off first Then, because of increased pressure for still lower prices, the manufacturer may have to use, where possible, cheaper labor—until the product at last has become a fraud on the public.

A product's advertising may sound or read as it once did and the product may look as good, but the service and satisfaction it gives the consumer is not—cannot—be the same. The customer has become the victim of the most serious kind of inflation—"concealed" inflation.

You have seen strongly advertised products of proud manufacturers fall victim to the discounter. The service-giving retailer, is confronted by the problem of formerly honored trademarked products being offered noisily as bait, often for less than the ethical retailer must pay for it. And, unfortunately, the people who usually buy flagrantly discounted goods are the people who can least afford to be cheated in the quality and value of the product they get.

The genuine "bargain" centers of this country will also welcome quality stabilization to present a standard of values from which a genuine bargain can be judged.

Unless they get the legislative help of the quality stabilization bill, neither the traditional retailers nor their manufacturers can protect against the discounters' manipulations.

Discounterism in America is destroying increasing thousands of honest independent wholesalers and retailers. In the process, discounterism's pressures on manufacturers have resulted in destroying the once firmly established reputation for rigidly maintained quality of many trademarked American products.

The manufacturer of quality products, the independent retail businessman, and the American consumer are all urgently needful of an effective remedy against the predatory, unethical, and deceptive practices of the all-sell-no-service discount merchandiser. The quality stabiliation bill provides the needed legal tools to deal with this ever-growing problem, invoking its remedy from a source richly in keeping with our national traditions and our Anglo-Saxon legal heritage; namely, the rights deriving from ownership of property.

I know that the members of this subcommittee are well aware of my distinct lack of enthusiasm for proposals authorizing new and expanded regulatory powers for the Central Government. To me the ultimate appeal of this legislation is to be found in its conceptual base of self-help rather than bureaucratic administration regulation. In this bill we reaffirm our confidence in the ancient legal rights arising out of property interest and contract; we give a remedy against injury to the party having the greatest direct interest, the manufacturer, who holds the property interest in the brand name or trademark; and we leave to the parties in interest the individual determinative responsibility for deciding whether or not the available remedy will be sought.

From my point of view the approach of this legislation, making available a normal judicial remedy rather than establishing new administrative regulations to be enforced by a governmental agency,

is not only appealing; I think it is far and away the most practical and workable approach. For in the area with which we are dealing there are literally thousands of incidents of injury. It simply would not be possible or feasible for a Federal regulatory and enforcement agency to remedy these cases of economic injury on a case-by-case basis, which is the only certain way of achieving equity and justice.

The quality stabilization bill, when enacted, will give each manufacturer the power to protect his trademarks, his resellers, and the public against predatory price cutting for bait purposes, and against misrepresentation of his merchandise. It is high time we gave back to the ethical reseller the opportunity to offer to the public fine quality products protected against degradation.

Mr. MACK. The committee will stand adjourned until 10 o'clock tomorrow morning.

(Whereupon, at 4:40 p.m., the committee adjourned, to reconvene at 10 a.m., Tuesday, June 12, 1962.)

QUALITY AND PRICE STABILIZATION

TUESDAY, JUNE 12, 1962

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE AND FINANCE OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to recess, in room 1334, New House Office Building, Hon. Peter F. Mack (chairman of the subcommittee) presiding.

Mr. MACK. The committee will come to order.

We are meeting this morning to continue hearings on House Joint Resolution 636, H.R. 10335, and related bills. We are honored to have with us this morning our very able and distinguished colleague from Maryland, Sam Friedel. Sam.

STATEMENT OF HON. SAMUEL N. FRIEDEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. FRIEDEL. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, it is a pleasure to appear before this subcommittee to express my views concerning the need for enactment of a quality stabilization bill. I am hopeful that my statement on the legislation under consideration House Joint Resolution 636, may be of help in working out a sound and constructive solution consistent with the public interest.

In my opinion, quality stabilization is a special competitive system offering great practical benefits to qualified manufacturers, retailers, wholesalers, and the consumers alike. Let me briefly explain this proposition.

Although quality stabilization does assure the qualified manufacturer of a stable market for his trademark or brandnamed product, it does not give him an unfair advantage or a monopoly. Even with the protection of quality stabilization legislation, the manufacturer is obliged to compete successfully with other manufacturers of the same or similar products. Should the manufacturer fail to maintain the quality of his product, or if he sets the price too high, he loses out to competitors—quality stabilization notwithstanding.

However, quality stabilization does protect the manufacturer's product from possible destruction as a result of loss leader selling and irresponsible price cutting. Moreover, quality stabilization gives the manufacturer a right to safeguard his property rights in his trademark or brandname from the irresponsible use of certain price-cutting operators.

Quality stabilization benefits the retailer and wholesaler, too, by placing him on an equal footing with all other retailers or wholesalers selling the same branded or trademarked product, whether such competitors are large or small. Under the system, the retailer or wholesaler, as the case may be, is granted a profit margin which is designed to yield him a fair return on his investment and, at the same time, to pay decent wages to his employees.

Most importantly, retailers and wholesalers are given adequate protection from monopolistic-minded sellers who might be disposed to combine relatively large financial resources with price-cutting tactics for the purpose of eliminating their smaller competitors.

Of course, the consumer, too, is benefited by quality stabilization legislation in a number of ways. Misleading bait merchandising will be eliminated. Misrepresentation will be outlawed. Under quality stabilization, the housewife will be assured that a trademarked product may be purchased at a standard price range set by the manufacturer wherever she goes to buy it.

She will know that her lack of information on what the selling price should be cannot be used as the basis for making her pay a premium price. The housewife will know, too, that the price for the product will always be reasonable.

By the very nature of the quality stabilization bill, a price-maintained product cannot survive in the marketplace unless it competes successfully with similar items produced by other manufacturers. Quality stabilization also assures the consumer that an outstanding product will remain on the market and not be destroyed by predatory price tactics.

As Mr. Justice Holmes said in his famous dissent in the well-known Dr. Miles case:

> I cannot believe that in the long run the public will profit—by permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

I am confident that these hearings will demonstrate the urgent need for speedy enactment of a national quality stabilization bill as the means for preserving the economic vitality of our Nation's small-business community.

Thank you very much, Mr. Chairman.

Mr. MACK. Thank you, Mr. Friedel.

Our next witness this morning will be the Chairman of the Federal Trade Commission, the Honorable Paul Rand Dixon. Mr. Chairman, would you like to introduce your associates this morning?

STATEMENT OF HON. PAUL RAND DIXON, CHAIRMAN; ACCOMPANIED BY J. V. BUFFINGTON, ASSISTANT LEGAL ADVISER TO THE CHAIRMAN; AND FLETCHER G. COHN, ASSISTANT GENERAL COUNSEL, LEGISLATION, FEDERAL TRADE COMMISSION

Mr. DIXON. Thank you, Mr. Chairman.

To my right is J. V. Buffington, my assistant legal adviser at the Commission, and to my left is Mr. Fletcher Cohn, who is the Assistant General Counsel in charge of legislation at the Commission.

Mr. Chairman, I deeply appreciate the invitation to appear on behalf of the Federal Trade Commission today to present its views on House Joint Resolution 636 and H.R. 10335, a joint resolution and bill entitled "To amend the Federal Trade Commission Act, to promote quality and price stabilization, to define and restrain certain unfair methods of distribution and to confirm, define, and equalize the rights of producers and resellers in the distribution of goods identified by distinguishing brands, names, or trademarks, and for other purposes."

The resolution and bill state that their objective is to "remove the quality-deteriorating and value-diluting pressures" resulting from reselling of branded, named, or trademarked goods to the public in the manner proscribed in the subject legislation.

Perhaps they also have as their underlying purpose and objective the protection of small business and the fostering of fair competition and the Commission is entirely in sympathy with any movement to aid small business and bring about fair competition. We at the Federal Trade Commission perhaps deal more with the immediate problems of the small businessman in the U.S. economic complex than any other agency of the Government.

Mr. Chairman, before proceeding further with my statement, based upon my individual experience, I know of no one that is familiar with the economic complex today that is not disturbed about the plight of the small businessman. I think one would be less than frank if he was presumed to be an expert in this field if he did not state to this committee that the small businessman is in considerable trouble in this country.

From the very nature of the enforcement of the statutes that the Congress has passed and delegated to the Federal Trade Commission to enforce, we know that in our own procedures and own processes after we receive complaints, long before those complaints are brought to a finish under due process, very often the small businessman has disappeared from the American scene.

I know that this is a problem that each Member of the Congress is worried about and I know it is the desire of the Congress to try to solve it. I wanted you to know that I and the other members of the Commission are fully sympathetic with the attempt of the Congress to try to solve this problem.

However, with reference to House Joint Resolution 636 and H.R. 10335, there are serious questions in our minds as to whether, as now drawn, they are conducive to the desired results, and in that respect we feel it incumbent upon us to point out some of these questions, which we consider serious, as to whether the subject legislation would actually accomplish this.

It is my belief that enactment of the subject bill and resolution, both of which seek to protect brands, names, and trademarks, may well result in a market increase in the offering for sale under private labels, identical goods to those which are sold under labels bearing such brands, names, and trademarks. As we all know, retailers sell two types of products: (1) Those under the manufacturer's labels, and (2) those under the labels of the retailers. In the frozen food industry, statistics show that of the total number of sales of products bear-

ing both packer and private labels made by the top 10 chain groceries, 19 percent have packer labels, whereas 64 percent of such products are sold under their own private labels. Of all the frozen fruit juices and vegetables sold by these 10 largest chains, 57 percent were sold under the private brand labels of the chain and 43 percent under the labels of the packers. One of the largest chains, for example, sells nearly four times as much of these particular products under its own labels as it does under the packers' labels.

The small businessman does not have the capital or other means of selling products under his own private labels.

Consequently, under the proposed legislation, this small businessman would be forced to sell the branded products, at the prices fixed by the manufacturer, in competition with private brands, at prices set by this small businessman's competitors. The figures which I have given you and others, which are available, demonstrate that this is not a theory but a hard practical competitive situation which the small businessman must meet and, in the meeting of which he would not be helped, but instead in all probability would be hindered by the enactment of the subject legislation.

As I understand House Joint Resolution 636 and H.R. 10335, they would amend section 5(a) of the Federal Trade Commission Act by adding a number of new paragraphs to provide, among other things, that the owner of a brand, name, or trademark may revoke, under designated circumstances, the right of any person to employ such brand, name, or trademark in effecting the resale of goods. They would also grant the owner of a brand, name, or trademark the authority to sue in a civil action for damages and injunctive relief.

The purposes of the resolution and bill apparently are intended to be accomplished by declaring that the owner of a brand, name, or trademark retains his property rights therein without diminishment, regardless of any sale or transfer of the goods identified by a brand, name, or trademark, and that any person who resells, in commerce, goods identified by such brand, name, or trademark may rightfully employ the same, but only in effecting the resale of such goods, and subject to the provisions of paragraph (8).

The proposed paragraph (8) of the resolution and bill provides that the owner of a brand, name, or trademark may revoke the right of any person to use the same in effecting the resale of goods so identified, when other goods usable for the same general purposes are available to the public, if the reseller—

(*a*) Uses such goods in furtherance of "bait advertising practices";

(*b*) With knowledge of the owner's clearly established resale prices, advertises, offers for sale, or sells such goods other than at such prices; or

(*c*) With intent to deceive purchasers "has published misrepresentations concerning such goods."

In addition, as we already have noted, both the proposed resolution and bill would authorize the owner of a brand, name, or trademark, among other things, to enjoin or obtain damages for the offense of reselling goods under a brand, name, or trademark the right to use which has been revoked under the provisions of paragraph (8).

It is apparent that the proposed legislation has two general approaches:

(1) The establishment of a Federal resale price maintenance law; and

(2) The creating of a private remedy for misusing the brand, name, or trademark in any manner proscribed by the subparagraphs of paragraph (8).

As to the first approach, let me reiterate that the Commission has for many years opposed resale price maintenance. In 1945, after completing an exhaustive study of the subject, the Commission submitted an 872-page report to Congress on the subject, in which the Commission stated, in effect, that resale price maintenance is harmful and undesirable in our system of competition. This comprehensive report covered all facets of this subject, including the history and early court decisions leading to the enactment of the Tydings-Miller Act of 1937, State legislation, and resale price maintenance in the drug, food, tobacco, hardware, and liquor industries. The summary and conclusions of this report alone cover 38 pages.

I think it would be pertinent to repeat a few of the conclusions of that report. They are:

Maintenance of minimum resale prices has been more extensively applied in the drug, toilet goods, cosmetics, liquor, and sporting goods trades than in any other lines covered in this inquiry. This is due in part to the individuality lent to such products by branding, national advertising, proprietary secret formulas, and the like, and in part to the existence of strong cooperating trade groups of manufacturers, wholesalers, and retailers. Among manufacturers of surgical supplies, a cooperating group of large companies fixed by agreement the specific prices at which their products should be sold by themselves and their wholesalers to large users, and carried the system of maintaining noncompetitive prices among their products all the way to the small retail purchaser by placing retailers under contract to maintain prices that are uniform for the same products made by the different leading manufacturers.

As the result of its investigations in antitrust cases, the U.S. Department of Justice has stated that, as an amendment to the antitrust laws, the Tydings-Miller Act does not serve the purposes which were urged upon Congress as a reason for its passage in that it sanctions arrangements inconsistent with the purpose of the antitrust laws, and becomes a cloak for many conspiracies in restraint of trade which go far beyond the limits established in the amendment. The conclusion of the Department of Justice is that the actual effects of resale price maintenance have been those which are to be expected from private price fixing conspiracies unregulated by public authority, whether or not they enjoy the sanction of law.

The essence of resale price maintenance is control of price competition.

Both the results of the Commission's present special study of the operation of legalized resale price maintenance and information developed over a period of many years in connection with complaints strongly confirm these earlier conclusions and point to the further conclusion that in the absence of effective Government supervision in the public interest, resale price maintenance, legalized to correct abuses of extreme price competition, is subject to use as a means of effecting enhancement of prices by secret agreements and restraints of competition by coercive action on the part of interested cooperating trade groups of manufacturers, wholesalers, and retailers in such ways and to such an extent as to make it economically unsound and undesirable in a competitive economy.

The Federal Trade Commission has continued to observe the operation of various types of resale price maintenance laws and now reaffirms its opposition to any proposals which would constitute a means, in our opinion, for resale price maintenance.

The Federal Trade Commission strongly feels that to uphold its statutory duty to protect the public interest by free and open com-

petition, it should seek to maintain for consumers the benefits of price competition between merchants for all the types and classes of merchandise which they purchase. Fixing prices to be paid by the consumers through the methods provided in the proposed legislation is as detrimental to this concept of the public interest as is fixing such prices by any other means or method.

As previously stated, subsection (a) of paragraph (8) of the proposed legislation would empower the owner of a brand, name, or trademark to revoke the right of a reseller to employ them in furtherance of "bait merchandising practices." The proposed legislation, however, nowhere defines what is meant by that term. In an effort to give the business community some guidance on this subject, the Commission on November 24, 1959, adopted and promulgated "Guides Against Bait Advertising" wherein that expression was defined, as follows:

> Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.

A copy of the Commission's "Guides" is being presented with this statement.

The Commission considers bait advertising to be unlawful under section 5 of the Federal Trade Commission Act as falling within the proscription against unfair methods of competition and unfair or deceptive acts or practices and has proceeded, where it had jurisdiction, against such practices regardless of whether branded or trademarked articles are involved. The same may be said of attempts to deceive purchasers by making misrepresentations, which are covered by subsection (c) of paragraph (8) of the subject legislation. The Commission, under its existing statutory authority, is, where it has jurisdiction, protecting the consumer from both "bait advertising" and misrepresentations not only with reference to the goods covered by the proposed legislation, but also as to the resale of all goods over which the Commission has jurisdiction.

Illustrative of the Commission's activities in the enjoining of "bait" advertising are orders which the Commission recently issued, ordering the discontinuance by the respondents of representations "that any merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered." These orders of the Commission apply to such merchandise as carports and patios (docket No. 7665), Pati-Port, Inc., et al.; sewing machines and vacuum cleaners (docket No. 7697), Atlas Sewing Centers, Inc., et al.; storm windows (docket No. 7728), Luxury Industries, Inc., et al.; and sewing machines and accessories (docket No. 8425), A. C. Weber & Co., Inc., et al.; painting automobiles (docket No. 8483), Earl Scheib; remodeling of homes (docket No. 8423), Crawford Industries, Inc.; floor tile (docket No. C–27), Tile City; aluminum storm windows, doors, and patios (docket No. C–17), Johnstown Products.

In the field of false advertising generally, during the fiscal year ending June 30, 1961, the Commission issued 292 complaints charging the perpetration of deceptive acts and practices committed in violation

of the provisions of statutes under which the Federal Trade Commission exercises jurisdiction; during that same period, the Commission issued 266 orders to cease and desist such acts and practices. During the period extending from July 1, 1961, through April 30, 1962, the Commission issued 153 such complaints and 282 orders to cease and desist. Of these complaints and orders, the vast majority pertain to advertisements for the resale of goods.

We have cited the Commission's activities in the fields of "bait" advertising and other misrepresentations made in an attempt to deceive purchasers as illustrations of the methods now employed by the Commission, where it has jurisdiction, to prohibit the practices by resellers which the proposed legislation would deal with by other methods. We ask that such activities by the Commission be considered by the committee in determining whether there is a real need for further legislation on these subjects.

In this connection, we freely acknowledge that while we are trying in every way possible to expedite the final disposition of cases before the Commission, such a result is not always achieved. This, in part, is the reason the Commission has recommended to the Congress that it be given authority, in proper cases, and subject to appropriate safeguards, to issue temporary cease-and-desist orders.

If such a law were passed, we believe, the Commission would be in a position to act with real effectiveness, not only in the fields of "bait" advertising and other misrepresentations intended to deceive purchasers in the reselling of goods, but in all other fields in which the Commission has jurisdiction.

This we think, offers a much more practical solution to those problems dealt with in the resolution and bill than does the approach of this proposed legislation which also involves the establishment of enforcible resale prices.

In connection with the proposed legislation, it is noted that although the resolution and bill would amend the Federal Trade Commission Act, they do not expressly or by necessary implication empower the Commission to take any action in enforcing their provisions.

Instead, they authorize private lawsuits by the owners of the involved brand name or trademark. They do, however, state that any reseller who violates their provisions commits "unfair acts of competition." The Federal Trade Commission Act specifically provides that "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" are declared unlawful and the Federal Trade Commission is given the mandate under this act to issue cease-and-desist orders preventing the continuation of such conduct.

Thus, in the event this legislation is adopted an incongruous and confusing situation would arise. The Federal Trade Commission, in accordance with innumerable court decisions, always has held that fixing or maintaining resale prices was an unfair method of competition.

The subject resolution and bill would make it an unfair act of competition, subject to private remedial action, not to maintain resale prices fixed by the owners of brands, names, and trademarks.

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Paragraph (14) of the subject legislation contains new matter not previously covered in similar legislation of this type. It provides that the exercise of any right or remedy provided in paragraphs (7) through (13) shall not be construed to be a violation of any of the antitrust acts—

and all such rights and remedies shall be also available to any owner of a brand, name, or trademark who in the resale of goods identified by such brand, name, or trademark, shall compete, at any level of distribution, with any reseller offering such goods: *Provided*, That such owner shall sell such identified goods at any level of distribution.

These provisions apparently are designed to negate the effect of the Supreme Court's decision in *United States* v. *McKesson & Robbins, Inc.* (351 U.S. 305) (1956)), cited in *United States* v. *Parke, Davis & Co.* (363 U.S. 29, 47 1959)).

It was held that a manufacturer with its own wholesale outlets could not make "fair trade" agreements with independent wholesalers covering the products sold by such wholesalers, when these products were sold in competition with the manufacturer's own wholesalers; the Court held that such horizontal agreements violated provisions of the Sherman Act.

The enactment of paragraph (14) in the subject legislation would, in our opinion, further strengthen the resale price maintenance objective of the proposed legislation, in that it would enable the manufacturer of a branded, named, or trademarked product to fix the resale price of such product by a wholesale purchaser even though the purchaser resold the product in competition with the manufacturer's own wholesale outlets. The Commission is opposed to the enactment of this paragraph for the same reasons that it has opposed all attempts for resale price maintenance.

In conclusion, may I reiterate the opposition of the Commission to House Joint Resolution 636 and H.R. 10335.

I thank you for the opportunity of expressing the views of the Commission on this pending legislation.

(The document referred to follows:)

Federal Trade Commission—Guides Against Bait Advertising

(Adopted November 24, 1959)

The following guides have been adopted by the Federal Trade Commission for the use of its staff in the evaluation of bait advertising[1] and related switch practices. While the guides do not purport to be all inclusive, they enumerate the major indications of bait and switch schemes. They have been released to the public in the interest of consumer education and to obtain voluntary, simultaneous, and prompt cooperation by those whose practices are subject to the jurisdiction of the Federal Trade Commission.

Adversary actions against those who engage in bait advertising, and whose practices are subject to Commission jurisdiction, are brought under the Federal Trade Commission Act (15 U.S.C. secs, 41–58). Section 5 of the act declares unlawful, "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."

THE GUIDES

Bait advertising defined

Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is

[1] For the purpose of these guides "advertising" includes any form of public notice however disseminated or utilized.

to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.

1. Bait advertisement.—No advertisement containing an offer to sell a product should be published when the offer is not a bona fide effort to sell the advertised product.

2. Initial offer.—No statement or illustration should be used in any advertisement which creates a false impression of the grade, quality, make, value, currency of model, size, color, usability, or origin of the product offered, or which may otherwise misrepresent the product in such a manner that later, on disclosure of the true facts, the purchaser may be switched from the advertised product to another.

Even though the true facts are subsequently made known to the buyer, the law is violated if the first contact or interview is secured by deception.

3. Discouragement of purchase of advertised merchandise.—No act or practice should be engaged in by an advertiser to discourage the purchase of the advertised merchandise as part of a bait scheme to sell other merchandise.

Among acts or practices which will be considered in determining if an advertisement is a bona fide offer are:

(*a*) The refusal to show, demonstrate, or sell the product offered in accordance with the terms of the offer;

(*b*) The disparagement by acts or words of the advertised product or the disparagement of the guarantee, credit terms, availability of service, repairs or parts, or in any other respect, in connection with it;

(*c*) The failure to have available at all outlets listed in the advertisement a sufficient quantity of the advertised product to meet reasonably anticipated demands, unless the advertisement clearly and adequately discloses that supply is limited and/or the merchandise is available only at designated outlets;

(*d*) The refusal to take orders for the advertised merchandise to be delivered within a reasonable period of time;

(*e*) The showing or demonstrating of a product which is defective, unusable, or impractical for the purpose represented or implied in the advertisement;

(*f*) Use of a sales plan or method of compensation for salesmen or penalizing salesmen, designed to prevent or discourage them from selling the advertised product.

4. Switch after sale.—No practice should be pursued by an advertiser, in the event of sale of the advertised product, of "unselling" with the intent and purpose of selling other merchandise in its stead.

Among acts or practices which will be considered in determining if the initial sale was in good faith, and not a stratagem to sell other merchandise, are:

(*a*) Accepting a deposit for the advertised product, then switching the purchaser to a higher priced product;

(*b*) Failure to make delivery of the advertised product within a reasonable time or to make a refund;

(c) Disparagement by acts or words of the advertised product, or the disparagement of the guarantee, credit terms, availability of service, repairs, or in any other respect, in connection with it;

(d) The delivery of the advertised product which is defective, unusable, or impractical for the purpose represented or implied in the advertisement.

(NOTE.—*Sales of advertised merchandise.*—Sales of the advertised merchandise do not preclude the existence of a bait and switch scheme. It has been determined that, on occasions, this is a mere incidental byproduct of the fundamental plan and is intended to provide an aura of legitimacy to the overall operation.)

Nothing contained in these guides relieves any party subject to a Commission cease and desist order or stipulation from complying with the provisions of such order or stipulation. The guides do not constitute a finding in and will not affect the disposition of any formal or informal matter before the Commission.

ROBERT M. PARRISH, *Secretary.*

Mr. MACK. Mr. Dingell, do you have any questions?

Mr. DINGELL. Thank you, Mr. Chairman.

Mr. Chairman, I wanted to commend you for a very excellent statement this morning. I have watched your work at the Federal Trade Commission with a great deal of pride and pleasure. I think when the tenure of your term has been completed history will record that you are one of the greatest, if not the greatest, Chairman of the Federal Trade Commission.

Mr. DIXON. Thank you, sir.

Mr. DINGELL. I am particularly concerned with several facets of this bill. You alluded to the principal items in the bill appearing on page 4, lines 4 through 14, items (a), (b), and (c) regarding bait merchandising and regarding reselling of goods with intent to deceive purchasers.

You stated in your statement that these items constitute presently a violation of the Federal Trade Commission Act. Am I correct?

Mr. DIXON. You are correct, sir, and also the Sherman Act. That is with respect to item (b), "Resale price maintenance."

Mr. DINGELL. Item (b) is a new item, "price fixing"?

Mr. DIXON. Yes.

Mr. DINGELL. But items (a) and (c) are violations of the Sherman Act; is that correct?

Mr. DIXON. Items (a) and (c) violate the Trade Commission Act and item (b) would violate both the Federal Trade Commission Act and the Sherman Act.

Mr. DINGELL. Let me restate that in a different way. If items (a) and (c)—if this were enacted—were committed now by a person in commerce, it would constitute a violation of the Federal Trade Commission Act; is that correct?

Mr. DIXON. We have so held in many cases.

Mr. DINGELL. So this language is superfluous then to the real purpose of the bill and is unnecessary, is that correct?

Mr. DIXON. I think I would be less than fair if I didn't point this out to you. It is necessary for us to have jurisdiction to find these acts being committed in commerce. I am fully aware that there are many sales by national sellers that are made to a party that come to rest. They are there in his hand and bait advertising emanates from this reseller in intrastate commerce which the Federal Trade Commission cannot reach.

I would be less than fair if I did not state that to you. It must be necessary for us to have the case in commerce. The Congress saw fit to put that in section 5 of the Federal Trade Commission Act, "Unfair Methods of Competition in Commerce," or "Unfair Acts or Deceptive Practices in Commerce."

Now, it is not affecting commerce; it is in commerce, and when these goods completely come to rest sometimes, as in many instances, I would say it would be quite questionable as to whether or not we have any jurisdiction or basis to proceed there, but when we find that the seller himself has placed this means to commit unfair acts of competition in the hands of another, or has been a party to it, or when we find that we do have jurisdiction of a seller who is shipping across State lines and advertising and selling across such lines to the reseller, we proceed there, sir.

Mr. DINGELL. Do you have a proceeding pending involving whether or not the Federal Trade Commission has jurisdiction over all sales,

even though they might be in intrastate commerce as opposed to interstate commerce?

Mr. DIXON. We have no such case pending.

Mr. DINGELL. No such case pending. Would item (a) involving bait merchandising or item (c) involving reselling goods with intent to deceive purchasers, an act of this kind, constitute a violation of any of the other antitrust acts such as the Sherman or Clayton Acts?

Mr. DIXON. No, sir; not on (a) and (c).

Mr. DINGELL. I noticed that this bill amends section (a) of the Federal Trade Commission Act. In your testimony you made allusion to the powers of the Federal Trade Commission with regard to section (a) of the Federal Trade Commission Act. Am I correct in reading the act as stating that where such actions are committed by a person involving either unfair methods of competition in commerce or unfair and deceptive acts or practices in commerce, the Federal Trade Commission is empowered and is required by the statute to take certain actions to abate those practices?

Mr. DIXON. You are so correct, sir. This is section 5(a).

Mr. DINGELL. Am I correct that section 5(a) of this proposed statute would in effect establish the practices set forth herein as being either unfair methods of competition in commerce or unfair and deceptive acts or practices in commerce?

Mr. DIXON. I tried to point that out, Mr. Congressman, by saying that they are declared in this bill as unfair——

Mr. DINGELL. The language of the act is "unfair methods of competition in commerce."

Mr. DIXON. Unfair methods of competition is what they call them.

Mr. DINGELL. Also "unfair and deceptive acts or practices in commerce."

Now, when such acts occur is the Commission empowered and required to come in and abate those acts?

Mr. DIXON. That is correct, sir.

Mr. DINGELL. So, am I fair in asking you whether or not this proposed statute would require the Federal Trade Commission to initiate action to abate the situations complained of in this bill?

Mr. DIXON. I don't think this bill would in any way retard us from proceeding nor excuse us for not proceeding.

Mr. DINGELL. It is ambiguous on the point then. You alluded to the *McKesson & Robbins* decision. You also alluded to the *Parke Davis* decision and you pointed out that the language at the bottom of page 6 and the top of page 7, permitting manufacturers to compete at any level of distribution and at the same time fix prices under this bill, is a repealer of the *McKesson & Robbins* decision. Am I correct?

Mr. DIXON. That is correct, sir. I would believe it would directly overrule or revoke that decision.

Mr. DINGELL. It would also overrule the case of the *Secatore* case, am I correct, the gasoline retailing case of *Esso Standard Oil* v. *Secatore, Incorporated.*

Mr. DIXON. I think that is generally true, sir. I would believe that to be so.

Mr. DINGELL. I would like to go a little further if I may with regard to the effect of this bill. Your previous experience in Govern-

ment was as counsel for the Kefauver subcommittee. Am I correct?

Mr. DIXON. That is one of my experiences, yes, sir.

Mr. DINGELL. And in connection with that you made a rather thorough scrutiny of the pricing structure in the drug industry. Am I correct?

Mr. DIXON. Yes, sir.

Mr. DINGELL. And you found, as a matter of fact, in that scrutiny of the drug industry that, to put it mildly, in many instances markups by pharmaceutical manufacturers were on the order of 17 times in some instances and in many instances as much as 10 times. Am I correct?

Mr. DIXON. The committee so found, sir. I believe that the proper description of it would be that they found that the manufacturer marked up over his cost of production, his cost of manufacture, many, many times. I think also during those hearings that the record brought out in many, many places that the retail druggist has followed the usual practice of marking up at the minimum amount of 66⅔ percent over his own costs.

Mr. DINGELL. This bill would in effect vest in the manufacturer the power to fix prices at all levels of distribution. Am I correct?

Mr. DIXON. That is correct, sir.

Mr. DINGELL. And in so doing it would sanction this program of high markups that were found by the Kefauver committee. Am I correct?

Mr. DIXON. It would make it legal, sir.

Mr. DINGELL. It would make it legal.

Mr. DIXON. It would immunize him from the Federal law, sir.

Mr. DINGELL. As a matter of fact, it offers specific exemption from the antitrust laws of any practice pursuant to that particular fixing of prices. Am I correct?

Mr. DIXON. It is specifically so stated in the bill, sir.

Mr. DINGELL. Is there any requirement in this bill that the prices be uniform across the country?

Mr. DIXON. No, sir.

Mr. DINGELL. Is there any requirement in this bill that the manufacturer give the same price to each particular small businessman that he sells goods to, each retailer that he sells to?

Mr. DIXON. I noted that as late as this morning. It is not in my statement, but I would visualize one other such problem. For instance, the bill empowers the manufacturer, the holder of the trademark, to proceed if he wants to. It does not say he has to proceed against everybody. He might pick his own targets. He might proceed against one and not against another.

Mr. DINGELL. And he might in turn discriminate with regard to prices as to each person who purchases from him?

Mr. DIXON. And if he did that, I do not know what kind of a problem we would have under section 2(a) of the Clayton Act where we have the declared policy of the Congress to prohibit, under certain conditions, price discrimination.

Mr. DINGELL. However, we come down to the language here at the bottom of page 6 and under section (14):

No exercise of any right or remedy provided in paragraph (7) to (13) inclusive of this subsection shall be construed to be a violation of any of the Antitrust Acts.

So there we have a situation where conceivably a manufacturer could discriminate with regard to prices as to different retailers and wholesalers, offering the little fellow a high price and the big man a small price, price fix all across the line, and fourth, this section provides an exemption from the antitrust laws otherwise prohibited. Am I correct?

Mr. DIXON. I cannot believe the sponsor of this bill so intended that, but I would think unless further perfecting language were put in the bill we might have a serious problem.

Mr. DINGELL. As a matter of fact, the danger is very real, is it not?

Mr. DIXON. It is without such language, sir.

Mr. DINGELL. Now, we come to some other questions with regard to the bill here. This bill mentions that it is a quality stabilization bill. I assume you have studied the bill in a number of instances, have you not?

Mr. DIXON. Yes, sir.

Mr. DINGELL. I do not find the word "quality" anywhere in the bill, except in the preamble. Do you find it anywhere else?

Mr. DIXON. I believe that is correct, sir.

Mr. DINGELL. And with the exception of the title, which appears on page 3. I want to commend you for a very excellent statement. Thank you very much.

Mr. DIXON. Thank you, sir.

Mr. MACK. Mr. Glenn?

Mr. GLENN. Mr. Chairman, I commend you for a very fair statement. I want to call your attention to page 11 and to what appears to me to be an inconsistency and see if some of the figures might be cleared up. At the top of the page you say that during the fiscal year ending June 30, 1961, the Commission issued 292 complaints and obtained 266 orders to cease and desist, and that after that time, from July 1, 1961, through April 30, 1962, you only issued 153 complaints and obtained 282 orders to cease and desist. Can you explain this?

Mr. DIXON. Yes, sir. This is one of the things I have been very busy trying to do since I went to the Commission, to clean up our backlog, sir. Many of these cases had been pending for a long time. These orders were not based entirely on new complaints. Some were on old complaints, several years old. We have been very busy trying to bring to the end some of those.

Mr. GLENN. In the last paragraph you say that in this connection you freely acknowledge that, while you are trying in every way possible to expedite the final disposition of cases before the Commission, such a result is not always achieved. Can you enlighten me as to just what you mean by that last phrase?

Mr. DIXON. Sir, shortly after I went to the Commission, having come there in 1938, I learned a whole lot about the Commission practices; I came up to the Senate as the counsel to the Senate Antitrust and Monopoly Subcommittee and was there 4 years, and I went back. I believe that much could be done to speed up our own processes, to do something about the regulatory lag that we have heard so much about. We reorganized the Commission so that we would center responsibility and make it work and make the work flow faster from the day that we got a complaint until, we might say, we finally disposed of the matter. We also changed our rules of practice. Where

we used to run around the country and have 2-day hearings in Milwaukee, and 2 days in St. Louis, and 2 days somewhere else, now when we issue the complaint finally we will set it down at a time, place, and date certain and hear it until completed. We also instituted a procedure where now before the complaint is finally served, we offer the party the opportunity to negotiate for a consent settlement and we give him 10 days to tell us whether he wants this and then 30 days to negotiate, unless we extend it. Many of our cases are being settled under that procedure.

This is about as far as we can go with our own procedures and processes within due process in trying to carry our function out as the Congress commanded us to. Nevertheless, I mean by that statement this: That in those instances, for example, where we are told that a large national seller might perhaps be selling beneath cost in a certain trade area, only in that area, and is destroying local competition or regional competition, it takes us some time to investigate that. We are using our full powers of investigation, including investigational hearings, but even then after we get this information and pass on it and decide that we should issue a complaint, a very good attorney within the framework of due process can keep one of those cases alive a pretty good time. I would estimate from 4 to 5 years.

Now, in that period of time while we are litigating, very often the party that complained disappears from the American scene. He is gone. It was for that reason that we testified here before this full committee on the temporary cease and desist order bill that is being considered by the full committee. This equally applies to some facets of advertising. For instance, as to bait advertising, unless it might perhaps relate to, we might say, food, drugs, devices, or cosmetics, in those four limited categories we might be able to go to a court and seek a temporary order, but with reference to any other product—let's take a product like a carpet sweeper, or an electric iron, or something like that—if it was bait advertising, we would have to follow the procedure of investigating it and then if we have reason to believe that there was a law violation, proceed to prove it, and thereafter, if we issue an order it is subject to judicial review in the circuit court and Supreme Court. That takes time. This is the American system and I think it is a good system, and I would only suggest, as I did to the committee, that only in the extraordinary circumstances, where it could be shown that irreparable harm and injury was going to come from the practice, that we could even issue a temporary order while the trail was going on. However, here in this bill rather than following the traditional purposes of law enforcement, this is the approach, in a sense, of delegating a certain part of the congressional authority, because the Constitution, article I, section 8, says that the Congress shall regulate foreign commerce and commerce among the States and with the Indian tribes. It does not say that the seller, Westinghouse, or General Electric, or somebody that has trade names shall regulate it. This bill says that he can regulate it. If you have your name on it, it says that "you can in this respect tell the American public what they are going to pay for it." That is what this bill says.

I have suggested to others that have asked me questions about this type of legislation that I have a general personal fear for the American consumer in this practice, and I know the Congressmen, the spon-

sors, have this desire to see that the consumer is not fleeced. Yet traditionally when you are going to regulate price in this country in the true regulatory sense, you have a regulatory body that takes care of the consumer. This takes care of the public. This bill delegates that to the holder of a trademark. There is no one taking care of the consumer here, sir. I see that danger in this bill. There is a possibility that you might have a little inflation out of this bill. I read the testimony of the Justice Department representative over in the Senate. I think there is a pretty good point there.

Traditionally through the Tydings-Miller and the McGuire Acts this problem of resale price maintenance was left to the States' decisions and when a State adopted such a law it was said through the Tydings-Miller and McGuire Acts where there was such law, the Federal jurisdiction did not apply. We all know that those laws have been variously interpreted to where you might say there might be about 25 of them that are fairly effective. That is about all that is left that has any teeth in them.

Many of the States actually have laws against sales beneath cost. One facet of this bill on retail price maintenance could involve practices where sales beneath cost would be aimed at that kind of practice. I don't know whether you would have some kind of a conflict between State law and Federal law or not, because this bill gives to the seller certain rights. That is what it does. It says to the seller that "if you find somebody engaging in bait advertising or false advertising, or if you find someone either advertising or selling your product at a price different from what you directed him to sell it, you can sue him for damages and cut him off." That is what he could do. He would not have to do that but about once or twice until the message got around, I am quite sure. If he wants to sell these products, he is going to maintain price, but what I am so afraid of is what we are seeing. The great big buyer, and this is happening in America, throughout all industry, the big chain grocery store, the big chain drug store, has a lot of economic power and he can come to a seller with a brand name merchandise and he can buy that merchandise from him, but he has enough power to say, "I want the same thing with my name on it," and he can get it. Then he takes both of those products into his store and he offers them right there. He could maintain the price that was fixed on the brand name and for that guy that came in that wanted a brand name he would sell it to him at the price, but for the fellow that came in and said, "That is too high. Don't you have something cheaper," he would say, "Well, I have the same thing with my name on it $20 less or $10 less, so he can play both sides of the consuming public, but the small businessman that is across the street from him does not have enough economic power to go to that big manufacturer and say, "Make one with my name on it." He would have to buy the brand name if he bought anything, and that is all he could sell and the only guy he could sell would be the one that was going to buy brand names. If the man was a shopper he would go across the street to the big purchaser, and I am afraid that perhaps the small businessman that is not in too good a shape right now in our country might find himself in worse shape, sir.

Mr. GLENN. Thank you very much.

Thank you, Mr. Chairman.

Mr. MACK. Mr. Harris, do you have any questions?

Mr. HARRIS. Mr. Chairman, I too, have listened very attentively to your presentation here this morning. I must confess that I get a little bit confounded about our whole economic system with all the contentions, and the positions, that this or that is necessary to maintain this great system of ours. I must say that I get a little bit confused about the positions taken by some people who want to uphold and promote our system of free, competitive enterprise by rigid authority from the Government to tell people what to do, and how to do it, and what is best for the consumer. Particularly, I am confused by that attitude which leads the general public to believe that there is an all-powerful Government that knows all the answers and that can determine and decide what is best.

I do not think that there could be any difference of opinion as to what causes this system of ours to work, and that is basically the opportunity and encouragement of business to develop a product which is good for the consumer. You would not disagree with that, would you?

Mr. DIXON. No, sir, to make something which the consumer will buy.

Mr. HARRIS. Yes. Unless that business is encouraged and given that opportunity to do it, then you don't have that product developed in this country, do you?

Mr. DIXON. That could be true, sir.

Mr. HARRIS. In order to do that there must be an incentive to provide for research and development in that field. Is not that true?

Mr. DIXON. I think that is part of being competitive and being alive 10 years from now in a competitive society.

Mr. HARRIS. That is true. And do you know of any nation of people in all history that has ever been able to compare, even remotely, with what we have been able to do in this country under our system?

Mr. DIXON. None has thus far reached us.

Mr. HARRIS. And this has all been done under our competitive, free enterprise system.

Mr. DIXON. But under a competitive system not perfect, but one that at least under a national policy of the Congress, which has said that this was our system, one of competition and free enterprise.

Mr. HARRIS. That is right. Now, the Constitution provides that the Congress shall regulate commerce between the States, as you so well stated a moment ago.

Mr. DIXON. The sole power and the sole decision is here in the Congress. Everything that has ever happened under any of these laws has only been by the will of the people through the Congress.

Mr. HARRIS. Now, of course, your statement a moment ago that this bill does not involve the congressional power to regulate commerce, but that it gives industry the power to regulate commerce, is just another one of the contentions that, in my judgment, is made to confuse the issue.

Mr. DIXON. I meant by that, sir, that if it was the will of the Congress to turn this over to them, this would be a form of regulation. It certainly is true, sir.

Mr. HARRIS. Yes, but that was not the portent in which it was portrayed a moment ago, in my judgment, in the answers to questions

by Mr. Dingell. However, the point is that the Federal Trade Commission opposed the Tydings-Miller Act, did it not?

Mr. DIXON. I am quite certain from my reading of the history it did, sir. I was not there then, but I know it opposed it.

Mr. HARRIS. Neither was I here.

Mr. DIXON. They opposed it, I am sure.

Mr. HARRIS. The Federal Trade Commission opposed the McGuire Act, did it not?

Mr. DIXON. That is correct, sir.

Mr. HARRIS. The Federal Trade Commission has opposed any proposal that has ever been made whereby the Congress sets the ground rules on which business is to operate, has it not?

Mr. DIXON. That is a pretty broad statement. I would hate to think we have opposed everything that Congress would say.

Mr. HARRIS. Name one ground rule that has ever been proposed by the Congress itself to regulate commerce, just one, that the Federal Trade Commission did not oppose.

Mr. DIXON. If it entailed, sir, the delegation to the individual business enterprise in America from the inception of the manufacturer, to wholesaler, to jobber, to retailer, to the consumer, I would say the Federal Trade Commission has consistently recommended to the Congress against that.

Mr. HARRIS. That is right. In the first place, the Federal Trade Commission was established in 1914 for a particular reason which the Congress felt was necessary.

Mr. DIXON. It was established as an arm of the Congress with the hope that here you would have a body of experts that could remove as much uncertainty as possible from the businessman's problems before he found himself in litigation, and also it was cloaked with the right to investigate and the right to enforce section 5, sir.

Mr. HARRIS. Now, was section 5 included in the original Federal Trade Commission Act in 1914?

Mr. DIXON. It was, sir. It was there in 1914. "Unfair methods of competition in commerce are hereby declared unlawful." In 1938 it was amended.

Mr. HARRIS. That is right. So the Congress did not in 1914 give to this agency the regulatory powers which it later felt were necessary to regulate commerce in the interest of the public.

Mr. DIXON. This was extended, sir.

Mr. HARRIS. Yes, and it was in 1938 when the broad authority was given in order to meet certain unfair practices and unfair methods of competition at that time.

Mr. DIXON. That is correct, sir.

Mr. HARRIS. I do not want to ask you the question because I feel that it would be a little unfair but the way I have observed the history in my brief time here I fear that the attitude has been that the regulatory agency should have complete authority without any restrictions or limitations to regulate the commerce of this country as it deems necessary.

Mr. DIXON. Mr. Congressman, I would be very disturbed to think that you have that idea. I would like to try to disabuse you of it because you wrote into this basic law, and you have kept in this basic law, that this Federal Trade Commission does not regulate. We do

not regulate a thing, sir. What we do is enforce the statutes. We are the finder of fact, period. When we find the fact and we issue what we think is the proper relief, the cease and desist order, it is then subject to judicial review and the courts pass upon the law.

Mr. HARRIS. I am well aware of that. I will not argue that. I consider it as a regulation and I feel that that is the import of it. The Commission wants further authority, as you indicated a moment ago, to issue temporary cease and desist orders where, as you said, you are finders of fact. You use your own judgment to decide whether or not to permit a certain practice and you go to a business and say, "We are going to tell you whether or not this is the kind of operation that should be permitted." Mr. Chairman, I have been trying to help resolve these questions for about 15 years. I feel that, since the Commission recognizes there is a problem, since there are certain things going on that should not be permitted, the Commission should in some way assist the Congress in providing the ground rules so business would know what can and cannot be done. Business should not have to wait until a judgment is made by some individual in a regulatory agency somewhere. When they do not comply with those ground rules, the agency should take its action and perform its responsibility.

Mr. DIXON. Mr. Chairman, let me say to you effective June 1 this year for the first time in 48 years you got your wish, sir.

Mr. HARRIS. I want to congratulate you, if that is true.

Mr. DIXON. May I try to describe what we just published and made effective June 1? I firmly have believed all my adult life, since coming to the Federal Trade Commission, that the businessman should be entitled to a binding advisory opinion before he committed an act that could get him in trouble. We issued and said to the American businessman, "On any prospective action that you propose to take that comes anywhere under our statutory obligation, you come to us, if you will, and ask for an advisory opinion and you won't get it from just a staff member. You are going to get it from the five Commissioners," and we will tell them whether or not we would proceed or not. Now, we further have told the businessman that if we tell him this and he proceeds, we will not change our mind until we notify him that we have changed our mind and give him a chance to come down and to work this thing out himself before we would proceed.

We have gone all the way with the American businessman that says the Federal Trade Commission is antibusiness, because we are saying to him, "You come in good faith and ask and we will give you, if it is at all possible, this ruling, but if you do not come, you go your own way, and if we decide upon a complaint after we investigate, we are going to sue you." Then to try to do something for him on a mass scale, we have adopted another procedure which we call trade regulation rules, sir.

We are going to extend the trade practice rule another step. Where we know that there seems to be a common problem to not only one industry, maybe several industries, we will notify through the Federal Register that we propose to hold such a procedure, giving notice to all the people to come. We will hear this thing and we will gather, ex parte, true, the expertise of all business, everybody that would be affected, to give us their best views, based upon the advice of our prior cases and what have you. Then we will propose to promulgate

these rules finally and we will publish them and give them a second time to come back, and if they can show us errors of our way or an improvement we will then change, but when they are finally published we intend, sir, that they be effective, because if they are not followed, when we file our complaint, sir, we will state in the complaint that we intend to take notice of this procedure and this record back here and we are going to put the burden upon the party to show cause why it should not apply to him. We intend by that to guide. We intend by that also to get the man that will not follow the rule of the industry, and we are working it out with the industry, sir.

Mr. HARRIS. I want to applaud and commend the Commission for coming up with these splendid changes in administration. I would be one of the first to respond with my support and encouragement for these efforts. Insofar as your responsibility is concerned I think that is fine. But what I am talking about is a basic step beyond that, and that is some guide rules which the Congress itself under the Constitution is supposed to give, in order that your administration of the law may be more effective and that business may know what the Congress intended and not have to wait for the judgments to be made by the Commission. I feel that the problem we are trying to meet by this legislation needs something.

Mr. DIXON. There is a problem here, Mr. Chairman.

Mr. HARRIS. Let me finish now. You have had a pretty long time this morning to expound your viewpoints, and you did very well. Over the years something has been wrong and this has been recognized. It is recognized by the States. It is recognized by the Commission. It is recognized by the Department of Justice. It is recognized by the Congress.

Yet we have never had one single recommendation from either the Federal Trade Commission, or the Department of Justice, as to what kind of guidelines or rules the Congress should set down by law for business to follow and for your agency to administer that would meet this problem that we have here today. Your agency wants to do it under your decisions and judgments. The Department of Justice wants to determine it by specific case-by-case method. In our investigation in 1958, and 1959, and 1960 one of the things we so glaringly developed was the fact that no Government agency under our system can, in case-by-case administration, ever adequately and satisfactorily administer the laws in the public interest. It is utterly impossible to do it. There have to be guidelines. You say that you have taken steps to notify industry what they can and cannot do by these meetings. But several months ago I met with several Senators and other Members of the House, staff members of both committees, and with people from your own agency and the whole theme throughout that meeting was the recognition that there was a problem for small business. Never have we had one recommendation come from you to overcome such serious objections in this field. I am for as keen a competition as we can promote, but I do feel if business is going to develop new products and have new things available they have to have an opportunity. If they are going to provide the research and development, there must be an incentive. When we have an agency that cuts them off and says, "You cannot do it because we are going to

let you be destroyed by some product that is infallible," I just do not see how we can hope to have business continue on the scale it has in the past, and it worries me a great deal.

That is all, Mr. Chairman.

Mr. DIXON. Mr. Chairman, I think our trouble lies in this country long ago having elected to honor what we call the free competitive enterprise system, a fine objective, maybe a dream, and maybe it will never be perfect, but it still was a decision and has been reiterated many times by the Congress that this is the national policy.

Now, competition is hard to explain in concrete language. Perhaps that is the trouble, no one ever drawing the guideline. Wherever the Congress seems to me to have decided that competition would not serve the American public as well as monopoly, franchises, and grants, the way the Congress has proceeded to protect the public interest was to create another public agency with the power to regulate and that was the sole thing that took the place of competition, but all other industry that does not fall into one of those orbits, is exposed to the national dream of free competitive enterprise. This is not perfect.

You will remember back in the early 1930's it had broken down and we tried the experiment of the NRA, and working hand in glove with industry, codes were adopted to regulate it from the beginning to the end, and then the Supreme Court said this violated the Constitution. Then we proceeded with our schizophrenic approach to our economic system because promptly thereafter Tydings-Miller was passed and then at the same time the Robinson-Patman Act was passed amending the Clayton Act and in 1938 Wheeler-Lea was passed amending the Federal Trade Commission Act. On the one hand a great group of people believed that competition would not work, that you needed something else, and on the other hand there was group of people that believed that we had to try to make it work, and that is what we are trying to do.

When I come here as an expert I only come here to say to you I believe that Congress has announced many times the national policy. I believe the policy to be for a free competitive enterprise. I see in this bill a beginning, a slice into it. If this is the will of the Congress to solve this problem, then so be it, but I say to you, sir, that you are correct that all the laws we have on the books are not saving the small businessman. He is still disappearing. Whether this would save him or not, I am not that good of a prophet. I see in it, though, something different from free competitive enterprise, sir.

Mr. HARRIS (presiding). That is just where we disagree. I cannot, to save my life, see it as you do. There must be competitive goods when you give a man, who has put in a lot of time, thought, study, research and development, and spent a lot of money to develop something, an opportunity so that he can remain in business—that is improving the strength of competitive enterprise.

Mr. Curtin?

Mr. CURTIN. No questions.

Mr. DINGELL. I want to ask you very briefly another question, if I may, Mr. Chairman.

You said on page 7 of your statement and the bottom of page 6:

> As a result of its investigations in antitrust cases, the U.S. Department of Justice has stated that, as an amendment to the antitrust laws, the Tydings-

Miller Act does not serve the purposes which were urged upon Congress as a reason for its passage in that it sanctions arrangements inconsistent with the purposes of the antitrust laws, and becomes a cloak for many conspiracies in restraint of trade which go far beyond the limit established in the amendment.

A few years ago when we had another price-fixing bill before this committee I made a rather exhaustive study both of the dockets of the Federal Trade Commission and also a study of the Federal Trade Commission, of resale price maintenance, and I found this language as follows:

If the Antitrust Division had sufficient men and money to examine every resale price maintenance contract written under State and Federal legislation and proceeded in every case in which the arrangement goes beyond the authorization of the Tydings-Miller amendment, there would be practically no resale price maintenance contracts.

Then I subsequently requested the Federal Trade Commission to give me a list of instances in which State and Federal fair trade sanctions were used by industry as a device to evade and get around the antitrust laws, and I asked specifically for violations which had been found by the Federal Trade Commission, and I found a series which appeared on page 56 of my report on this subject, and I found Docket No. 4526, *Law Book Publishers Company;* Docket 4900, *Refractories* case; Docket 5448, *Rubber Manufacturers Group;* Docket 5734, Mid-*Atlantic Distributors Corporation;* Docket 5635, *Cycle Jobbers;* Docket 5636, *American Dental Association;* Docket 4093, *Wholesale Liquor Distributors Association of Northern California, et al.;* Docket 4132, *Western Confectioners Association;* and Docket 4168, *National Retail Liquor Package Stores Association.* These were instances cited to me by the Federal Trade Commission as constituting the utilization of fair trade and price-fixing legislation for a violation of the antitrust laws.

Have you had any further instances where you found that fair trade has been utilized as a device for breaching and violating the antitrust laws?

Mr. DIXON. They were price-fixing cases. I know one of those cases I tried myself, the *Mid-Atlantic* case. It involved a resale price of whisky here in the District of Columbia. There was no resale-price maintenance law in the District of Columbia. They were exposed to the full force of the Sherman Act and the Federal Trade Commission Act. We simply charged them with maintaining prices and proved it, and I think you will find that in most of those cases.

Mr. DINGELL. And also in Maryland and Virginia, was it not, where they did revise the resale prices?

Mr. DIXON. The only trouble was we would go over in Maryland and Virginia and what we would have to tell them was if they had fair trade laws there and they were within their limits, we would not even investigate it and enter the case. We would stay out because the law was very clear they were immune from our statutes. We proceeded in those States where there was no such law, or where the law had been limited, or where there had been an abuse.

Mr. DINGELL. And also in Maryland and Virginia, was it not, where maintenance it becomes almost impossible to prove unlawful combinations in restraint of trade. Am I correct?

Mr. DIXON. It becomes very difficult because we have found that we have administered prices, for lack of a better name, of follow the

leader. Somebody announces in the paper next month, "I am going to raise my price $6," and that afternoon 10 people say "me too," just like that. They did not meet in a room and you cannot prove they met in a room and you cannot prove that that is a conspiracy. The law says it is a conspiracy if you can prove it.

Mr. DINGELL. So if this bill passes in order to protect the law enforcement agencies and to protect the small businessmen and large businessmen of this country from violations of the antitrust laws and actions and combinations in restraint of trade, it would be necessary for us to impose some other condition in this bill, probably that books and records of these companies should be open to the scrutiny of the Federal Trade Commission and the Antitrust Division of the Department of Justice to determine whether or not there have been such combinations and conspiracies in restraint of trade. Am I correct?

Mr. DIXON. What good would that do, do you suppose, to open the books and they decided to mark it up 100 percent, whereas he had been marking it up 25 percent. What good if it was decided he should make a hundred percent. What control are you going to have to keep that from happening? What is in this bill to keep him from saying a thousand percent if he wanted to?

Mr. DINGELL. What you are telling me, then, is if this bill becomes law it will be almost impossible to enforce the antitrust laws in instances where this particular practice is used?

Mr. DIXON. In a vertical line, sir, from the seller down it would be impossible. In the vertical lne where a man makes an article, puts his trade name on it, he could decide the price all the way through.

Mr. DINGELL. It becomes almost impossible to enforce the antitrust laws where this is used. Am I correct?

Mr. DIXON. In the vertical resale price maintenance case, yes, sir, it would. It might make it a little more difficult to prove by substantial evidence the horizontal price-fixing case among the sellers. It might make it a little more difficult, but still they would not be exposed as much to the antitrust laws under this bill.

Mr. DINGELL. As a matter of fact, though, it would make it a great deal more difficult to even catch horizontal price-fixing combinations.

Mr. DIXON. It could very well.

Mr. DINGELL. And those cases are highly difficult to prove. Is that right?

Mr. DIXON. That is correct. You understand this, that if it were legal for the seller to adopt a price and maintain it, if a seller looking around found that his other competitors had a price and he, just on his own decision, adopted the same price and he maintained it, then you would have the same price for irons, for instance, of all sellers at the same price from beginning to the end.

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

Mr. MACK. Mr. Chairman, would that be possible under this proposal?

Mr. DIXON. Under this bill, sir?

Mr. MACK. Yes.

Mr. DIXON. Yes; I would view it as a possibility.

Mr. MACK. You could have all of the merchandise that is available to consumers in the same general area coming under the provisions of this bill? In other words, would the manufacturer have a right

to set the price on merchandise being sold in this general area if no merchandise is available other than at what the manufacturer's established price is?

Mr. DIXON. There is a limitation in here that would indicate I think it is aimed at prevention of an absolute monopoly. In other words, if you had an absolute monopoly of a trade product that nobody else could manufacture, I would think you would be deprived of price maintenance of that product.

Mr. MACK. That was not my understanding. It was my understanding that there would be other merchandise available of the same type in the general area.

Mr. DIXON. That is correct, sir.

Mr. MACK. Mr. Chairman, I want to commend you on your statement. I am especially impressed with the reference that you made to small business concerns in the country and the expression of sympathy that you made for these businessmen and the problems confronting them. Certainly I am sure it was a very sincere statement on your part. I recognize that you are very familiar with the problem because of the vast background you have had in public service here in Government work. You said on page 1 that you were in sympathy with any movement to aid small business and bring about fair competition, and on page 2 you express some apprehension or concern as to whether the bill as now drawn would be conducive to the desired results. Were you inferring if this bill were properly amended to bring about the desired results that you could support such a proposal?

Mr. DIXON. I think, speaking now as an individual, one of five men, that if certain limited language were put in this bill in connection with creating an agency of this Federal Government to determine how much price could be marked up and what it is to be sold at, then I might very well find myself in sympathy with it. I say I am speaking personally now. I think, if you are going to fix prices for products all over the United States, that you better do it as an arm of the Congress, not turn it over to an individual. If you will study the increased concentration of industry, you will find more and more of our national product is controlled by fewer and fewer. If you want to pass this legislation, and you can pass it—this is your responsibility—you will put in the hands of these people the right to price the product all the way to the consumer with no control. You will put in their hands the right to determine what profits shall be made, by whom and at what level, and remember, the public or the consumer ultimately picks up the tab for everything in America.

Mr. MACK. As I understand your position, you might individually support the proposal?

Mr. DIXON. Yes, sir.

Mr. MACK. Providing a Federal agency or arm of the Congress had the authority to supervise or regulate the prices being established.

Mr. DIXON. We lose a lot of freedom when we do it, too, a lot of freedom. The only guardian of freedom we have now is competition.

Mr. MACK. I concluded that you felt very strongly that there was something needed to be done to assist these small businessmen.

Mr. DIXON. I do, sir.

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Mr. MACK. And many of us are interested in it not only because of the individual businessmen concerned, but because of the small communities, rural communities and small towns, so they maintain a healthy and good environment and contribute substantially to our society. Without the small businessmen operating in these small communities they can no longer exist.

Mr. DIXON. I would like to try one more time, sir, to make free competitive enterprise work by good strong enforcement. I would like to see our tools increased.

Mr. MACK. On that we are in complete agreement. I think the Commission, as well as Congress, wants to utilize our free competitive system, but at the same time we do want to provide adequate protection for many of our citizens, the consumers as well as the employers and small businessmen.

I have one other question, Mr. Chairman. You have been here quite a long time and I was quite interested in the publication, your "Guides Against Bait Advertising." Could you tell me the difference between bait advertising and loss-leader sales?

Mr. DIXON. With a loss leader actually you sell the product. This is the price at which you sell it. Bait advertising is like when you switch a higher product for the bait. You do not intend to try to sell the product. You intend to get the person in and then try to sell him something else, but a loss leader that so many of these people that support this legislation, the small businessmen, come here and speak of, is the practice of sales beneath cost. This is a reprehensible practice, sir. Many of our States have legislated against sales beneath cost. I consider it an unfair practice, an unfair method of competition, for instance, but time is of the essence in these practices. This is what is bothering the small businessman. He says "by the time I complain and you get around to proving it, I may be out of business," and he thinks, I think, that if you will put an umbrella up where they can all get under it he will do just as well, but I think he is up on cloud 9 because he is going to find that great big buyer over there buying one just like it and he puts his name on it and this is what he will call his loss leader thereafter, and he will have a bargain for the consumer that the small businessman won't have.

Mr. MACK. Both of them are reprehensible practices, are they not?

Mr. DIXON. I do not know if it is reprehensible. I think in a competitive society that a seller ought to have, on the broad purposes—it is in the law—the right to pick and choose his customers. If I buy something from you I ought to have the right to sell it. I ought to decide what profit I want. You ought not to decide for me. I ought to decide myself. If it is mine, if I want to give it away, it is my business, but, on the other hand, if you come along in here and you go to buying a thing that I buy and sell in competition with you and you decide suddenly to sell that particular article beneath your actual cost, then I am going out of business. That is what is going to happen to me. I am going to go out of business if I do not have enough money to meet that practice from other products that I might sell. This is what they keep talking about, sales beneath cost.

Mr. MACK. That is a loss leader, though, is it not?

Mr. DIXON. Loss leader; that is one way to say it. I suppose we are spending about 30 percent or so of our money changing so-called loss leaders.

Mr. MACK. Isn't it used not to eliminate the competition on some occasions, but it is used to draw people into discount houses and department stores to sell them other merchandise?

Mr. DIXON. This could be, but this is not bait advertising.

Mr. MACK. No; I say loss leader.

Mr. DIXON. Take the giant food chains that seem to be addicted with the practice in the dairy field of putting on a lot of these products at questionable prices, if not as loss leaders. I suppose everybody has to buy the broad range of dairy products. If you look at these big chain groceries, total sales and profits, they made money, but if you were a little bitty man across the street where you could not take this licking, you would not be long for this business world.

Mr. MACK. These are some things we are real concerned about.

Mr. DIXON. We certainly are, sir. That is the reason I said that I wish the Congress would give us the power to issue a temporary cease and desist. We would try to do something about it while those people were still on that corner over there.

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

Mr. DIXON. You are very welcome, sir.

Mr. MACK. Our next witness is Mr. John W. Anderson, president, the Anderson Co., Gary, Ind.

Mr. Anderson?

STATEMENT OF JOHN W. ANDERSON, PRESIDENT, THE ANDERSON CO., GARY, IND.

Mr. ANDERSON. Mr. Chairman and gentlemen of the committee, we appreciate greatly the opportunity to participate in these discussions. We have listened with great interest to the proceedings this morning and we would like to say for the record that we are impressed with the obvious sincerity of Chairman Dixon. We believe that he shows a disposition to live and labor according to his "book" and his code. I hope that I may pay him that compliment without any implication that I agree very much with anything he has said as affecting the efficacy of the proposed legislation.

I have prepared and submitted a formal statement. With your tolerance I think I shall resort to that statement at this time.

Mr. MACK. Mr. Anderson, if you desire, you may be seated.

Mr. ANDERSON. I shall do that momentarily. If it would be more agreeable, I shall sit down now.

Mr. MACK. We want our witnesses to be comfortable.

Mr. ANDERSON. Thank you.

Mr. MACK. Until they complete their statements.

Mr. ANDERSON. Most of the time when I speak from a chair—I speak to subordinates and I cannot reconcile that with my feeling today.

Mr. Chairman, thank you for this opportunity to submit for the consideration of your committee, in support of the quality stabilization bill, a statement based upon more than 40 years of grassroots experience and observation is appreciated.

As the record indicates, my name is John W. Anderson. I am president of the Anderson Co., operating factories in Gary and Valparaiso, Ind. We manufacture a diversity of trademarked products marketed through ethical independent resellers—primarily automotive

products for original equipment and replacement purposes. We also manufacture reciprocating power-and-motion-transmitting devices such as employed in automobiles, aircraft, and in many other fields. And we make chemical products for home and car uses.

I have been active for more than 50 years with other manufacturers—in trade associations dealing with the manufacture and distribution of a variety of trademarked products.

I was cofounder in 1937 of the American Fair Trade Council, a nonprofit educational corporation. I served first as a member of its board of directors. Five years after the council's incorporation I became its president, in which capacity I served until the council, after 22 years of continuous activity, was dissolved in 1959.

On December 9, 1958, I had organized Quality Brands Associates of America, Inc., of which I am president, to replace AFTC and to explore and promote a wholly new concept of quality stabilization through price stabilization, as exemplified in the quality stabilization bill now before you.

National Patent Council, of which I am president, was founded by me in 1945—a nonprofit corporation interested in promotion of a favorable climate for creative contributions in the strength of our national economy.

During World War II, I served, in an advisory capacity, agencies of the U.S. Government dealing with various phases of production and distribution.

During 3 consecutive years of World War II, I served as president of Motor & Equipment Manufacturers Association—of the policy committee of which I have been for many years, and remain, chairman.

I was cofounder, officer, and director of the Automotive Council for War Production, Detroit, Mich., nationwide organization of manufacturers. Throughout World War II, I was chairman of its military replacement parts governing board, and was a member of its public relations committee.

I have traveled extensively through all parts of the United States, engaged in building distribution and sales for various kinds of products, including those of the Anderson Co., founded by me in 1918.

I remain president and general manager of the Anderson Co., Gary, Ind., and am active in all of its areas of interest, including the area of legislation exemplified in the pending bill here under consideration.

The above formalities of identification aside, please glance back with me upon more than 40 years of my company's dealing with the serious problems involved in meeting the challenges of competition, while striving for public favor for my company's trademarked products. Those laborious but rewarding years have kept under continuous test the steadily evolving policies and procedures of our manufacturing business.

During the early years of the Anderson Coal Co. we cherished some borrowed notions about what might constitute sound and productive selling policy—notions one or another of which we were compelled to modify greatly, or abandon—in the face of practical demonstrations of their lack of capacity to contribute to our strength for service to the public—and thus to our success.

It is with mixed emotions that I recall the various periods in which, huddled with my active associates often far into the nights, we sought

understanding and courage that would enable us to avoid what from time to time looked all too much like impending, and perhaps well-deserved, disaster.

Through 6 dreadful years of the great depression that followed the historical collapse of our national economy in 1929 we battled stubbornly—with our corporation in a Federal equity receivership—to avoid failure of our business.

An understanding Federal judge sheltered us in that receivership until we could pay all our debts in full—out of earnings—and emerge without reorganization or extending the distribution of the stock of our company—which we did.

During those toughest of all our years we were frequently reminded, in humble admiration, of the enviably superior mentalities of men in high places in Government, men who, out of sheer "darkroom" contemplations, could so readily conceive, and so confidently advocate, restrictions and controls labeled certain to increase the capacities of a corporation, such as ours, to serve the public.

And our admiration became overwhelming whenever we were reminded that the cureall capacities of those "men in high places" were conjured without benefit of knowledge acquired the hard way, from living with sharp realities such as we were required constantly to face.

For example, at one time when we were very weak financially, and often were compelled to rely, for working capital, on a floating overdraft, the Federal Trade Commission decided we were doing some things in the wrong way and graciously entered a formal complaint against us.

Men of the Commission soon excited our admiration for their patience in conducting, in various States, solemn hearings on that ill-founded complaint. We went along, of necessity without legal counsel, usually on borrowed money and half out of breath, until at the end of approximately 4 years, the Commission dismissed the complaint—we were told by unanimous vote—doubtless convinced that we either could work out our problems without their help or, if not, we could simply expire in our own crude way.

You see, it all came about this way. We had started our business as an Indiana corporation, on March 1, 1918, with only $10,000 of invested capital. From that date on we had to earn nearly all of the capital needed to finance our errors—and our growth. Today, our assets are modest, amounting to less than $10 million, a small fraction of the assets of our principal competitor. We have accumulated enough current assets to much more than pay all the debts of our company—both short-term and long-term debts. We employ about 1,200 very fine people. We have never lost an hour of production because of any dispute between management and employees.

Our trademarked products are sold in every civilized country of the world. They are sold in the United States through 4,500 ethical wholesalers to more than 130,000 ethical retail outlets registered with us.

Without effective price stabilization on our products we could not have survived. I belabor these facts only to emphasize the certainty that price stabilization does not, as the Department of Justice and Federal Trade Commission would have you believe, exterminate small business. Quite the contrary is true.

Qualified authorities assure, without any reservation, that the quality stabilization bill is soundly based constitutionally and is fully and readily workable under applicable law. The quality stabilization bill does not invite unlawful collusion, horizontally between competing resellers, to influence pricing by the manufacturer or to dictate his enforcement policies.

The quality stabilization bill is entirely vertical in its function. No manufacturer is required to employ it. Its operation is cleanly limited to the optional protection of the manufacturer's property rights in his trademark.

Price worshipers who insist upon keeping at least one eye closed constantly conjure only with the retail prices of trademarked products. With both eyes open, they could readily satisfy themselves—out of an abundance of evidence to be found in the grassroots history of American production and distribution of trademarked products—that disastrous consequences can follow spotlighting alone the retail price of a trademarked product.

They perist in that error without reference to the highly significant relationship of price to quality, to dependability, to mileage, to satisfaction to be received from the product. It is well established that the quality goes out of a product much faster than its labor and material costs can be reduced.

Without the protection of the proposed quality stabilization law, the manufacturer of an honored product, selected by discounters as cutprice bait, is the helpless victim of price competition that has no relation to product value, and has no respect for integrity in the quality manufacturer's distributive policy.

In an address entitled "Henry Morgan Trades His Ship for a Store," made in 1944, I stated that:

> It, of course, is not well known to the public that a reduction in the quality of a product to accommodate, for example, even a 10-percent reduction in the factory's price, to meet the demands of piratical price cutters, usually reduces the value of that product to the consumer by a great deal more than 10 percent. It is the last 10 percent of cost of labor and material put into a product that carries to the consumer a far greater proportion of the product's value than does any other 10 percent. At times an arbitrary cheapening of the prime production costs of a product by 10 percent or less reduces its value to the consumer by 50 percent or more.

Since that date in 1944 all Federal legislation intended to support price stabilization has been disabled or destroyed in court tests. As a result, thousands upon thousands of smaller businesses in America—manufacturers, wholesalers, retailers, and related services—have disappeared from the American scene. They are disappearing today at an accelerating rate, because neither our State nor Federal laws have sufficiently protected the kind of manufacturer that is inherently disposed to produce and deliver highest quality—highest value per unit of price—in his trademarked products.

In a nation traditionally opposed to oppressive monopoly, there is growing frighteningly, in size and power, a monopoly of distribution that gives the consumer less and less for what he pays—while dictating both price and product quality to the captive manufacturer.

And what of the citizen in between? What of the consumer? The Wall Street Journal, for example, has reported that, in 1959, consumers spent $5 billion for TV and appliance repairs—while spending

$8 billion on new equipment. This startling $5 billion upkeep cost is a frightening portent to be faced by the type of retail store that feels responsibility to its customers for the quality of the merchandise it sells.

Such mounting service costs understandably have driven many retail stores entirely out of the business of selling home appliances. Printers' Ink in December 1958 reported a survey indicating that reputable servicemen have found themselves totally unable to service appliances the concealed internals of which have been cheapened, dimensionally and in quality, to qualify the product for sale by discounters as store-traffic bait.

A housewife—who thinks she has saved importantly at the discounter's price on a washing machine she had been hoarding slavishly to buy—soon wakes up to find that, besides the machine delivering unreliable and spasmodic service, the savings she expected soon is exhausted in charges for repairs. She begins at last to know the meaning of "concealed inflation"—forced by ruthless discounterism.

Price, standing alone, may—and often does—mislead the consumer into buying a trademarked product the quality of which has been diluted steadily to meet repeated pressures of discount-type resellers for lower and lower costs of acquisition.

It is equally discernible that the percentage of discount offered to a reseller by the manufacturer's discount from the retail price, on a trademarked product purchased for resale, is devoid of significance when considered apart from its relationship to the rate of turnover of the reseller's inventory of the product. Turnover may be accelerated temporarily by cut prices. However, cut prices on any product are but a temporary stimulus to turnover, and cut prices themselves tend to reduce aggregate gross profit on sales.

It is the aggregate of gross profit producible out of the rate of turnover of the product by the reseller—with relation to warehouse space required for the product and to other costs allocable to the product—that determine the rate of turnover necessary to lift the product into a profitable operation.

In connection with the question of turnover I am reminded of an early experience of my company wherein one of our valued wholesale customers got an idea. He at the time was going great guns on our product—turning his inventory 11 or 12 times a year.

This very good wholesale customer, who had been in business for many years, finally decided to shift some of his responsibilities to new personnel. So, among other steps, he hired a so-called merchandising expert who had never had the problem of meeting a payroll but who at that time had quite a lot of publicity in the industry as possessed of a superintellect. You no doubt are familiar with the effortless fluency of men of the type.

We later received a letter from this wholesaler—over the signature of his new expert—advising that the firm's cost of doing business had been determined as a certain percentage of its gross sales. The letter said the firm was discontinuing at once all products that did not provide a percentage of "markup" exceeding their "percentage cost of doing business." Our product did not meet that test.

So, I went to see the expert. I tried to persuade him that he was neglecting the determinative factor of turnover—and that the aggre-

gate of gross profit our product produced for him, with his rapid rate of turnover, made the product an unusually profitable item for him.

He disagreed, and demanded an increase in our discount. Always we have only one discount, available to all our customers regardless of quantities they bought from us. So the expert threw out our product. Soon thereafter be boasted to me that he had taken on a competing product on which he received a much greater discount than ours.

Three years later, after the "expert by confession" had been discharged in high disfavor, it was discovered by the unfortunate wholesaler, whose business we had lost because the expert got his conclusions out of something other than sound experience, that the firm still had left in its inventory, unsold, much of the expert's original purchase of the competitive product with the more attractive discount.

With all their facilities for conducting searching investigations, doesn't it seem reasonable to expect that presumably interested Federal agencies surely would have stumbled somewhere upon another highly significant economic fact, known today to about everybody engaged in manufacturing or selling trademarked products?

That fact is that at meetings of ostensibly competing discounters—meetings widely discussed—discounters rather freely exchange with each other their experiences in the techniques by which they disable, at great profit to themselves, manufacturers of popular trademarked products who refuse to sell their products to the discounter for deceptive use as store-traffic bait.

Discounters have perfected a formula for blackmailing a manufacturer into submitting—to the discounter, for purposes of prostitution—the manufacturer's most precious and most fragile property—which is the reseller's and consumer's goodwill toward the manufacturer's trademark. That predatory discounter's formula is the subject of wholly frank discussions today throughout America's tottering distributive system.

The discounter's formula for "prostitution by blackmail" is usually one of the principal subjects discussed—with increasing arrogance—at "seminars" of discounters. It seems that here, truly, is a full-grown and vicious "elephant" worthy of recognition, and public condemnation, by the Department of Justice—lately accused of inability to see elephants on rampage because of the preoccupation of the Department with "chasing mice."

The rampaging "elephant"—that is "discounterism"—will soon destroy America unless restrained by the Quality Stabilization Act.

Yes—there are even further "strawstacks tumbling in the big wind." For example, there has been in circulation for some time the well-authenticated text of a statement of a very strong midwestern discounter to the effect that when he advertises a popular product he has little interest in how much of that product he sells as a result of that advertisement. He is reported as having said that his test of the value of such an advertisement is "How many people does it bring into the store?"

Here we have a bold and shameless, and not uncommon, confession of a merciless policy of prostitution that can benefit, not the public—but can bring profit only to the discounter.

For comparatively petty crimes—involving much less economic damage and social degradation—others are sent to jail—while the

discounter, guilty, many times over, of the grandest of grand larceny, often is greeted respectfully at his country club by members renowned for their own integrity, possibly including the discounter's banker, pro tem.

The discounter's advertisement of a popular product, of course, drives ethical wholesalers and retailers to withdraw it from sale. Thereafter, about the only customers the manufacturer has left, by which to keep his factory in operation, are the discounters.

Then begins the quality squeeze—as the then-captive manufacturer is compelled to seek, constantly, extreme methods by which to degrade his labor and material costs—to meet the discounter's repeated demands for lower and lower quotations with which to outdiscount other discounters.

At last—having been abandoned by ethical retailers and wholesalers—who naturally are the ones who normally create, with the public, prestige for a high-grade trademarked product—the discounter finds the product no longer effective as store-traffic bait—drops it—and turns to put other once-proud products through the same cannibalistic process.

Thus the discounter forces one respected product after another down that "last mile"—toward oblivion—while the public complains bitterly that it is getting from the product less and less for its money. Many point out that the discounter thus creates a "concealed inflation" even more frustrating than inflation that is created when prices rise visibly—where all can see.

Many labor leaders have begun to ask themselves, How do the employees of a manufacturer fare under the discounter's pressure for lower and lower prices? Some, possibly not among those overexposed to cloud-based theory, are asking the question out loud. How can a manufacturer under such pressure for lower prices hope ever to improve pay rates or working conditions in his factory? And how can a labor leader expect to do much "leading" after his members begin to ask why he neglected to support the quality stabilization bill?

And what will American housewives ask their "leaders"—including you gentlemen of Congress—when she knows you have had access to her plea for relief from the curses of discounterism?

A massive survey completed only last year provides your—and the Nation's—first authentic answer since 1952 to the question, "Does the consumer want quality stabilization?"

A total of 15,295 homemakers, selected in equal number from each of the 437 congressional districts of the United States, were interviewed by Manpower, Inc., skilled in the work of taking such polls. Manpower, Inc., mailed all reports direct to Ernst & Ernst, certified public accountants, in Chicago. Ernst & Ernst tabulated and certified the results, and is holding all pollsters' reports in confidence.

Question No. 3 of the survey reads as follows:

If a manufacturer is forced to reduce his own prices to avoid losing the business of discounters and so decides to use, in making his trademarked products, fewer and less-skilled employees at cheaper pay rates and decides to use lower and lower grades of inferior material, do you believe that homemakers who buy that downgraded product get less or more in value for what they pay?

Of the opinions expressed on the question, a total of 93.7 percent said the price-cut downgraded product gives less in value for what they pay. I might pause there to say that in approaching this survey quality brands conducted a number of test surveys on questions that had been reframed in conference with Manpower and with Ernst & Ernst to give them a more understandable approach to the question with the housewife. In those surveys which were conducted from our office by telephone we very frequently encountered a woman who the minute you said discount said, "I will never have another discount product in my place. They have taken the quality out of the stuff until you don't get your money's worth."

Question No. 6 contains the essence of the quality stabilization bill. It reads as follows:

Do you believe that the manufacturer who really wants to give you the highest quality, highest dependability, and highest value in his trademarked product should be permitted to protect that quality and value for you and protect his own good reputation by lawfully preventing any change, either up or down, by any storekeeper in the retail price such quality manufacturer may name to be paid for his quality product everywhere?

Of the opinions expressed on that question No. 6, a total of 81.1 percent voted for the quality stabilization bill, Senate Joint Resolution 159.

A photocopy of the certification of the results by Ernst & Ernst, and a photocopy of Manpower, Inc.'s report on the survey, is attached.

Public support for the quality stabilization bill is becoming more militant whenever and wherever the following facts begin to be understood:

(1) The proposed act can be applied only to trademarked products the makers of which have chosen to give their trademark—and the citizens who have learned to trust the mark—protection from those who would use the mark for their own cannibalistic purposes.

(2) No manufacturer is required to bring any of his products under the act.

(3) No reseller or consumer is required to purchase any product stabilized under the act. There must always be other products offered for the same purpose—to give the public a choice—or the price of the product cannot be stabilized under the act.

(4) A price-stabilized product must compete with all price-stabilized products available for the same purpose.

(5) A price-stabilized product must compete also with all non-stabilized products available for the same purpose.

(6) Thus the public has the full benefit of both price competition and quality competition.

(7) The fully authenticated report of the vast national housewives' survey mentioned herein shows that the public can be trusted—under any competitive condition—to determine, from neighborhood gossip and from experience, which product constitutes the best—and which the worst—"buy" for the need at hand. Obviously, any manufacturer who overprices his product soon feels the pinch of withdrawal of support made certain by decisions of this grassroots "court of last resort."

I would like to pause there to, let's say, give vent to some comment that urged itself upon me as I sat here and listened, particularly to

Chairman Dixon's discussion, his statements. Any attempt to substitute bureaucratic or governmental control, the control of a governmental agency, for the natural controls of competition is to my mind something like passing a law and deciding the weathermen shall be authorized to control the weather in their vicinity. It is an impractical and impossible concept.

Mr. DINGELL. Mr. Anderson, along that line, what do you think about vesting the power in the manufacturer to fix prices all along the line?

Mr. ANDERSON. I think it is a most logical, and fair, and practical thing to do because the manufacturer is the man who has his money invested in developmental work, his money invested in product procurement. He has his money invested in machinery, and equipment, and buildings to manufacture that product, and he is taking that tremendous investment on the value of that product to the consumer at the price that he can afford to sell it, and if he was not conscious of the fact that that is what he is doing, he would not be in the manufacturing business very long.

Mr. DINGELL. His motive is to so make profit. Am I correct?

Mr. ANDERSON. That is probably a sin.

Mr. DINGELL. No; it is not a sin.

Mr. ANDERSON. That probably is a terrible sin. I get the feeling that some people feel it is.

Mr. DINGELL. No; it is not.

Mr. ANDERSON. But what happens to that profit? He gives 52 percent of it to the Government to help you fellows operate, and the commissions operate, and the Department of Justice, and all that sort of thing.

Mr. DINGELL. I do not say that the profit system is improper.

Mr. ANDERSON. I am not vilifying any personality. I am even giving you credit for sincerity.

Mr. DINGELL. Thank you very much.

Mr. ANDERSON. But you could not be more wrong. You could not be more in error in the position you have taken, and I make that statement from, I would say, easily 50 years of grinding experience dealing with that competitive court out there, dealing with the public which makes the decision as to whether you are going to stay in business or not, and it bases that decision on its concept of what it learns about your integrity, the integrity of your merchandise, and its value to them with relation to the price. You may think that a governmental agency could determine it, and we heard Chairman Dixon say here just a litle bit ago that this bill might be all right if it contained a provision that would enable the Federal Trade Commission to determine how much markup a manufacturer could put on his product to sell it. Out of my experience, and it has been a continuous experience, I have been continuously engaged in this competitive field, and successfully engaged in this competitive field, against a powerful competitor that never fair-traded a nickel's worth of its merchandise.

Mr. MACK. I am wondering if we could not interrupt the proceedings at this point because we have a quorum call on the House floor and it might be a good place to recess.

Mr. ANDERSON. I think that would be fine.

We would reconvene at what time?

Mr. MACK. 2:30.

Mr. ANDERSON. Thank you very much.

Mr. MACK. The committee will stand in recess until 2:30.

Whereupon, at 12:15 p.m. the hearing was recessed, to reconvene at 2:30 p.m. the same day.)

AFTERNOON SESSION

Mr. MACK. The committee will be in order.

When we recessed this morning, we were receiving testimony from Mr. John Anderson.

Mr. Anderson, would you like to proceed with your statement.

STATEMENT OF JOHN W. ANDERSON, PRESIDENT, THE ANDERSON CO., GARY, IND., ACCOMPANIED BY JOHN LEWIS, THE ANDERSON CO.—Resumed

Mr. ANDERSON. Thank you, I would.

Mr. MACK. I think you were on page 14, is that correct?

Mr. ANDERSON. Continuing item No. 7.

(7) The fully authenticated report of the vast national housewives' survey mentioned herein shows that the public can be trusted—under any competitive condition—to determine, from neighborhood gossip and from experience, which product constitutes the best—and which the worst—"buy" for the need at hand. Obviously, any manufacturer who overprices his product soon feels the pinch of withdrawal of support made certain by decisions of this grassroots "court of last resort."

(8) The public knows many times more about its needs and its budget capacities than any sheltered theorist. The public can best find for itself suitable values—once protected by the proposed act—against discounters' trickery. The public needs the wider range of choice of products and the trend toward stability of identified values the proposed act will provide.

(9) Under the proposed act there will always be made available, for discounters to sell, products to compete, at fully flexible prices, with every important stabilized product offered. The discounters will be deprived only of the chance to force an honored quality product to destroy its own honestly earned popularity—as the discounter degrades it and destroys confidence in it.

(10) The proposed right of a manufacturer to stabilize his resale prices—as a means of protecting his property rights in the public good will earned by him and symbolized by his trademark—is well within the framework of his unquestioned right to make the product wholly unavailable to the discounter—or to the public—at any price. He can do just that by simply closing his plant and going out of business—as discounterism may easily force him to do. Such action is clearly within what has been referred to as the citizen's inalienable right to drop dead. Does any sheltered theorist claim that mounting trends toward such drastic result—which result he daily promotes—do anything but violence to the public he professes to serve?

The disease of discounterism inevitably destroys distribution of top-value trademarked merchandise in areas it infects.

Against thousands of honored trademarked products, such ruthless sabotage, refined and with many added "megatons" of destructive force, strikes today—while hundreds of thousands more of reseller personnel, and the public, get hurt—with no possible defense.

Isn't it out of mass hopelessness that Communists infect a people with the fatal conviction that "communism couldn't be worse"?

Does not it seem that our constitutional democracy may be facing an early test of the ability of its system of "checks and balances" to survive psychological aberrations such as many believe have destroyed past civilizations?

Is there not now a crucial problem confronting the legislative branch of our Government—as reflected in the mounting challenge to check economic vandalism and support constitutional incentivism through early enactment of the quality stabilization bill?

May we not, as a nation, be here confronted with our last chance to retrieve grievous errors that have led us to the very brink of catastrophe from which we cannot ever return?

Confronted with impending consequences of previous error, should we not now pray that we may never be forced to know how irretrievable a mistake we could have made by defaulting our present chance to listen to the cry of builders in our traditional American economy for relief from its destroyers?

At each level of our traditional constitutional incentive system for propulsion of creation, production, and distribution, there are at work today tremendous depressive influences.

All men of good will and understanding who in these crucial hours give freely of their resources, to help reverse the serious economic disorders that surround us, may earn thereby at last the abiding comfort of knowing that they did not in this grave crisis shirk their duty to their Nation—and to themselves.

The disease of discounterism is a mounting and devastating force now disrupting our economy. More and more people are being hurt. Khrushchev knows this. So did Lenin—who taught that our best internal defense against communism was our millions and millions of sturdy smaller businessmen, protected by law in the acquisition of a small share of the benefits their labors—in response to constitutional incentivism—bring to others.

Cannot it well be that too many of our valiant leaders are keeping eyes fixed on dramatic writings in the sky—while at the grassroots of America rodents that work best in darkness are spreading—constantly faster—hte deadly plague of communism?

May we respectfully suggest that 1962 may easily stand in history as the fateful year in which the legislative branch of our Government—none too soon—supported by a President known to be sensitive to the part small business must play in buttressing our national security—moved in unison to help able and conscientious manufacturers protect themselves, their resellers, and the public—from the destructive effects of economic cannibalism—by enactment of the quality stabilization bill.

I thank you.

That concludes my formal remarks. Any questions will be welcome.

Mr. MACK. Thank you, Mr. Anderson.

Mr. Dingell, have you any questions?

Mr. DINGELL. Thank you, Mr. Chairman.

Mr. Anderson, I saw in Drug Weekly of January 24, 1962, an article entitled "Quality Brands Nationally Predicted." In that you were quoted as saying this:

> This is not merely a minimum price. It is the exact price. The minimum price is what destroyed fair trade. It provided a floor but no ceiling. As a result, as the Kefauver hearings disclosed, some unscrupulous retailers charged two and three times the manufacturer's price. The public was injured, and the idea of price stabilization was not truly given effect.

Is that your view, sir?

Mr. ANDERSON. Yes, sir.

Mr. DINGELL. I am interested in helping small business, the same as every other member of this committee, is but if we enact House Joint Resolution 636, or any of the similar bills, what is there in those bills which will protect the consumers from unscrupulous retailers who charge two and three times the manufacturers' price?

Mr. ANDERSON. Well, there would be a great deal, Mr. Dingell.

In the first place, the manufacturer who stabilizes his price will, of necessity, publicize the price. People will get to know what the manufacturer's price is, and in many instances it will be printed on the boxes, the individual boxes or containers.

As to the Anderson Co., my company, we print the retail price on each and every individual package containing any one of our products.

Sometimes they are sold in pairs and we put the pair price on.

Now, it will not be a condition where the price will not be known. The price must be known in the trade in order to make it possible to proceed against the retailer. He must have knowledge of the fact that the item is stabilized at a certain price, and he will have that knowledge, or the manufacturer cannot make his price effective.

Mr. DINGELL. The manufacturer will stablize the price at a fair level?

Mr. ANDERSON. Well, to assume that he will not will be to assume that he has not been in business long enough to learn.

Mr. DINGELL. I do not assume that he does or does not. I just say what is there in the bill to guarantee that he will?

Mr. ANDERSON. Well, about the same thing that gives you a guarantee that when you walk out on the street, some insane passerby will not shoot you.

Mr. DINGELL. I really have no assurance on that. Just name one assurance in the bill that consumers will not be gouged.

Mr. ANDERSON. You cannot give that assurance. You cannot put that in a bill.

Mr. DINGELL. I recognize you as a fine businessman; you manufacture a fine product; but I want to look at this bill fairly and I think that this thing should be scrutinized carefully by this committee in order to determine whether or not this bill is in the public interest.

I would like to know where in this bill there is any language which will guarantee that, first of all, there will not be unscrupulous retailers or unscrupulous wholesalers or unscrupulous manufacturers who will not price a specific commodity too high?

Mr. ANDERSON. Might I state somewhat broadly that this bill in its major effect gives to a manufacturer who is competent and who

is of integrity an opportunity to give that competence and that integrity effect in the pricing of the product and in the defense of the public against abuses.

You will note that this bill provides that a reseller who sells either above or below the manufacturer's suggested price will be subject to having his right to use the trademark revoked.

Mr. DINGELL. Where does it say, if he sells above? I believe you are right—"sells for other than the currently set price."

Now, you assume that all manufacturers are going to be reputable?

Mr. ANDERSON. No, I do not.

Mr. DINGELL. Does this not afford the same right to fix prices by rascally manufacturers—and there are some of them, I am sure you will agree?

Mr. ANDERSON. I agree to that completely. I could not have been engaged in the development and manufacturing and merchandising of trademarked products for more than 40 years without learning—and I am not mentioning any of my competitors; I am not referring to them indirectly or otherwise—but without learning that there are manufacturers of no principle.

Mr. DINGELL. All right.

Now, the manufacturer without scruple or principle has the same power to fix prices under this bill as a reputable manufacturer like yourself; does he not?

Mr. ANDERSON. Yes.

There is nothing in there that attempts to differentiate, to fix the degree of integrity of the manufacturer, if that is what you mean.

Mr. DINGELL. This is one of my principal concerns with the bill.

Now, let us go on.

I am sure that you remember the hearings of the Kefauver committee. We heard how prices in the drug industry had been maintained as high as 1,700 percent over manufacturing costs. Now, what guarantee is there in this bill that would protect the consumers from price fixing at 1,700 times the manufacturer's cost?

Mr. ANDERSON. I think, Mr. Dingell, that the only thing you can rely on to equalize irregularities of that kind is the judgment of the consumer and of the reseller, and I am willing to credit most consumers and most resellers with good intent.

You have to rely on them to police that area, and once you put the manufacturer in the position where he, in order to do anything about this bill, must take upon himself the responsibility for the pricing, which was not the case in the drug field, all the druggist did under fair trade was to set a minimum resale price, which was all floor, and there was no ceiling—he could price it wherever he pleased. Now, this bill is not that kind of a bill.

Mr. DINGELL. I intend to come to that later, but I would like to pursue this other line of questioning, if I may.

Mr. ANDERSON. What is that?

Mr. DINGELL. I would like to pursue the basic difference between this and fair trade at a little later time, if I may.

Mr. ANDERSON. All right.

Mr. DINGELL. As soon as I conclude this line of questioning.

The thing that concerns me, though, is what economic leverage does the consumer have, other than to refuse to buy?

Mr. ANDERSON. That is adequate.

Mr. DINGELL. Let us go further.

Let us take the drug industry in particular.

In the drug industry you might have four or five manufacturers who manufacture a commodity, and who cross-license among each other these same items, now, to manufacture each other's patented items.

What leverage of protection does the consumer have to refuse to buy under those circumstances?

Mr. ANDERSON. I do not think you are going to be able to legislate poetic justice into any area of human relationships.

Mr. DINGELL. I am not interested in poetic justice. I want economic justice for the consumer.

Mr. ANDERSON. You are asking questions in the direction, Mr. Dingell, that would indicate that you are willing to criticize this bill because it did not have a complete panacea for all human error wrapped up in it.

It cannot have.

There are laws against murder, but that does not stop murder.

I think the only person you can depend upon as the final judge of the equity of a value that a manufacturer offers under this bill is the ultimate user, and I would not say that he is going to be at all times completely protected against irregularities.

However, we are not in the attitude of repealing the laws against murder because they do not protect the population against murder.

We stay in there and pitch with the police force and the courts and their juries and everything else, and we try to make murder so unpopular and profitless that people will not resort to murder, at least not readily resort to murder.

Now, I will say that there may be some "murder" committed under this bill and under any condition of which you could conceive. I think there will be an element of "murder" because we happen to have a population that does contain at various levels a lot of people, including the level embracing those who are so completely off balance that we have to put them in a padded cell.

Now, I do not think you can legislate integrity into a manufacturer, or into a reseller—but I do believe that the consumer is in a position to teach any manufacturer and any reseller the value of integrity by withdrawing support from products that do not reflect integrity in values.

Mr. DINGELL. Well, now, most pharmaceuticals today are manufactured under Food and Drug and U.S.P. standards, am I correct, and when they hit the market, they all, for all intents and purposes, a bottle of one pharmaceutical is substantially identical with the other.

But let us take a situation, now, and I am trying to find out what protection the consumer has when he walks in with a prescription from the doctor that says he has got to have, let us say, a certain prescription pharmaceutical by Merck. He gets it and that is all the choice he has.

The doctor says, "You have got to have this to get relief from your arthritis," and "You have got to have this to get relief from your diabetes," and, "You have got to have this to get relief from your heart condition."

It may be the only thing the fellow can have.

He walks in. There may be three or four manufacturers who manufacture this. The price is fixed under this bill. What protection does the consumer have to exert any economic leverage and continue to live in comfort?

Mr. ANDERSON. I would say, in the first place, that we would have to assume that the doctor was possessed of a certain degree of ethical feeling. I do not think the doctor would deliberately send—some doctors might. You know, they put some doctors in the penitentiary for what they do.

Mr. DINGELL. Let us look at the doctor's choice. The doctor's choice is between, let us say, giving the individual this item and not giving the individual this item. That is his choice.

Mr. ANDERSON. All right.

Mr. DINGELL. It is between giving him relief from the condition he has and giving him no relief from the condition he has.

Now, basically, that is the doctor's concern, is it not? He has no concern over the price, really. I am sure you are familiar with the hearings in the Kefauver committee.

Mr. ANDERSON. I am, to a degree and in a general way.

I would say that the situation there would be, as I have understood the way you have stated it, would be one where, if the patient had been confronted with that condition before this product had been developed he would have had no choice but to suffer with his disease, sir.

Mr. DINGELL. That is right.

Mr. ANDERSON. Now, comes the product, say it is a vitamin product, and the price is quite high above the actual prime cost of manufacturing that product, which would be the labor and material costs and other closely related costs, disregarding completely the developmental costs, which might have run into millions of dollars and often do in connection with the development of the single product, a drug product.

The manufacturer might recover on that product more than would be considered——

(Discussion off the record.)

Mr. DINGELL. I have to say, Mr. Anderson, you have still not convinced me that there is a single item of protection, because here we are talking about essentially a noncompetitive industry, the drug industry.

I do not worry about you fixing the prices of windshield wipers; I am sure you would fix them at fair levels.

Mr. ANDERSON. I beg your pardon?

Mr. DINGELL. I am not worried about you fixing prices of windshield wipers.

Mr. ANDERSON. I do.

Mr. DINGELL. You market an excellent product. I use them on my auto. But we come back to the drug industry. What protection am I going to have from them when I walk in with a prescription for a prescription pharmaceutical which says, "You get this particular item by Merck"?

Say I am a diabetic. Now, what protection am I going to have to guarantee, if the drug industry gets the utilization of this price fixing, that they are going to treat me fairly?

Mr. ANDERSON. I do not think that there is any process, legal or otherwise, by which you can influence the policy of that retailer of that type except as you reach his pocketbook.

Now, if he offends you with an unfair price, and at the next PTA meeting in the neighborhood you scream about it, I would imagine that that retailer would lose, that that druggist, if he be a druggist, would lose more in profit, in gross profit on sales, than he possibly could have gypped you out of.

Mr. DINGELL. Of course, you recognize that this is not a retailer's bill. The retailer does not fix prices. It is the manufacturer who fixes price.

Mr. ANDERSON. No——

Mr. DINGELL. Under this bill the manufacturer is going to fix prices. Maybe I can cripple one druggist. How am I going to get at the manufacturer, let us say, of cortisone or insulin, Mr. Anderson?

Mr. ANDERSON. You are assuming, now, the condition under the Kefauver bill, that Senator Kefauver dealt with. Now, that condition, as I have explained to you and as you can find, if you will search the fair trade laws of the various States, there was a floor. Very few of those States had any ceiling prices, and the result was that the unscrupulous retailer was not only permitted, he was almost invited to take advantage of that person.

Mr. DINGELL. As a matter of fact, this was almost the general practice under fair trade, was it not?

Mr. ANDERSON. I am not sufficiently informed to say it was. I have met with individual instances where that has been done.

Now, I can recall the first acromycin that was prescribed for me. I paid a druggist 50 cents a pill in Phoenix, Ariz. I could have afforded, for what that medicine did for me, I could have afforded to pay much more than 50 cents a pill.

Mr. DINGELL. But you are a man of substantial means, while other people may not be able to afford 50 cents a pill.

Mr. ANDERSON. Yes; but let us go back to the point where there was no acromycin, where the pharmaceutical producer had not spent the tremendous amount of money and taken the great big gamble on that development to produce that drug.

Then what would have been my position?

Mr. DINGELL. You see, you are assuming I object to him making a profit. I do not object to him making a profit, and I do not object to him making a fair return on his money. I do not object to him having every incentive to go out and invest and make money.

I think you perhaps may have misconstrued by position. This is not my position.

I just want to see to it that the consumer does not get gouged.

We keep coming back to the same point.

Where, anywhere, in the language of this bill is there a guarantee that the consumer is going to have any protection against unfairly high prices, just any language in the bill? Will you point that out?

Mr. ANDERSON. You cannot write that into legislation. Even the Bible, as long as the human race has been living with the Bible, has not been able to make men of integrity out of everybody.

Mr. DINGELL. I recognize that.

Mr. ANDERSON. And we are going to have that to deal with. But we cannot pitch our total economic policy to the proposition that somebody may be carrying a gun.

You cannot legislate all people off of the streets because some people on the streets might carry a gun. That is something that I think we have to tolerate.

We tolerate error at many levels in our lives, in our economy.

The only level that is free from it is, of course, the governmental level.

Mr. DINGELL. But, you see, Mr. Anderson, we are interested——

Mr. ANDERSON. I say that facetiously, now, and I expected you to laugh. You did not, so I will not try it again.

Mr. DINGELL. Now, the Government has its faults, too. We keep coming back to this same point.

You see right now my people—by the way, I represent a poor district. My people do not have great economic means. We have a high level of unemployment. We have a great number of people who are on welfare, who are retirees, who are people of very modest means.

Now, at least these people today have the benefit of the competitive forces in the economy working for them. Now, if we go to price fixing of this kind, where will they have an opportunity to shop for a bargain in the kind of pharmaceuticals that I am talking about, and what is there in this bill to protect them against gouging?

Mr. ANDERSON. Might I digress just a moment on two things.

In the first place, the phrase "price fixing" carries a certain odor because it is associated, I think, even in your mind, with sinful price fixing, where there is collusion——

Mr. DINGELL. No.

Mr. ANDERSON (continuing). Between resellers to fix price.

Mr. DINGELL. What I mean by that, Mr. Anderson, you say collusive price fixing; I just refer to price fixing.

Mr. ANDERSON. All right.

Mr. DINGELL. I would refer you to page 4, line 10, of the bill where it says "currently established resale prices." Those are fixed prices, are they not?

Mr. ANDERSON. These are established prices, established by that manufacturer.

Mr. DINGELL. And fixed prices they are?

Mr. ANDERSON. Now, may I please conclude?

Mr. DINGELL. Certainly.

Mr. ANDERSON. I think I have a thought there that might interest you.

There can never be a sale of anything, except at the point of a gun, that the parties do not agree on the price. The price has got to be fixed usually by the party who sells it.

Maybe there will be bargaining up and down, but normally every sale that is made involved a price fix in that sense.

Now, the question here is merely whether the retailer is more to be trusted than the manufacturer to determine at what price that product must be sold.

I want to point out, please, that all the retailer has invested in that product is in his inventory, which he is gradually depleting, and

he can leave that product and go to a competitive product as soon as he has depleted his inventory.

So any crime that he commits, any bad judgment that he shows in the pricing of that product, he can correct by merely shifting to another product.

Now, your manufacturer, if he makes a mistake by overpricing his product, the product does not sell. Maybe he can sell it for a little while—sell it to the resellers. But he is soon going to run up against a stone wall if that product is unreasonably priced for what the consumer gets out of it.

Now, you cannot proceed on the theory that the housewife, or the public in general, are incompetent to make decisions affecting their interests as they go along in life.

Now, AFTC ran a survey in 1952.

Mr. DINGELL. Let us concede everything you say for the purposes of argument here, but I still want you to tell me where in this bill there is anything that is going to protect, let us say, some of my diabetic, social security recipient retirees, who walk in with a doctor's prescription for a certain manufactured type of insulin or one of my arthritic, social security retirees, who walks in with a doctor's prescription for a certain brand of cortisone, from having a price fixed at an excessively high level?

If you can show me that, where there is something in this bill that will protect those people, I will look with a great deal more favor on this piece of legislation.

Mr. ANDERSON. Mr. Dingell, I would say that that Utopian desire of yours is something that can never be achieved because you can never be assured, that when you let a man into your retail store, he is not going to pick up a valuable piece of merchandise and tuck it under his coat and walk out with it. That "will to larceny" works both ways.

Mr. DINGELL. He may have to if the price is fixed too high for him to afford it.

You see, I represent consumers; I represent manufacturers. I recognize that the economic system we have is not very good, but I am still trying to find out where in this bill there is anything that would protect these people from being gouged under those circumstances, not by a rascally retailer, but by a rascally manufacturer.

Mr. ANDERSON. Where in the Bible is there anythng that will protect you against a violation of one of the Ten Commandments?

Mr. DINGELL. I still keep coming back to this point.

Now, I represent these people. I am down here to speak for them and to vote for them, and I am down here to fight for good legislation and what they feel is in their interest and I feel is in their interest, and I am down here to do everything I can to sink bad legislation.

Now, where is there something that I can take to people like this and tell them, "Here is protection for you if these prices are fixed"?

Where is there anything in this bill that offers them that?

Mr. ANDERSON. Well, I can say to that consumer, "Now, this is a big world and a big market with a tremendous variety of trademarked products in the market."

You can say to the consumer, "Now, there will not be a price-stabilized product that does not have competition."

You can say to a consumer, "You will have more chance to get a value out of a stabilized product than you will out of one that is not stabilized at all."

Now, tell me what protection he has got under the wide-open condition where there is no fair trade law in the State and he has got that great variety of products in front of him, and there is nothing to prevent the reseller from overcharging him on the product that he selects?

Mr. DINGELL. Let us take this conversely.

Conversely, there is nothing denying him, under the present circumstances, the economic play of the marketplace, from an opportunity to go in and to get a competitive buy, let us say, on insulin or cortisone, which he might be denied if price fixing goes into effect under this or under a fair trade bill, am I correct?

I have got a high responsibility to these people, Mr. Anderson, I want you to appreciate this, that I feel this very keenly.

Where in this bill am I going to show them something that is going to protect them?

Mr. ANDERSON. I felt my obligation in this matter to my fellow manufacturers and to the public and to good resellers sufficiently to have spent more than 20 years trying to find a sound basis for a stabilized quality and price.

Mr. DINGELL. I will concede there may be an excellent argument for stabilizing the price of windshield wipers.

He might not have to have a car. He can still ride the bus, or he can stay home, or he can walk. But let us say a man gets into a position where he is walking into a drugstore with a prescription in his hands for cortisone, and that prescription is for price-fixed cortisone.

Where is there anything in this bill that is going to protect him against being the victim of an unduly high price?

Mr. ANDERSON. I think you could just as well try to protect him against a pickpocket on his way to the store.

Mr. DINGELL. But we have laws against pickpocketing.

Mr. ANDERSON. You are darned right you have.

Mr. DINGELL. But where in this legislation——

Mr. ANDERSON. But those laws do not protect him.

Mr. DINGELL. Where in this legislation is there statutory protection?

Mr. ANDERSON. He gets his pocket picked anyhow, and when you say that you must lay down a law that will protect invariably a consumer who is using his best judgment otherwise and who thinks he is patronizing an honest merchant and who has to find out from experience that he is not. Then he goes to another retailer or goes from one product to another. To attempt to give paternalistic protection of your kind——

Mr. DINGELL. No, we are dealing here——

Mr. ANDERSON (continuing). To a consumer is like trying to—well, the farmer might ask you, "I should not plant my crops this year because what protection have I got, what assurance have I got that it will rain at all this year?"

Mr. DINGELL. Is it not fair to say that, on the one hand, we are giving the consumer protection against gouging, and, on the other

hand, we are giving the manufacturer protection against price competition?

Mr. ANDERSON. No, indeed, you are not.

Mr. DINGELL. Or does not this bill——

Mr. ANDERSON. You cannot——

Mr. DINGELL. Wait just a minute.

Will you tell me, sitting there, that this bill does not offer the manufacturer protection against price competition, if he desires to avail himself of it?

Mr. ANDERSON. I do not see how it could.

I cannot conceivably see how it could protect him against price competition.

Mr. DINGELL. Does this not vest in the manufacturer the power to fix the prices of his commodities?

Mr. ANDERSON. Not unless he has competition.

Mr. DINGELL. But does he not have the power to fix prices?

Mr. ANDERSON. He has the power to establish the price at which the product must be sold and that power does not exceed his basic right to drop dead, as I have pointed out. Now, he goes in there to perform a service and earn a profit.

Mr. DINGELL. Let us come back to this point.

Mr. ANDERSON. And I do not think that is——

Mr. DINGELL. Where in this bill is there any protection for the consumer against having the price level of a commodity which he must have fixed at an arbitrary figure which is so high as to constitute unconscionable gouging? Just tell me that one thing, and, by golly, I will support the bill.

Mr. ANDERSON. All right, I will try my best to do that.

I think I have done it, but I will try again.

Mr. DINGELL. Where is there language in the bill?

Mr. ANDERSON. The language in the bill cannot do it. You cannot protect the consumer by making picking pockets a crime. His pocket is going to be picked anyhow.

Mr. DINGELL. But we do make laws against pocket picking, do we not?

We make laws against shooting people down in the street, as you have been telling us.

Now, where is there a section in this bill, where we vest in the manufacturers the power to fix prices, which would say you may fix prices but you shall not gouge the consumer? Now, where is that language?

Mr. ANDERSON. I will tell you where it is.

You place that responsibility with the manufacturer. He can disable that retailer on his product overnight. A registered letter will do it.

Mr. DINGELL. You are talking about rascally retailers. Let us talk about rascally manufacturers, and I am sure your will agree there are a few of them.

Where is there protection in this bill against the rascally manufacturer?

Mr. ANDERSON. You get right down to the public. The public writes its own ticket. The public is the court of last resort in this matter.

Mr. DINGELL. Let us take the man who walks in about a prescription which says you have got to have this particular pharmaceutical. Where is the protection against gouging?

But let us just say X pharmaceutical manufacturer is a rascal and comes out with a wonderful drug and my doctor gives me a prescription and says, "Dingell, go get yourself this particular cure-all for arthritis."

I go in and I pay 50 or 75 cents or a $1.25 a pill.

Now, where is the protection in this bill against that? And let us say the 50 or 75 cents or $1.25 is an excessive price.

Where is the protection against that in this bill?

Mr. ANDERSON. When you answer that question as to how you could put that kind of protection in this bill, I think you will have solved most of humanity's problems. But yours is purely an altruistic concept.

We do not reach that degree of perfection in operations in any phase of human affairs that I know anything about.

Mr. DINGELL. Now, let us talk about something else, if I may, here.

Section 14, on page 6, says:

> No exercise of any right or remedy provided in paragraph (7) to (13) inclusive shall be construed to be a violation of any of the Antitrust Acts.

This language was not in last year's bill, the exemption from the antitrust laws under this bill. It was not in last year's bill.

Mr. ANDERSON. I think you are right about that.

Mr. DINGELL. Did you regard this bill during last year as requiring an exemption from the antitrust laws?

Mr. ANDERSON. I do not recall the circumstances or the reason for that having been included. Oh, yes, now I recall.

That was generally, most of that section 14 had to do with a problem that was presented by a *McKesson & Robbins* decision. You are familiar with that, no doubt.

Mr. DINGELL. Yes.

Do you regard the rest of the bill as requiring exemption from the antitrust laws?

In other words, do you regard the bill up to section 14 as requiring exemption from the antitrust laws?

Mr. ANDERSON. Well, I cannot offhand give you an answer to that question.

I think generally, that the bill in itelf is so completely sound and helpful and so seriously needed that it should not, in some future litigation, be a victim of an interpretation that would invalidate it.

Mr. DINGELL. The question I am asking is this.

Last year the bill did not have this section in it. This year it does.

Do you regard this bill as requiring an express exemption from the antitrust laws insofar as the practices set forth in the sections 1 through 13 are concerned?

Mr. ANDERSON. Well, I think that there is nothing in here that is not deserving of assurance that it will not run afoul and get a technical knockout.

Mr. DINGELL. Let me ask you this, Mr. Anderson.

I assume that you favor the purposes and intent of our antitrust laws, am I correct?

Mr. ANDERSON. On the whole, I think they are very good, and I regret that somebody is not in there asserting them against the tremendous monopoly that is being developed through the lack of this bill here.

Mr. DINGELL. I join you in endorsing the antitrust laws, and, as far as I am concerned, wherever there is a violation of the antitrust laws, it should be strictly punished. But, coming back to this, I am sure you would agree, as a matter of general principle, that the antitrust laws are important to the protection of our business community and that because of this importance, the Congress should, with the utmost of care, consider the possibility of repealing or of altering or amending these very essential statutes.

I am sure you would agree with that as a statement of general principle, would you not?

Mr. ANDERSON. I think that the Congress should, and very likely will, determine whether the need for this bill as it now stands is great enough that it should be enacted, and I do not want to be understood as saying that I believe the antitrust laws cannot be used wrongfully or that——

Mr. DINGELL. I do not think you are answering my question.

Mr. ANDERSON. I am trying to answer it very, very seriously, and I do not want to be understood as believing that the antitrust laws are made applicable to all conditions to which they should apply.

In other words, I do not think the enforcement of the antitrust laws is adequate in certain fields.

Mr. DINGELL. Now, let me ask you this——

Mr. ANDERSON. But that has nothing to do with this thing here.

I do not think that we should leave out of this bill a provision that would enable the bill to stand squarely on its own feet, be judged by what it is and what it provides, rather than be exposed to some technically based decision that would disable it, because I do not think the American economy can ever survive another collapse of the manufacturer's right to stabilize his price as a means of stabilizing his quality.

Mr. DINGELL. Coming back to this same point, though, why is this exemption from the antitrust laws in the bill this year when it was not in there last year?

Mr. ANDERSON. Well, I do not know whether I could——

Mr. DINGELL. I assume you have studied the bill last year.

Why do you in this bill put a very broad exemption from the antitrust laws?

Mr. ANDERSON. You mean you would support the bill as it was last year?

Mr. DINGELL. Why should we include this antitrust exemption?

Mr. ANDERSON. I think I have given you about the best reason I can give you, but we will have a man here.

Mr. DINGELL. I beg your pardon?

Mr. ANDERSON. I think Mr. Rothwell will be here to testify. Mr. Rothwell is much more competent to answer that question than I would be.

He is a very able lawyer and he knows antitrust, and I have not made any special study of the antitrust field, Mr. Dingell.

Mr. DINGELL. I have asked every witness that has come along why we should give an exemption to these antitrust laws, and I am asking you the same question.

Mr. ANDERSON. Well, you have some feeling that there would be some error in that exemption?

Mr. DINGELL. I go further than that.

I think it would justify and authorize a great deal of hanky-panky and worse. Now, let me get down here. You mentioned the *McKesson & Robbins* decision.

Do you manufacture and retail your own products? Do you retail the products that you manufacture?

Mr. ANDERSON. We sell only to wholesalers, and in all the years we have been in business, since 1918, we have sold only to wholesalers.

Mr. DINGELL. So you sell only to wholesalers?

Mr. ANDERSON. That is right.

We have no special interest in this provision in this bill, but I think it is a fair provision.

Mr. DINGELL. Then you do not endorse a repealer from the *McKesson & Robbins* decision, do you?

The *McKesson & Robbins* decision said that you could not manufacture, wholesale and retail and, at the same time, fair trade so as to fix the profit margin of your competitor on the retail level, and this was held to be violative of the antitrust laws, and that is what this particular language that is in here does away with.

I want to know if you happen to endorse that particular practice?

Mr. ANDERSON. The practice of the manufacturer competing with his wholesalers and retailers?

Mr. DINGELL. And, at the same time, fixing their prices by fair trade or by price fixing.

Mr. ANDERSON. As I understand it, this provides that he may do that only if he sells at the same price. He may not take advantage of them on price.

Mr. DINGELL. Now, you make the assertion that he cannot take advantage of it, but is it not a fact that he can fix the profit level so that the retailer can stay in business or not stay in business, or can fix the price at such a level that he can make an excessive profit while the retailer can barely stay in business?

Mr. ANDERSON. I think my answer to that would be that if I were in his position and undertook to do that, I would expect to lose my retail distribution, and I am quite sure I would.

Mr. DINGELL. The fact of the matter is, though, that McKesson & Robbins did it and did not, is that not right?

Mr. ANDERSON. I do not think—I am not familiar with the basis on which that decision was rendered.

Mr. DINGELL. The thing I want to understand——

Mr. ANDERSON. I did not follow that case. You see, you are specializing in one particular branch of industry which represents actually a very small percentage of the total number of people engaged in serving the public with trademarked products.

And it is the one industry out of which you can more readily generate emotional approaches to a legal consideration.

Mr. DINGELL. I think we are getting away from the point in question.

The question really here, Mr. Anderson, is:

Do you endorse a repealer of the *McKesson & Robbins* decision which stated that a manufacturer could not manufacture, wholesale and retail in competition with other retailers and could fix their profit levels and their markups and their competitive position in the industry by fixing their prices at the same time?

I want to know if you endorse that.

Mr. ANDERSON. I would say that a manufacturer might be performing a real service for his wholesalers and his retailers if he did stimulate, through his own outlets, the public interest and demand for his product, provided only he did not sell at an unfair price; that he did not hold his regular, independent resellers to a certain schedule of stabilized prices and then go out and undercut them.

I think that would be a horrible thing to do.

Mr. DINGELL. Is it not inherent in here that he is going to fix the profit levels and the markup at the point which is most advantageous to him?

Is it not fair to assume that he is going to do that?

Mr. ANDERSON. You might assume that all manufacturers would be so shortsighted that they would cut their own throats inadvertently.

Now, any manufacturer who followed that practice would lose his independent distribution. He would have to lose it, sir.

Mr. DINGELL. Now, I want to treat with you on one more point in this bill.

Mr. ANDERSON. The trouble is that the manufacturer is not alone. He does not have any sort of——

Mr. DINGELL. Let us talk about another section.

Mr. ANDERSON (continuing). Monopoly of this market.

Mr. DINGELL. Let us talk about another section of the bill.

Mr. ANDERSON. All right.

Mr. DINGELL. On page 3, line 19, subsection (8):

> When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark, the right of any person to employ such brand, name, or trademark in effecting resale of goods so identified may be revoked by the owner of such brand, name, or trademark, on written notice.

Now, before he can exert his rights and so forth, there have to be goods available for the same general purpose, am I correct?

Mr. ANDERSON. That is right.

Mr. DINGELL. Now, what does this "for the same general purpose" mean?

Does it mean another painkiller or does it mean another killer—killer of exactly the same kind, or does it mean another specific for, let us say, arthritis, or another specific of a different kind?

I think this is an important point.

Mr. ANDERSON. We are back in the drug field. Over in our field it could mean a windshield wiper that would wipe a windshield.

Mr. DINGELL. Let us go over to the pharmaceutical field.

What does it mean with regard to pharmaceuticals? Does it mean where there are two manufacturers of the same exact commodity or does it mean where there might be, let us say, aspirin in competition with a certain specific painkiller?

Mr. ANDERSON. You mean does that mean that Bufferin would not be a competitor to Aspirin?

Mr. DINGELL. That is what I am asking you.

Mr. ANDERSON. As meant here?

Mr. DINGELL. That is what I am asking you.

Mr. ANDERSON. I will tell you.

I think when you get down to that, you would have to depend on a trial of a case before a good judge with some good lawyers, and I do not think you can possibly make this bill impervious to court interpretations.

There is going to be, and the obvious intent of that was that there should be, competition.

Mr. DINGELL. That is exactly the point I am coming to.

What I am trying to get, I am not trying to make this bill impervious to attack. What I am trying to do is to find out what it means, because the day may come when it will be important, this legislative history that we are making today, to determine what this particular language means.

Mr. ANDERSON. That is right.

Mr. DINGELL. What I want to know is:

What does "for the same general purpose available to the public" mean?

Does it mean one manufacturer of the same identical item, two manufacturers of the same identical item, three manufacturers of the same identical item? Does it mean there have to be identical forces in the marketplace?

Mr. ANDERSON. I know, but what would satisfy you as establishing a real competitive force might not be another man's concept of it.

But if there are goods for the same general purpose available to the public, I think then it would be fair enough to stabilize the price.

If not, the price should not be stabilized.

Mr. DINGELL. What I am trying to find out, because in certain industries in this country competition for all intents and purposes is vanishing, and I think you recognize this fact as being true.

It is my opinion that this is true in the pharmaceutical industry, and it is my opinion in the pharmaceutical industry that in large numbers of instances there are not fair competitive situations existing where the forces in the marketplace are able to exert themselves on the price of a commodity.

What I want to know is under that set of circumstances does "for the same general purpose" authorize, let us say, the manufacturer of a pharmaceutical to initiate price fixing?

Mr. ANDERSON. We are back in the pharmaceutical field again, but let me say this.

I think that the condition that you mentioned, and your statement as to what that condition is, has some foundation. The condition is getting steadily worse, almost by the minute.

Mr. DINGELL. This is correct.

Mr. ANDERSON (continuing). Because this bill has not been in force. Now, you put this bill in force and you give the individual manufacturer the incentive to start a manufacturing business with some hope that he can make it stand up and that he can get recognition for his own integrity and the integrity of his products and that they

cannot be absolutely destroyed, that his distribution cannot be destroyed overnight by this discounter formula that I have mentioned.

Mr. DINGELL. We keep coming back to the same point. Mr. Anderson, I recognize you have made very valuable contributions to the record, but they still do not treat with the point I am asking you.

I am trying to find out, and I believe you have been pushing this bill for a long time, and I want you to tell us today what is required in terms of price competition under this bill and under the words "for the same general purpose" to make available the power of an individual to fix prices?

Mr. ANDERSON. I would not undertake to say to you that Bufferin would constitute the required competition with aspirin.

I think it would.

I think that Anacin would also compete with aspirin.

But I am not competent, and I do not think anybody else is competent, to say here that some court might hold, as they held in the *Eastman Kodak* case as between the colored film and the black-and-white film, that there was no competition between black-and-white and colored film; that it did not meet the requirements of fair trade.

Mr. DINGELL. What you are telling me, then, is that you can give the committee no guidance as to this point, is that it?

Mr. ANDERSON. No what?

Mr. DINGELL. No guidance as to this point that we have been discussing?

Mr. ANDERSON. Now, Mr. Dingell——

Mr. DINGELL. I want help on this because this is an important point.

Mr. ANDERSON. Mr. Dingell, you ought to be able, with your greater knowledge of many things——

Mr. DINGELL. This is not my bill, Mr. Anderson. You have labored mightily to bring it before this committee, and I am asking your help in construing this.

Mr. ANDERSON. But I cannot satisfy you.

Mr. DINGELL. I am not trying to cross-examine you. I am asking you as the creator of this piece of legislation to construe it to the committee today, and I am asking you to tell us what competitive forces have to exist in the marketplace before price fixing becomes available to a manufacturing of a commodity?

Mr. ANDERSON. I cannot anticipate what the court will do but I would say that I would regard Anacin and Bufferin both as competition for aspirin.

Mr. DINGELL. Now, let us say I walk in, then, with a prescription for a specific, which is the only one manufactured.

What protection—there might be two or three other specifics, but they might not be the same thing, and they might not affect your particular condition.

Mr. ANDERSON. Would they be in competition with your prescription?

Mr. DINGELL. For all intents and purposes this is the only one.

Mr. ANDERSON. Do I need price fixing just because there might be—not because there might be.

There would have to be a product for the same general purpose available to the public.

Mr. DINGELL. Another one, just two?

Mr. ANDERSON. Well, I would say one would be enough.

Mr. DINGELL. In other words, just one more?

Mr. ANDERSON. Where would you draw the line if you started down? You would have 50 or 60 and then you would get to 87.

Mr. DINGELL. Now, you believe in competition, do you not?

Mr. ANDERSON. Well, I think competition is the only thing that will salvage this economy, but not the kind of competition——

Mr. DINGELL. Right now, what you are saying is that you believe in competition.

What I am trying to find out—and I assume you would want competition to be exercised before this bill comes into play and before a manufacturer would be able to utilize it—is how much competition has to exist in the marketplace before a manufacturer can utilize the price-fixing sections of this bill?

Mr. ANDERSON. Well, that question is a good deal like asking me how long is a rope.

Now, all ropes have certain lengths.

Some of them are shorter than others and some of them are longer, and I think, if you want my own opinion, I think Bufferin would be adequate as competition with aspirin. I take both of them from time to time.

Mr. DINGELL. Thank you very much.

Mr. ANDERSON. I am just reminded that if aspirin got too confident of its position and overpriced its product—how many aspirins are there in the market today?

Mr. DINGELL. You see, Mr. Anderson, we are not dealing just with aspirin. We might be dealing with a rather unique product of which there might be just two and which might be unfairly price fixed by a pharmaceutical manufacturer without relationship to the price and without relationship to the normal forces of supply and demand in the pharmaceutical market and in a market which is dependent solely and exclusively on prescription trade, wherein the consumer has no choice whether he is going to buy or not, and where the choice of ultimately purchasing or the sale of the thing does not lie with the person who is going to consume it at all but with the doctor.

That is why I am trying to find out what competitive forces have to exist here before somebody can price fix what my constituent is compelled to buy by her doctor, and I say you have been no help.

Mr. ANDERSON. I would say in the language of the bill—I am so anxious to help you; I do not think there is anybody I would rather help—"when goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark," that is the qualifying clause.

Now, how long the rope is I do not know, and I think it is burning up a lot, if you will pardon my expression, it is burning up a lot of very, very short time that is available to complete these hearings to ask me as the, let us say, original sponsor of this principle of the bill, to ask me to assume a hypothetical condition that may come up in a court test, and to tell you that the court would or would not hold that Anacin was an adequate competitor to aspirin.

Now, I do not want to be intolerant; I try to be tolerant; but I think that is something that is unfair. I have told you what my

opinion is, and you want a guarantee written in there that nobody will pick your pocket, and I cannot tell you how to do that.

Mr. DINGELL. I do not want a guarantee written in that no one is going to pick my pocket. I just want a guarantee written in that I am going to be fairly treated.

Mr. ANDERSON. That you will be what?

Mr. DINGELL. That I will be fairly treated and that my constituents will be fairly treated if this bill becomes law.

Mr. ANDERSON. Mr. Dingell, you are asking me to assume a responsibility that God himself would not take, because He will not give you any assurance that you have not got sinners all over the place.

Mr. DINGELL. You see, Mr. Anderson, I know what the economic situation in this country is today, and I know what rights my people have under it.

I do not know what rights they are going to have under this bill.

Mr. ANDERSON. You do not know what?

Mr. DINGELL. I say I know the economic situation in this country, and I know the rights that my consumers have under it.

I do not know what rights they are going to have if your bill becomes law, and it is for this reason that I have great reservations about it.

Mr. ANDERSON. Would they not have every right with this bill enacted that they have now, and more?

Mr. DINGELL. How would my constituents get a bargain, let us say, on a specific prescription pharmaceutical if this bill goes through, and all of the prescription pharmaceuticals are price fixed by the manufacturers without the effect of the law of supply and demand?

Remember, this is your bill.

That is why I am asking you these questions, because, as I understood it, you have been laboring long and mightily to bring this bill to this committee and have been laboring long and mightily to bring this bill to the point where it will become law.

Mr. ANDERSON. Well, I think it will greatly improve the chances of your constituents to obtain for the price they pay generally for the merchandise they need much better values; it will offer them an opportunity to find in a stabilized product a consistency of value with relationship to price and integrity, on the whole, of which they cannot be assured today with manufacturer after manufacturer being brought captive to the discounters and forced to reduce his labor and material costs to stay in business.

Mr. DINGELL. Let me read you some language that came out here.

This is what an old friend of yours by the name of Dargavee said in a speech:

> Mr. Chairman, fellow druggists, the Pepsodent Co. is operating in the State of California under the California Fair Trade Act. In all that time they were operating under the Fair Trade Act, they made no attempt to enforce their contract. Like a bolt of lightning from the blue sky they informed us that the California fair trade product was canceled and the general sales manager, Mr. Kermit, came out of California and called on me in the California office to make excuses, and had with him one of the California salesmen, and I expressed my heartfelt sympathies to the two young men who were in my office because I told them they would have the toughest time any salesman had ever had in any territory.
>
> We passed a resolution at our meeting and we published that resolution in our journal and we sent the resolution to every member in California in which

we urged and advised them to discontinue the sale of any product that had canceled their fair trade contract.

Brothers, it was a slap in the face of our Fair Trade Act. It makes no difference what firm it was. It was unwarranted. It was the first cancellation, and, to my great delight and the great delight of our executive committee, all the druggists in California refused to sell Pepsodent toothpaste or Pepsodent products. They put it in the basement. Some were enthusiastic enough to throw them in the ashcan. I would not bring this out except that I want you to really understand how the sales of Pepsodent products in all California dropped off.

Now, this was cited in the Federal Trade Commission's report on fair trade, and this was just one example of how retailer pressure was utilized to compel manufacturers to raise their prices rather than lower them.

Now, if your bill goes through, what protection are we going to have as consumers and what guarantee are we going to have that this same kind of practice is not going to be utilized against manufacturers to compel them to raise prices as opposed to the forces which you mentioned today which compel them to lower prices for the benefit of the consumer, Mr. Anderson?

Mr. ANDERSON. I do not know what—I think the purpose of that activity that you have just described or that——

Mr. DINGELL. Is it a violation of the antitrust laws?

Mr. ANDERSON. That purpose was admitted.

I think it was, no doubt, a collusive attempt to force the manufacturer to fair trade his merchandise.

Mr. DINGELL. All right.

Now, what protection are you, Mr. Anderson, going to have to protect the Anderson windshield wipers from the same exact situation if this bill goes through?

What protection is in this bill to protect you from that and so that you can protect the consumers from inordinate prices, from price gouging and so forth?

Where is the protection in this bill that guarantees that you will not be put to this pressure just as Pepsodent was? You want to remember that Pepsodent is a bigger manufacturer than the Anderson Co.

Mr. ANDERSON. Yes, I guess they were at that time.

Mr. DINGELL. And they were forced to knuckle under.

Mr. ANDERSON. But I do not see how you apply that in any sense to this bill.

Mr. DINGELL. What guarantee is in this bill that the same thing will not happen? You cite chapter and verse.

Mr. ANDERSON. You mean you could write anything in this bill that would guarantee——

Mr. DINGELL. I am asking you where is the protection?

Mr. ANDERSON (continuing). That there would not be a collusive effort to force the manufacturer to fix his price at a certain figure?

I would say that when that time comes, if that ever happens, you can quite consistently ask your people over in the Department of Justice to do something about it.

Mr. DINGELL. As a matter of fact, this bill gives specific exemption from the antitrust laws on page 6, line 22:

"No exercise of any right or"——

Mr. ANDERSON. Oh, but that would not be an exercise of a right.

Mr. DINGELL (continuing). "Shall be construed to give a"——

Mr. ANDERSON. That would not be an exercise of a right. That would be an abuse.

How can you argue that?

Mr. DINGELL. What guarantee will we have?

Mr. ANDERSON. The same kind of a guarantee that you have got that nobody will ever pick your pocket.

Mr. DINGELL. There are laws against picking pockets.

Mr. ANDERSON. There are laws against collusive price fixing, too.

Mr. MACK. Mr. Anderson, this bill, as I understand it, would permit the competitive forces to operate freely, that is, free competition, would it not?

Mr. ANDERSON. It does, and it does most meticulously, and any manufacturer that gets offsides is going to have competition.

There is always somebody in the same field fighting for position, fighting for volume, fighting for the respect of his distributors, his resellers and the public, and you cannot legislate into existence any substitute for that competition, sir.

All you can do is to see that it is fair competition. That is the thing that is going to protect the consumer: That whenever anybody starts to abuse the consumer by overcharging, the competition will come in and take his business away from him, take his distribution away from him, take his public away from him.

Mr. MACK. I think the thing that was bothering my good friend and colleague a few minutes ago is the fact that he felt that there would not be competition at the retail level, and that he was concerned about the merchandise or goods for the same general purpose being available at the retail level.

And if that situation does not exist, then the manufacturer would not be able to stabilize his price?

Mr. ANDERSON. That is right.

Mr. MACK. And so that protection is in the bill?

Mr. ANDERSON. It is in the bill, I think, definitely.

Mr. MACK. I say that would be provided, that protection is provided?

Mr. ANDERSON. It is.

Mr. MACK. It is in the bill that is before us.

And, in addition to this, there would possibly be some nonstabilized products also in competition with the stabilized products being sold at the retail level?

Mr. ANDERSON. The very condition would invite competition both from stabilized products and from unstabilized products, and we believe that there is a need in the market for lower grade products to meet a limited budget or to meet a temporary requirement.

And, in that connection, there has been told at many meetings across the country the story of the mother who spent many days with her son and his newlywed wife going about and selecting furniture for their home. One evening a neighbor woman came over and looked around a bit, sort of a nosy person. She saw a mattress of a make that she recognized, and she said to the mother:

"Why did you select that mattress? That mattress I know. I know that brand. It will not last."

And the mother said:

"Neither will the marriage."

So that story has been used as an example of why there must be lower priced and nonstabilized products. Speaking of mattresses, Simmons is an outstanding example. Simmons has always fair traded in good faith (wherever fair trade has been available) has fair traded its "Beautyrest" mattress. I understand Simmons makes, including private brands, possibly 60 to 75 different specifications of mattresses. Anybody can buy a Simmons mattress according to his budget or his requirements, his needs.

He can buy a mattress of Simmons or of some other manufacturer's make, either private brand or company brand, just about any kind of a mattress he wants. Simmons has provided in part its own competition under fair trade in that manner, and it has been very satisfactory.

I do not think anybody has been injured by it at all.

Mr. MACK. I have perhaps one other question.

I would like to know if it is your opinion that the enactment of this legislation would encourage the development of private brands?

Mr. ANDERSON. I do not believe it will. I think the present chaotic condition out there has done more to encourage private brands than anything else, because the outfit that can afford a private brand, and in some fields there are manufacturers who will simply change the type of package and sell you the same product to resell under your own brand. You do not have to have a terrific volume to be able to get that kind of a product, but if your favorite trademarked product that has been operating under stabilized prices, whether fair traded or however, if that product through discounters pressures has gotten you into so much trouble and has so discredited you and has lost its integrity as to quality under the pressures of the discounters, you have got every reason in the world to seek a truly stablized brand or take to a private brand, because that private brand will be sold only at your price.

The big mail-order houses have got that condition.

I think instead of increasing the number of private brands, that this act will be quite likely to give the public such assurance as to stabilized quality in manufacturers' brands that stabilized brands will become most popular and that the private brand will not necessarily improve its position in the market.

I think it will be much better for the public to have a comprehensive competitive condition like that developed.

Mr. MACK. Thank you for your testimony, Mr. Anderson.

Mr. ANDERSON. Thank you very much.

Mr. DINGELL. By the way, Mr. Chairman, just one question.

Mr. Anderson, if I were to survey 35 people in my district and they were to tell me that they did not favor this particular bill, would you regard that as a fair sampling on which I could base my opposition to this bill?

Mr. ANDERSON. I have had a pretty strong feeling about surveys. You see, Manpower made a survey in your district, the same number of people that they surveyed in each of the other districts.

Mr. DINGELL. I think the question was if I were to survey 35 people in my district and the bulk of them, the majority or all of them, opposed it, would you say that that was a sufficient basis on which I could oppose this particular bill?

Mr. ANDERSON. I would say that it would depend a great deal on how those people were selected.

If they were selected by a disinterested party that had no objectives in connection with this bill, and if they were selected at random from telephone directories, I would say you would have some difficulty in getting 35 people that you would not have about 30 of them favoring this bill.

Mr. DINGELL. Just say if I solicited the opinion of 35 people at random and they opposed this bill, would that be a sufficient basis for me to oppose this piece of legislation? I represent 328,000 people, and I just want to know if I survey 35 people from the telephone book or by any other standard you would care to make, and they told me to oppose this bill, would that be a sufficient basis on which I could oppose this piece of legislation?

Mr. ANDERSON. Let me put it this way, if you do not mind.

We asked Opinion Research, the Claude Robinson outfit——

Mr. DINGELL. I am not——

Mr. ANDERSON. Wait, just a minute, please, I am going to answer it in my own way, if you do not mind.

Mr. DINGELL. I would just like to have you answer the question.

Mr. MACK. I think the witness should be permitted to answer it in his own way.

You may proceed.

Mr. ANDERSON. We asked Claude Robinson of Opinion Research how many people it would be necessary for us to survey in the United States, random surveys, random selections, to get an accurate cross section. He told me that beyond any question 1,500 people would give us within 1 or 2 percent of an accurate cross section.

We asked Roper. He told us the same thing.

Now, we went to 15,000 people with this survey, and the questions were developed with the assistance of both Manpower and Ernst & Ernst to get them satisfactory to them so that they would be willing to take their share of the responsibility, and Manpower made the survey, and they mailed all of the pollsters reports directly to Ernst & Ernst, and Ernst & Ernst certified——

Mr. DINGELL. Let us make it abundantly clear that I am not discussing with you the survey that you made. I am asking you this question. I think it is a fairly simple question. If I survey 35 people out of the 328,000 people in my district and they said, "Vote against House Joint Resolution 636, Dingell," or a substantial majority of them said that, would I have a fair basis on which I could oppose this legislation?

Mr. ANDERSON. I think if that were confirmed by the net results, by the overall results, obtained from similar surveys in every congressional district in the United States——

Mr. DINGELL. I am just asking you if I came up to 35 people in my district and said, "Should I vote to oppose it"——

Mr. ANDERSON. You would have to make that decision for yourself.

Mr. DINGELL (continuing). Would I have a fair basis on which to oppose it?

Mr. ANDERSON. You would have to make that decision for yourself. I could not make it for you.

Mr. MACK. Mr. Keith?

Mr. KEITH. No questions, Mr. Chairman.

Mr. ANDERSON. Am I excused?

Mr. MACK. Yes, I would think that you should be. You have been on the witness stand now for about 3 hours today.

Mr. ANDERSON. Not from choice.

Mr. MACK. We have found your testimony very interesting. I think you have made an excellent statement, and because of the questions that have been raised today, we have had a good opportunity to discuss the bill itself. I think it has been very helpful to the committee, which has the responsiblity of making the final decision on this legislation.

I want to thank you for your testimony and your patience and the time which you have spent with us today.

Mr. ANDERSON. Thank you very much, Mr. Chairman. That is very much appreciated, and I only wish I could be of more help.

Mr. MACK. Our next witness is Mrs. Daphne Leeds. We will be happy to hear your testimony.

STATEMENT OF MRS. DAPHNE LEEDS, WASHINGTON, D.C.

Mrs. LEEDS. Thank you very much, Mr. Chairman.

I have prepared a statement and it has not been duplicated. Therefore, it is not available.

So, if it meets with your satisfaction, I will just proceed with it.

Mr. MACK. Will you identify yourself for the record? Are you appearing as an individual, a housewife, or a representative of an association, whatever your situation is?

Mrs. LEEDS. Thank you very much.

My name is Daphne Leeds. I am a lawyer and a consultant in the field of trademark law and unfair competition with an office in Washington, D.C.

From August 31, 1953, to December 5, 1959, I served as Assistant Commissioner of Patents in the U.S. Department of Commerce, where I was charged with the responsibility of administration of the trademark registration provisions of the Trademark Act of 1946.

This act resulted from 8 years of study, hearings, and reports by congressional committees, and during that period I served as a member of a drafting committee which coordinated the results of the studies of various congressional committees, professional associations, and trade associations.

I have published a book on the law, and I have also done the commentary which is published in the United States Code Annotated, which just precedes the Trademark Act of 1946 in the volume title 15.

Today I appear in support of the quality stabilization bill as a lawyer representing no clients, but believing that the legislation would clarify and properly strengthen the trademark owner's right to preserve and expand his goodwill symbolized by his trademark, and would provide a means whereby small retailers might be enabled to compete with those who have greater purchasing power and who, because of great volume and relatively lower overhead, can sell at a lesser markup.

My appearance, you might say, is pro bono publico.

This bill is generally referred to as the quality stabilization bill, just as the Miller-Tydings Act and the Maguire Act were referred to as Fair Trade Acts.

The latter were directed solely to resale price maintenance, and the present bill is a resale price maintenance bill coupled with provisions making unlawful bait merchandising practices and product misrepresentations by resellers of branded goods with intent to deceive purchasers, all of which, taken together, create the basic competitive problem for small business.

I do not subscribe to the theory that unless a trademark owner is permitted to establish and maintain resale prices on his trademarked merchandise, the quality of the merchandise will necessarily deteriorate.

In some cases it will, but I believe that there are more logical and more rational and more pressing reasons for Congress to act favorably on this legislation.

The status of pricing under the law has become a jungle where the American business community is at the mercy of all sorts of forces, even of agressive bureaucratic and often arbitrary administrative agencies and courts whose lack of sympathy with an act of Congress seems to justify them in their own minds in giving it a construction which cannot be rationalized in terms of any policy reasonably attributable to Congress.

The lawyer today is unable to advise his clients with any degree of certainty so far as pricing is concerned. The result is a chaotic situation or condition of disorderly marketing, accompanied by consumer confusion and loss of confidence, by the closing of small retailer businesses, and by substantial injury to the goodwill of trademark owners.

It is essential, as I view it, for Congress to speak now and establish a national policy which will make possible a system of orderly marketing for trademarked merchandise, of building and maintaining consumer confidence, of preserving and protecting the goodwill of a producer of goods as symbolized by his trademark, and of providing a means whereby small retailers can compete for customers in their communities.

What is a trademark?

It is not anything technical or complex or monopolistic. It is a brand name or a symbol which identifies the goods of one person and distinguishes them from another.

It is a word or a symbol by which the consumer identifies and buys that which has satisfied him in the past and by which he avoids that which was unsatisfactory.

It is a tool of competition which supports freedom of choice in the marketplace, and it is the symbol of the goodwill of the producer of the goods identified by it.

As branded merchandise moves through the channels of trade from producer to retailer to consumer, title to the physical property changes hands but title to the trademark and the goodwill which it symbolizes remains in the producer.

The primary aim of the bill now under consideration is to protect that goodwill, and the restrictions of the bill are an appropriate means to that perfectly legitimate end and not an end in themselves.

In essence, the bill provides that B's right to employ A's trademark in selling or advertising or offering for sale A's goods may be revoked if B has employed the mark in bait merchandising or if he is selling the goods with intent to deceive purchasers and has made misrepresentations concerning them or has sold, advertised, or offered for sale A's goods at a price different from A's currently established resale prices.

And then, of course, you will recognize that there are remedies for both parties prescribed, but we need not go into that.

Bait merchandising practices and misrepresentations with intent to deceive are clearly injurious to the public interest and no less injurious to the goodwill of the brand-name owner.

These two provisions of the bill under consideration, however, have not attracted much opposition.

This leaves the matter of resale price maintenance of trademarked items as the focus of attention.

During the past half century this Nation has witnessed an unparalleled concentration of industry wherein the small manufacturer finds it increasingly difficult to survive. During the same, or perhaps a lesser, period, we have seen the corner grocers, the neighborhood drugstores, the community hardware stores, and other independent retailers diminish in number and in some places disappear from the local scene. In their places are the chains, cutrate and discount operators, which sell everything from soup to nuts.

The small retailer, with the services customarily offered and expected of him, finds it increasingly difficult, if not impossible, to survive.

And so do the Community Chests and other civic and charitable organizations within the communities, because it is the independent, small retailer who has been the backbone of them.

The impersonal, serve-yourself, no-service-performed operations are taking over, and, as this concentration continues, these big retailers may ultimately control so much of the market that they will be able to dictate quality as well as price, and the consumer will be at their mercy. The small retailer with the jobs and the services he provides will eventually be a rarity and may become extinct.

Even today he finds it increasingly difficult to maintain his own goodwill against the charge of his customers that he is asking unconscionable prices, when he is merely seeking a fair profit.

This legislation would make possible continued competition between the small retailer and the chain and the cutrate and discount operators, so far as trademarked items are concerned.

Typically, the market for these trademarked items is created by the trademark owner through his national advertising and promotion, and he should be entitled to control his own market to the extent that his distribution be orderly and his retailers be able to compete with one another.

Competition has become a fetish in some quarters, but in those same quarters no discrimination seems to be made between fair competition and unfair competition, nor between competition which promotes the public interest and that which does not.

Unbridled competition was never envisaged by the founders of our system of economy. The evils, the real evils, if any exist, of a pro-

ducer establishing a resale price for his brand of merchandise, have never been set forth to my satisfaction.

The producer must compete with all other producers of goods sold in free and open competition. With a price-oriented and a quality-oriented consuming public, he must compete both in quality and in price, and I have far greater confidence in the American public to determine good quality and a fair price than I have in Washington bureaucracy, of which I once was a part.

If a manufacturer establishes a resale price which is too high, his goods will not move, and if it is too low, his production will become unprofitable.

But, most importantly, he will maintain his goodwill among his customers at each level of distribution if he has a single price at each level, because all will have some assurance that they are being treated by him the same as all others.

Moreover, his goodwill among consumers will be preserved because they will have freedom of choice among retailers as well as among products, with the assurance that when they buy the trademarked merchandise, they are getting the same quality at the same price, no matter where they buy.

No justification has ever been offered for requiring self-competition under a given trademark.

The testimony of Chairman Dixon of the Federal Trade Commission this morning provided a strange inconsistence to me, where he expounded at great length on the purposes of the Commission to foster competition, and then he concluded that this legislation would, by reason of its permissive provisions, under which resale prices of trademarked items might be established by the trademark owner, have a devastating effect upon competition.

He suggests, however, that if there were a provision in the bill to provide for Government establishing the price or the profit to be made at each level of distribution, he personally would support it.

Does this suggestion represent an effort to foster and encourage competition or an effort to enlarge still further the power of Government?

Mr. Dixon failed to show how governmental authority in this field would add to the total competitive potential.

This bill will not prevent the reseller of a branded commodity from selling the commodity alone at any price he pleases. It would interfere only when he sells with the aid of the goodwill of the trademark owner, and it interferes then only to protect that goodwill against injury, yet it proceeds on the very sound theory that the sale of the trademarked goods at less than the trademark owner's established price is an assault upon the goodwill of the trademark owner.

There is nothing in the bill to preclude the reseller from removing the brand or trademark from the commodity, thus separating the physical property which he owns from the goodwill which is the product of another, and then selling at his own price, provided he can do so without utilizing the goodwill of the trademark owner as an aid to that end.

Resellers will not be obliged to buy the trademark commodities but their voluntary acquisition of them will carry with it upon every prin-

ciple of fair competition, assent to the requirements of the bill with consequent liability under which the acquisition was conditioned.

There is, likewise, nothing in the bill which would prevent any reseller from having manufactured for him any commodity of any quality he wishes to be sold at any price he desires, so long as it is not identified by, or associated with, the producer's trademark which identifies the product for which retail prices have been established.

Finally, there is nothing in the bill which would require a trademark owner to establish resale prices. He, too, would have freedom of choice.

This legislation is a purely voluntary measure with respect to resale prices, providing only that if a producer of trademarked goods establishes resale prices for those goods, resellers for such goods under the trademark must observe the prices under penalty of having revoked the right to employ the trademark in the resale of such goods in the future.

Back in 1952, the Department of Commerce reported on the then pending Maguire Act, which provided for fair trade laws in the various States. They filed a report, and I would like to paraphrase their conclusions of that report. They stated:

There is reason to conclude that the case against resale price maintenance is more theoretical than real. Resale price maintenance is beneficial to small business. Facts regarding its causing higher prices in total are unconvincing.

Monopoly does not result from resale price maintenance, and resale price maintenance has a stabilizing influence on the economy.

That was the view of the Department of Commerce in 1952.

Now, as I sat here this afternoon, Mr. Chairman, and listened to Mr. Dingell ask some questions, it occurred to me that it might be appropriate if I commented somewhat on some of his questions.

With your permission, I would like to do that.

Mr. MACK. Yes. You have completed your formal statement I presume.

Mrs. LEEDS. Yes.

Mr. MACK. If you care to make additional remarks, that will be very fine. I am sure that Mr. Dingell will want to be present to hear your remarks.

Mrs. LEEDS. Thank you very much.

The first thing I would like to refer to is that provision in the bill which refers to goods usable for the same general purpose. I personally would like to see the language changed to read "free and open competition with goods of the same general class," because that is the language of the McQuire Act, and it has a substantial body of interpretive decisional law back of it at this time, and I think that there would not be the question of interpretation which might arise under the present language of the bills under consideration. Free and open competition would, I think, serve to answer some of the questions which were in Mr. Dingell's mind concerning the pharmaceutical industry particularly.

With regard to that provision in section 14 of the bill which Mr. Anderson commented was directed toward the *McKesson & Robbins* decision, I personally believe Congress should overrule the *McKes-*

son & Robbins decision. It was a split court which arrived at the decision, and I feel that it provides very unsound guidance for American business, because if a manufacturer is going to fix a price which will drive his retailers, his independent retailers, away from his product, he, it seems to me, has that right, because he can refuse to sell together. He can open up his own retail establishments across the country if he wishes to. He doesn't have to sell to anybody else.

With regard to the antitrust language, the exemption from the antitrust laws, Mr. Dingell inquired whether or not Mr. Anderson felt that this kind of vertical price fixing today was in violation of the antitrust laws, and as I pointed out in my more formal statement, Mr. Chairman, this whole field is a "jungle," and I don't think anybody knows whether it is in violation of the antitrust laws. Even if it isn't today, on this case-by-case basis under which the Department of Justice and the Federal Trade Commission operate, tomorrow it may be.

So it seems to me that now is the time when Congress should say specifically, once and for all, that this kind of vertical price fixing on trademarked items is not a violation of the antitrust laws.

Those were the three things which I wished especially to comment on.

Mr. MACK. Thank you. Are there any questions?

Mr. DINGELL. Yes, Mr. Chairman.

Mr. MACK. Mr. Dingell?

Mr. DINGELL. You indicated that you feel that the *McKesson & Robbins* decision should be repealed by statute?

Mrs. LEEDS. I think it should be overruled, yes, sir.

Mr. DINGELL. In other words, you feel that it is wise for the Congress to change the antitrust law decisions case by case as need be by statutory enactment?

Mrs. LEEDS. Well, I wouldn't say that I think that the Congress should do it on a case by case basis, but I was much impressed by Mr. Harris' statement this morning that perhaps there should be some guide rules about this by Congress on the basis of the recommendation of the enforcement agencies.

Mr. DINGELL. I see. You think we ought to then take the council of the enforcement agencies with regard to the antitrust laws, or do you feel we ought to take the council of those who violate the antitrust laws, in consideration of law?

Mrs. LEEDS. I don't think I quite understood your question.

Mr. DINGELL. Well, your suggestion is instead of taking the recommendations of the Department of Justice, we should take the recommendation of McKesson & Robbins. This is a rather novel thing.

Mrs. LEEDS. No, I am not making that——

Mr. DINGELL. McKesson & Robbins violated the Antitrust laws, did they not?

Mrs. LEEDS. Well, five members of the Supreme Court said yes.

Mr. DINGELL. Yes, and I believe that constitutes a majority decision.

Mr. LEEDS. Yes.

Mr. DINGELL. And I believe for all intents and purposes that constitutes the law, am I correct?

Mrs. LEEDS. Well, it constitutes the law of that case, yes, sir.

Mr. DINGELL. Would you say then that we should take the view of the four who dissented?

Mrs. LEEDS. No, but what I am saying is that Congress has the right to make the law. The Court doesn't. The Court merely interprets, and Congress is certainly empowered to make the law as it sees fit.

Mr. DINGELL. I see. You feel then that it is appropriate for the manufacturer to manufacture, wholesale and retail, and at the same time fix the price and the profit margin for the small retailer who might compete with him. You feel that this is a sound practice, am I correct?

Mrs. LEEDS. Yes, so long as he himself sells at those same prices at each level of the distribution.

Mr. DINGELL. Are you an antitrust lawyer, by any chance?

Mrs. LEEDS. No. I have had some experience, but I don't consider myself an expert.

Mr. DINGELL. Did you ever practice antitrust law in the Government?

Mrs. LEEDS. No.

Mr. DINGELL. Or outside the Government?

Mrs. LEEDS. I have rendered some opinions outside the Government, yes.

Mr. DINGELL. How many antitrust cases?

Mrs. LEEDS. I have never tried a case, sir. I have rendered some opinions.

Mr. DINGELL. Have you studied the *McKesson & Robbins* decision?

Mrs. LEEDS. Yes, I have.

Mr. DINGELL. You have. What was the finding of the court in that case, and what was McKesson & Robbins enjoined from doing?

Mrs. LEEDS. They were enjoined from competing at the same level, competing at the retail level with their own independent retailers, for for whom they were establishing prices under the fair trade laws.

Mr. DINGELL. That was a consent decree, was it not?

Mrs. LEEDS. Oh, no, sir.

Mr. DINGELL. As a matter of fact it was. I would suggest that it would be very useful for you to look at it. You will find that in McKesson & Robbins the decree was a consent decree, and McKesson & Robbins expressed the consenture to the conditions which were fixed by the Department of Justice, and they agreed that in the future they would not wholesale manufacture and retail at the same time fix prices.

Now do you think that we ought to thereby, that we ought to here in the Congress of the United States relieve McKesson & Robbins from a consent decree, to which they expressly agreed?

Mrs. LEEDS. No. I am talking about what the Supreme Court said in its opinion.

Mr. DINGELL. Well, I am just saying that if there was a consent decree rendered in the case where it was rendered by consent of the parties, do you think that the Congress ought to repeal that and give McKesson & Robbins some special benefit, after they have made a deal with the Department of Justice to absolve them from their deal

and agreement with the Department of Justice? Do you feel that that is sound legislative policy for this Congress?

Mrs. LEEDS. No, sir, I do not, but I am not talking about that.

Mr. DINGELL. As a matter of fact, you don't think it is sound legislative policy at all, do you? It would be a very bad principle to let McKesson & Ribbons welsh on a consent decree of this kind; would it not?

Mrs. LEEDS. Yes, sir, but I am not talking about McKesson & Robbins specifically. I am speaking about what the court stated to be the rule of law.

Mr. DINGELL. Thank you, Mr. Chairman. No further questions.

Mr. MACK. Mrs. Leeds, thank you very much for your testimony.

Mrs. LEEDS. Thank you.

Mr. MACK. Mr. S. Walter Foulkrod, executive director and counsel, Fair Trade Council of Delaware Valley.

STATEMENT OF S. WALTER FOULKROD, JR., EXECUTIVE DIRECTOR AND COUNSEL, FAIR TRADE COUNCIL OF DELAWARE VALLEY; ACCOMPANIED BY ALAN J. VOGENBERG, PRESIDENT, FAIR TRADE COUNCIL OF DELAWARE VALLEY, BRISTOL, PA.

Mr. FOULKROD. Mr. Chairman, my name is Walter Foulkrod, Jr., and I am from Philadelphia, Pa. I am an attorney at law and my office is located at 1500 Walnut Street, Philadelphia, Pa. It is my privilege to be executive director and counsel for the Fair Trade Council of Delaware Valley on whose behalf I appear and offer for the record these comments.

There is with me today, seated on my left, Mr. Alan J. Vogenberg from Bristol, Pa., President of the Fair Trade Council of Delaware Valley, and he is also here today with me as a member of and representing the Mill Street Business Association of Bristol, Pa., and the Mill Street Business Association takes in practically all of the business district of Bristol.

The Fair Trade Council of Delaware Valley is a nonprofit corporation dedicated to the advancement of fair competitive practices. The membership consists of retail trade organizations, whose members are engaged in retail trade in the Delaware Valley area.

Mr. Chairman, you probably are aware that the Delaware Valley area comprises part of southeastern Pennsylvania, western and southern New Jersey and the State of Delaware. The area includes a population of over 4 million people.

Permit me to express the appreciation of the members of the Fair Trade Council of Delaware Valley for the privilege of presenting the following facts and conclusions in support of House Joint Resolution 636 and H.R. 10335.

I shall not attempt to point out the inadequacies of the present Federal law or the ruinous, chaotic conditions in those States which do not have adequate laws suppressing various methods of unfair competition. Other persons appearing before this subcommittee either have or will do this.

Mr. Chairman, I have prepared and have presented for the record a prepared statement, and I would like now to briefly read a part

from that prepared statement and supplement the record with these additional comments.

I listened with great interest to the testimony of Mr. Paul Rand Dixon, Chairman of the Federal Trade Commission, given before this subcommittee this morning.

You will remember that Mr. Dixon said that:

> It is my belief that the enactment of the subject bills and resolution, both of which seek to protect brands, names, and trademarks, may well result in a market increase in the offering for sale under private labels identical goods to those which are sold under labels bearing such brands, names, and trademarks.

It is a fact, Mr. Chairman, the manufacturers of products bearing a brand, name, or trademark expend millions of dollars each year in advertising and otherwise promoting the sale of such products.

It is apparent, at least apparent to me, sir, that no manufacturer of a product bearing a brand, name, or trademark would establish, under this subject legislation, a retail price for his product which would permit an intrusion upon his proprietary interest in the brand, name, or trademark by opening the door for the use of private brands.

It is therefore unrealistic to contend, as did Mr. Dixon, that the establishment of retail prices by manufacturers of products bearing a brand name, name, or trademark would place retailers in a disadvantageous position with regard to private brands.

Mr. Anderson, who testified before this committee a few minutes ago, in answer to a question gave it as his opinion, and in my opinion he is learned from many years of experience in marketing, that the subject legislation would not increase the use of private brands.

I was happy to hear Mr. Dixon say that the small businessman is in considerable trouble in this country, and I believe, Mr. Chairman, that that is an accurate statement, that the small businessman is in considerable trouble in this country.

Mr. KEITH. Mr. Chairman, I don't think you want the record to read quite as it might sound, that you are happy to hear someone say that the small businessman is in tough straits.

Mr. FOULKROD. No, I do not, sir.

Mr. KEITH. I understand the way you meant it.

Mr. FOULKROD. Thank you, Mr. Congressman. I was happy to hear what Mr. Dixon admitted.

Mr. KEITH. Thank you.

Mr. FOULKROD. Thank you sir.

When I heard the testimony in support of the quality stabilization bill before the Senate subcommittee, a member of the subcommittee, for whom I have the highest regard, stated to the Senate subcommittee that there were 17,000 business failures in the United States in 1961, and that of the 17,000 business failures, 50 percent of them were retailers.

In my opinion, and I so state to the committee, that the subject legislation would go a long way, if not absolutely abolish the law of the economic jungle with regard to the marketing of trademarked products.

I think it would go a long way to abolish the predatory price cutting. I think it would go a long way to abolishing loss leaders and bait merchandising, and I believe that if we could abolish those by legislation of this type, not only would the manufacturer be helped, not only would

the retailer be helped and all modes of distribution be helped, but I believe, sir, that the consuming public would be protected.

Therefore, in the brief time allotted me, I would urge upon this subcommittee expeditious approval of the subject legislation to the end that it may be considered by the full committee, to the end that it may be considered by the House of Representatives and become law as promptly as possible.

I have carefully studied the proposed legislation and, as a lawyer, I am convinced and so state to this subcommittee that, if the proposed legislation is enacted, it will suppress certain methods of unfair competition, and will accomplish those results mentioned by Mr. Madden when he introduced the bill. At that time, Mr. Madden said in part:

> The American system of product distribution is in the process of being disintegrated. The most efficient distribution system in the world is being steadily undermined. The Senate Small Business Committee has reported that small business failures—bankruptcies—businessmen giving up the struggle for survival—climbed in 1961 to the highest point since 1933.
>
> There are about 2 million retails in America. Some 88 percent of them operate in only one location from one store. About 70 percent individually own their own businesses. These are not huge outfits—over 75 percent have annual sales under $100.000.
>
> There are 165,000 merchant wholesalers in the United States. Approximately 91 percent of them are active owners of unincorporated businesses; 71 percent operate from only one building. These are not huge outfits either—77 percent have sales under $1 million.
>
> Out of these peoples—individual owners of one-unit businesses—139,000 decided in 1959, according to statistics from the House Small Business Committee, that doing business in today's jungle was just not worth the kicking around they were getting. It is getting worse every day. The Chicago Tribune on February 13 reports that 400,000 small business firms failed last year.
>
> * * * a good part of this frightening rate of failure is due to predatory, unfair, destructive competition.
>
> Unrestrained price slashing is rapidly disabling labor, industry, resellers, and the public. Our entire economy will continue to deteriorate at a time when leading economists and statesmen agree we need instead, economic growth to strengthen our Nation for survival.
>
> Enactment of this quality-stabilization legislation will contribute more toward restoring employment than any other legislation that can be enacted by Congress. When a manufacturer is forced to make 15 men do the work of 20, and is forced to employ cheaper and less skilled labor as well as inferior materials, both American labor and the American consumer are injured where it hurts the most. Hundreds of smaller manufacturers of trademarked products have been forced to close their factories or downgrade the quality of their products to suit loss-leader operators as a means of staying in business.

How this is to be done is set forth in the bill in complete and unambiguous language.

I shall confine my comments to the conditions prevailing in the Delaware Valley area. I shall do this with the knowledge that the same or comparable conditions are duplicated in most, if not all other States which do not have adequate quality stabilization laws.

Technically, Pennsylvania, New Jersey and Delaware have laws permitting the establishment of minimum resale prices. Yet the courts have so construed our laws that the relief intended to be afforded has been nullified in several important respects. The relief intended was that of fairplay in the marketplace—through restoration of decent, moral sales practices. Now, however, many retailers who possess certain economic advantages are free to employ every competition destroying device known to those who practice the law of the jungle. They may now, with impunity, offer nationally

branded products as loss leaders for the purpose of luring customers to whom to sell unknown, substandard, or deteriorated products at exorbitant prices.

These are costly devices to retailers. They are schemes in which only merchants with abundant capital can participate. Widespread practices of this type have imperiled the average retailer in Pennsylvania.

I think it is actually reported that bankruptcies in our area involving small businesses, particularly small retailers, are occurring at an alarming rate. Some of these insolvencies are directly traceable to predatory price cutting, the unconscionable use of loss leaders and other such destructive practices. The small merchant can neither compete with nor retaliate against these tactics. It has been reliably reported that in 1961 the average drugstore net income was only 5.3 percent of sales. Any appreciable loss of sales volume or further reduction in basic rate of profit could result in economic catastrophe for such small retailers. Nevertheless, substantial sales volume is being transferred to those retail outlets who can afford the initial costs of these nefarious merchandising schemes, which costs are recaptured by foisting on an unsuspecting public unbranded, unknown, substandard—and often—obsolete, deteriorated commodities at prices far in excess of real worth.

I am in complete accord with other comments made by Mr. Madden at the time of the introduction of the proposed legislation. Mr. Madden also said:

> Enactment of the quality stabilization bill in this session of Congress will help greatly in the restoration of quality manufacturing and quality distribution—while providing the consumer at the same time much needed protection and relief against shady and deceptive practices in the marketplace.

The Fair Trade Council of Delaware Valley, therefore, appeals to you to give expeditious approval to the proposed legislation. If you do so, you will honor the just and the decent. You will lift up retailing in our area and throughout the Nation to the level of fair dealing. You will honor the opportunity to sell the commodities of the Nation's reputable producers at a fair and reasonable price, and at the same time receive a fair and reasonable profit, and at the same time protect the consuming public.

I shall be happy to submit to any questions that the subcommittee may wish to ask of me, and I would like to call upon Mr. Vogenberg who is with me for assistance in answering those questions.

I would like to point out to the subcommittee that I represent groups of retail businessmen in the Delaware Valley area. I do not speak for any manufacturer. I do not speak for any wholesaler, but I do believe that I can speak for some consumers with whom I have talked, who have been lured into buying bait merchandise in substitution of the legitimate trademarked products of the legitimate manufacturer.

Mr. MACK. Thank you very much. You have made an excellent statement. You are executive director of the Fair Trade Council of Delaware Valley; is that right?

Mr. FOULKROD. I am, Mr. Chairman.

Mr. MACK. And Mr. Vogenberg is the president?

Mr. FOULKROD. He is, Mr. Chairman.

Mr. MACK. Very good.

Are there any questions?

Mr. KEITH. No questions.

Mr. MACK. Mr. Dingell?

Mr. DINGELL. Yes. You have endorsed fair trade in the past, haven't you?

Mr. FOULKROD. I have, sir.

Mr. DINGELL. Do you endorse fair trade because it essentially fixes prices on all levels of distribution? Am I correct in that?

Mr. FOULKROD. No, I can't answer that, sir, in the affirmative, but I can say this to you, sir. I think fair trade as we have it in those States embraced in the Delaware Valley area has worked well.

Mr. DINGELL. Fair trade has fixed prices, has it not, in States where it has been?

Mr. FOULKROD. I think fair trade as we know it, Mr. Dingell, has established minimum retail prices.

Mr. DINGELL. I see. This bill does not establish minimum resale prices?

Mr. FOULKROD. It does not, sir. It establishes the price.

Mr. DINGELL. But one of the reasons that you and your organization have endorsed fair trade has been because it has fixed prices, have you not?

Mr. FOULKROD. We have heretofore endorsed fair trade because it did go part way.

Mr. DINGELL. Toward fixing prices.

Mr. FOULKROD. Toward curing an ill or an evil.

Mr. DINGELL. Yes, but it did it by fixing prices, did it not?

Mr. FOULKROD. No, sir.

Mr. DINGELL. Would you have supported then the last fair trade bill if we had taken fixed prices out of it?

Mr. FOULKROD. I would support a fair trade——

Mr. DINGELL. Without fixed prices?

Mr. FOULKROD. I would prefer to have the fixed price clause in the bill as we have it in this one.

Mr. DINGELL. Would you support this bill if we eliminated the price-fixing sections of it?

Mr. FOEULKROD. I don't believe, sir, that the bill would accomplish its objective, if we took out the established price subsection.

Mr. DINGELL. I see. So we come back to this. The reason you support this bill is that it fixes prices, am I right, just the same as fair trade fixes prices?

Mr. FOULKROD. The reason I support this bill is because it fixes a price which, in turn, establishes an orderly, economic process of marketing goods, which in turn will protect the consumer.

Mr. DINGELL. Conceding for purposes of the argument that the bill would establish orderly marketing, it does fix prices, and that is the way you achieve your orderly marketing, isn't that correct?

Mr. FOULKROD. I think so, sir.

Mr. DINGELL. It is the same thing with regard to fair trade. It fixes prices, and thereby establishes orderly marketing, and that is the reason you have endorsed fair trade.

Mr. FOULKROD. I cannot concede, sir, that fair trade fixes prices. I will concede——

Mr. DINGELL. Does fair trade not fix prices? Do you make the statement it does not fix prices?

Mr. FOULKROD. I think fair trade establishes or permits the establishment of a minimum resale price.

Mr. DINGELL. We are engaged in semantics. The simple fact of the matter is fair trade fixes prices at a minimum level or above, am I right, and this bill fixes prices. So this is actually the same as fair trade, is it not, in that it fixes prices?

Mr. FOULKROD. I do not think that fair trade is price-fixing legislation.

Mr. DINGELL. What is fair trade, then?

Mr. FOULKROD. Fair trade is the establishment of a minimum resale price.

Mr. DINGELL. Isn't that a fixed price?

Mr. FOULKROD. Not necessarily.

Mr. DINGELL. Or at least it is fixed insofar as it isn't below a certain point, is that correct?

Mr. FOULKROD. That is correct.

Mr. DINGELL. I see. And this bill also fixes price, isn't that right?

Mr. FOULKROD. This bill fixes the price.

Mr. DINGELL. So for all intents and purposes this is the same as fair trade, is it not, in that it fixes prices, and in that fair trade fixes prices.

Mr. FOULKROD. In that the subject legislation will establish a price of a trademarked commodity, which is in competition with other commodities. It will establish a price, there is no question about that.

Mr. DINGELL. In other words, this bill is nothing more or less than price establishment legislation and fair trade legislation. That is what you want to get on the books.

Mr. FOULKROD. I think it is more than that, sir.

Mr. DINGELL. It is price fixing, really reduced to the simplest thing, just the same as fair trade pricing, isn't it?

Mr. FOULKROD. That is one of the objectives of the bill, but it also, by fixing the prices, will produce the other benefits which are set forth in the bill.

Mr. DINGELL. The other benefits sort of frighten me with regard to my consumers. But getting back to this, speaking as the Fair Trade Council of Delaware Valley, your organization enthusiastically endorses this legislation.

Mr. FOULKROD. Yes, sir.

Mr. DINGELL. And fixes prices.

Mr. FOULKROD. Yes, sir.

Mr. DINGELL. Thank you.

Mr. FOULKROD. But I must add to that comment, Mr. Dingell, that this bill will do the other things mentioned in it, and in my opinion will do it very effectively, which is good for the small businessman.

Mr. DINGELL. As a matter of fact, the other sections of this bill, the violations of business practices set forth in the other sections of this bill, are already violative of the Federal Trade Commission Act, which you heard Mr. Dixon discuss this morning; am I correct?

Mr. FOULKROD. No. I heard Mr. Dixon carefully point out that in order for bait merchandising to be in violation of any present Federal law, the goods must be in commerce.

Mr. DINGELL. But essentially the "heart, liver, and lungs" of this piece of legislation is price fixing, is it not?

Mr. FOULKROD. I think not, sir.

Mr. DINGELL. The benefit and virtue which brings you down to testify on behalf of this piece of legislation is the fact that it is going to fix prices in the retail drug industry, isn't that so?

Mr. FOULKROD. No, sir; that is not what causes——

Mr. DINGELL. If we take the other things out and left the price fixing in, will you support the bill?

Mr. FOULKROD. I would be less enthusiastic about it, to be honest with you.

Mr. DINGELL. If we took the price fixing out would you support the bill?

Mr. FOULKROD. I don't think you could take the price fixing out and accomplish the objectives.

Mr. DINGELL. I recognize that. So really you couldn't support the bill if we took price fixing out, could you?

Mr. FOULKROD. No, because it wouldn't accomplish the other objectives.

Mr. DINGELL. So the "heart, liver, and lungs" of this piece of legislation is nothing more than price fixing, isn't it?

Mr. FOULKROD. I do not agree with you, Mr. Dingell, because——

Mr. DINGELL. You wouldn't support the bill without it, would you?

Mr. FOULKROD. Because the bill wouldn't accomplish the objectives; that is true.

Mr. DINGELL. This is just pure and simple price fixing legislation.

Mr. FOULKROD. I do not agree with that, sir.

Mr. DINGELL. Let me ask you one more question here. Do you endorse the principle that McKesson & Robbins ought to be able—by the way, are you a retail druggist?

Mr. FOULKROD. No, I am not, sir. I am a lawyer.

Mr. DINGELL. It is kind of hard to ask you what you would do if you were a retail druggist then, because you are not.

Mr. FOULKROD. I am probably the biggest consumer of drugs in the United States, but I am not a pharmacist. They are not narcotic drugs, sir.

Mr. DINGELL. Let's look at this bill here. Do you feel that McKesson & Robbins ought to be able to compete on the wholesale and retail level with the little members of your fair trade council, because that specific duty is in this bill on page 7, the bottom of line 6?

Mr. FOULKROD. I believe that is section 14 of the bill.

Mr. DINGELL. That is right, section 14 of the bill.

Mr. FOULKROD. Would I offend you, Mr. Congressman, if I say that there are speakers listed to be heard before this subcommittee who are much better qualified to answer that question than I?

Mr. DINGELL. It would not be offensive to me. I would just like to have you answer it.

Mr. FOULKROD. I believe, sir, that the best answer to your question can come from somebody better qualified than I, and that is the best answer that you want.

Mr. DINGELL. Let me ask you this: Are you going back to your people, the little druggist on the corner, and tell him that you think that as a matter of good practice, and in his best interest, he ought

to let McKesson & Robbins fix his price, and at the same time compete with him on the wholesale and the retail level? How do you think he is going to like that, if you go back and tell him that?

Mr. FOULKROD. I believe that section 14 of the subject legislation is not that offensive, because this McKesson & Robbins product must be in competition with other commodities available to the consuming public.

Mr. DINGELL. You are still fixing the little man's prices, and the man who is competing with him is fixing his prices. Do you endorse that practice?

Mr. FOULKROD. I would like to point out to you, sir, that, take the case of McKesson & Robbins fixing the retail price of a McKesson & Robbins product, that that price by the laws of economics, which you and I well understand, must be fair and reasonable.

Mr. DINGELL. Just a minute. That is your assumption. Under the laws of economics, what compels that price to be fair and reasonable?

Mr. FOULKROD. Because in order to have this legislation applicable to the fixing of prices, we must have products in competition with each other.

We have discussed that here today, and it was discussed yesterday. When these products are in competition with each other, and then we have after them 3, 4, 5, 10 similar products doing the same or a similar job, those prices fixed by the manufacturers must be fair and reasonable, in order for those commodities to stay in competition with the other 9 or 10.

Mr. DINGELL. Well, now, let's look at that a little bit. It may be fair and reasonable to McKesson & Robbins, but what incentive has McKesson & Robbins got to fix that price so that it is going to make the maximum returns to the small druggist, and not make the maximum return for McKesson & Robbins?

Mr. FOULKROD. They have to keep that product in competition.

Mr. DINGELL. Just a minute. But within the framework of competition, what says that they can't still fix it in the best interests of McKesson & Robbins?

Mr. FOULKROD. The best interest of McKesson & Robbins, and they are alert enough to know it, is that this price be fair and reasonable, in order to keep that product in competition with the products of other manufacturers.

Mr. DINGELL. Who is to say that you aren't to have follow-the-leader pricing in the pharmaceutical industry, the same way you have it in the steel industry, the same way that you have it in the automobile industry, where everybody fixes the price at substantially the same level?

Now you won't deny that that is a fact, an economic fact. You won't tell me that there is cutthroat competition between McKesson & Robbins and Lilly and Ciba, is there?

Mr. FOULKROD. No, sir, I won't deny that.

Mr. DINGELL. There is not as a matter of fact.

Mr. FOULKROD. I won't deny that.

Mr. DINGELL. As a matter of fact there is a very little real competition between them, isn't that also a fact?

Mr. FOULKROD. No, I do not agree with that, sir.

Mr. DINGELL. Well, it certainly is not cut-throat competition anyhow, and their prices as a matter of fact generally tend to run pretty much the same. They are sensitive to each other on comparable items, isn't that true?

Mr. FOULKROD. I think as to some, McKesson & Robbins products, there is intense competition.

Mr. DINGELL. Well, as a general rule, though, there are large numbers of items produced in the pharmaceutical industry whose prices between different manufacturers are within a cent or two of each other, isn't that a fact?

Mr. FOULKROD. I believe that is a fact.

Mr. DINGELL. That is an economic fact.

Mr. FOULKROD. I think that applies to the price of automobiles.

Mr. DINGELL. And it is true in the case of automobiles, it is true in the case of steel, and I think it would be hard to find any instance where among large manufacturers that that isn't also a fact.

Mr. FOULKROD. I believe that that is a fact largely.

Mr. DINGELL. Does that make you think that there is vigorous competition between these people?

Mr. FOULKROD. Oh, yes, I know it is vigorous competition, particularly in, well, the automobile industry.

Mr. DINGELL. Vigorous price competition?

Mr. FOULKROD. I believe there is.

Mr. DINGELL. Vigorous price competition between, let's say, manufacturer A of pharmaceuticals and manufacturer B of pharmaceuticals whose comparable products happen very often to be within a cent or two of each other? Is that conclusive proof of competition?

Mr. FOULKROD. If we are confining this to price competition, I might say this: that while I believe price competition is ever present, the competition between the manufacturers' pharmaceuticals is vastly more and something vastly in addition to the price competition.

Mr. DINGELL. I am talking about price competition, because that is the thing that my consumers are most keenly aware of, whether they can get a bargain.

That always strikes them as being the important element of competition. Now if that were applied to a substantial number of commodities where prices were within a cent or two of each other, that is certainly not evidence to the consumer that there is competition in prices, is it?

Mr. FOULKROD. I believe that the consumer has become increasingly aware that although the prices are similar or close to each other, there is competition beyond the price, and in addition to the price.

Mr. DINGELL. That is not evidence of price competition, though, is it? There may be competition on advertising, there may be competition on promotion and who knows what else, but that is not price competition, is it?

Mr. FOULKROD. It is a competition in addition to price competition.

Mr. DINGELL. But this is not evidence of price competition, is it?

Mr. FOULKROD. Not evidence of it, no.

Mr. DINGELL. No. As a matter of fact, as you conceded a little earlier, there is not much in a number of instances, in the pharmaceutical field there is not much price competition.

Mr. FOULKROD. If you are talking about the retail price of a commodity, I am obliged to agree with you.

Mr. DINGELL. And I am also talking wholesale and manufacture. They are within a cent or two.

Mr. FOULKROD. But I don't believe, sir, we can close the door on competition by simply talking about price competition.

Mr. DINGELL. I see. But if we eliminate price competition from the marketplace, we have eliminated a significant amount of competition from the American scene, have we not?

Mr. FOULKROD. Oh, I don't think so necessarily, no.

Mr. DINGELL. Well, now, let's see, how much competition in the market is price competition? Is it a very small part?

Mr. FOULKROD. I think it is a large part.

Mr. DINGELL. I see. So if we eliminate that large part of competition from your marketplace, we will have eliminated very large amounts of competition from the American scene, will we not?

Mr. FOULKROD. Yes, but there always remains——

Mr. DINGELL. I understand that, I am aware of that, but we will eliminate a large amount. And if we fix prices, we will eliminate a large amount of the present competitive structure from our capitalistic system, will we not?

Mr. FOULKROD. No, I don't think so.

Mr. DINGELL. Didn't you just tell me that price competition was a large part of competition?

Mr. FOULKROD. I think your question is really in the form of a statement.

Mr. DINGELL. No, it is not. I am asking you a question.

Mr. FOULKROD. And your question contemplates this. Take, for instance, five products which do the same or a similar job, be they mechanical products or pharmaceutical products. They could be automobiles. The prices are similar. They are not identical, but they are similar.

Mr. DINGELL. Yes, but getting back to this now, if we eliminate price competition, we are going to eliminate an awful lot of competition from the American scene, are we not?

Mr. FOULKROD. Yes, if——

Mr. DINGELL. Isn't this true from your own statement, that price competition is a large element of competition in the American scene?

Mr. FOULKROD. I think so, Mr. Dingell, but I don't think the subject resolution will eliminate price competition.

Mr. DINGELL. It will eliminate a large amount of price competition.

Mr. FOULKROD. I don't think that is so. I don't think it will.

Mr. DINGELL. It will eliminate price competition in a large number of instances, won't it?

Mr. FOULKROD. I don't believe it will.

Mr. DINGELL. Why are you here endorsing this bill?

Mr. FOULKROD. We are endorsing this bill because if a manufacturer is given the right to stipulate his price, and make available to the manufacturer and in all modes of distribution, even to the consumer, the benefits of the other sections of the act, in my opinion we will have a more orderly economy in the marketing of goods in the United States.

Mr. DINGELL. But the simple fact of the matter is this bill is designed to eliminate price competition in the instances of products which——

Mr. FOULKROD. No, I won't agree that the bill is designed to do that.

Mr. DINGELL. The manufacturer fixes the price. Is there going to be competition in the price on a commodity on which he fixes the price?

Mr. FOULKROD. That manufacturer must fix that price so that that commodity will remain in competition.

Mr. DINGELL. Yes, but is there going to be any competition between retailers on that particular commodity?

Mr. FOULKROD. Oh, yes, indeed.

Mr. DINGELL. With regard to price?

Mr. FOULKROD. Oh, no, not with regard to price.

Mr. DINGELL. Somebody walks in and gets the same price everywhere he goes.

Mr. FOULKROD. No, not with regard to price, you are absolutely correct.

Mr. DINGELL. So the consumer can't shop and get a bargain.

Mr. FOULKROD. You are absolutely correct.

Mr. DINGELL. Thank you very much.

Mr. FOULKROD. But we have other facets of competition.

Mr. DINGELL. I recognize that, but you know what you are going to do is eliminate competition, by this bill, as you told me, you are going to eliminate the opportunity for the consumer to shop and get himself a bargain on a particular item where the price is fixed.

Mr. FOULKROD. Provided we have the same established price on all competitive brands.

Mr. DINGELL. Yes, but on the same——

Mr. FOULKROD. But we don't have that situation.

Mr. DINGELL. On specific items the consumer has a fixed price. He can't competitively shop and get a bargain on that particular item.

Mr. FOULKROD. On that particular item?

Mr. DINGELL. That is right.

Mr. FOULKROD. No, he cannot.

Mr. DINGELL. Whether it be an Arrow shirt or Dr. Miles pharmaceuticals or a particular brand, a particular prescription pharmaceutical, he can't go in and get a bargain.

Mr. FOULKROD. No, you are talking about two things, Mr. Dingell, and may I point them out. If you have a fixed price for Bufferin tablets, a consumer in Philadelphia can't go to store A and shop and go to store B in Philadelphia to shop to get the best price of Bufferin.

But he can shop around Philadelphia to get the best analgesic for him between Bufferin, Anacin, Emperin Compound, APC and aspirin.

Mr. DINGELL. But he still can't get a buy on Bufferin.

Mr. FOULKROD. No, not on Bufferin alone.

Mr. DINGELL. Thank you very much. You have been very helpful.

Mr. MACK. Are there any other questions?

Mr. KEITH. No questions, Mr. Chairman.

Mr. MACK. Thank you very much for your statement.

The hour is quite late, but we have another witness that we would like to hear tonight, Mr. Louis Rothschild, executive director of the National Association of Retail Clothiers & Furnishers.

STATEMENT OF LOUIS ROTHSCHILD, EXECUTIVE DIRECTOR, NATIONAL ASSOCIATION OF RETAIL CLOTHIERS & FURNISHERS

Mr. ROTHSCHILD. My statement, Mr. Chairman, is brief. I recognize the lateness of the hour. I appreciate this opportunity to be heard.

I am Louis Rothschild, executive director of the National Association of Retail Clothiers & Furnishers. This is the national trade association which for nearly 50 years has been working for and representing the interests of retailers of men's wear. We have in excess of 2,700 members who practically unanimously favor the quality stabilization proposal of H.R. 10335.

This position in favor was reaffirmed at our recent convention held in Washington in February. Not only did our resolutions committee of 30 merchants from all parts of country, but also our board of directors approved a formal resolution which was adopted without objection at a general membership meeting. This resolution in part read:

> We again reiterate most strongly our support of Federal legislation which will permit those brand manufacturers who are interested in safeguarding their brand names to have legal protection in doing so.

This may be accomplished effectively and properly through H.R. 10335 now before this subcommittee.

I would like to quote the concluding paragraphs of an article which on May 18, 1962, appeared in the Daily News Record, the daily trade paper of our industry:

> Brands are the backbone of thousands of stores in the United States. Remove the backbone and you have crippled the store.

The author of this article, one of a series under the title of "From the Small Store" is Robert Jerome, a small men's wear merchant from Elmira, N.Y., who I am happy to report is a member of our board of directors. With the consent of the committee, I would like to present this article in full for possible inclusion in the record of this hearing.

Mr. MACK. The committee will receive the article for our files, and if appropriate it will be included in the record.

Mr. ROTHSCHILD. Thank you, sir.

The present chaotic situation by which reputable brand name retailers and the manufacturers owners of these brands have no protection against bootlegging and subterfuge by which discount sellers obtain such goods, can and does lead to much more violation of the antitrust laws than that which is feared by the opponents of the quality stabilization bill.

Let me, to illustrate, tell you briefly the sad, sad story of how our organization in an effort to protect not only our membership but good manufacturers ran amiss of the Federal Trade Commission Act. It was 5 years ago that a group of mail order discount operators who had previously restricted their effort to hard goods decided to go into selling of soft goods including men's wear. A number of nationally known brand name manufacturers were persuaded to sell these companies thinking that they were wholesalers selling to retailers whereas in fact much of their volume was direct to the consumer at cut prices.

This situation was originally uncovered by the Illinois Men's Apparel Club, an organization of traveling salesmen and merchants

in the men's and boy's wear field with whom we mutually cooperate although there is no legal or financial connection. Together we brought to the attention of the manufacturers that their brands were being advertised in these "catalogs." The trade paper recognized this program and published a list of the discount sellers together with the names of brands included. Our association reproduced this article and sent it to our members, thereby engaging in what was subsequently called a blacklist. Incidentally, many of the manufacturers involved welcomed this action saying that they would not knowingly permit their respected brand names to be discounted.

Regardless, nearly 2 years later the Federal Trade Commission issued a formal complaint against our association, the Illinois group and nearly 100 merchants and salesmen who were on the respective boards of directors.

I must admit that there was some technical and legal support for the Commission's action although it came at least a year after this program had been voluntarily terminated. In order to avoid lengthy and expensive litigation, all of the respondents entered into a consent order which of course is being rigidly adhered to. As a practical matter, for a small trade association to litigate with the Federal Government would drain the financial resources of the group.

The point that I would make is: had the quality stabilization law been on the statute books of the country the violation of law claimed by the Federal Trade Commission would never have occurred. The individual manufacturer when he discovered he was selling to a discounter could have taken appropriate action for the protection of his reputation and that of his historic retailers.

According to the legal theory of the Federal Trade Commission, the following hypothetical facts would constitute a violation of law. A discount house in a certain city advertises at cut price a well-known name shirt. In this city there are four stores which have been selling this brand for many years. Individually and without concert any one or all of them may protest to the manufacturer. But if they do it in concert their action is a combination in restraint of trade. This is so even if they happen to play in the same golf foursome and talk about it at the country club. And it makes little difference if the manufacturer would welcome their complaint because he does not want to jeopardize the good name of his brand nor injure his historic customer.

As a practical matter, few independent merchants, if any, are going to continue to stock a national brand name if it is continually advertised by a discount competitor, often at a price lower than the cost to the independent merchant. While I know of no instance, it is contrary to human nature not to expect merchants to talk about such competition. Thus I repeat, the lack of protection may very well lead to more violation of the antitrust laws than which is feared by the opponents of the quality stabilization bill.

One other point which I desire to bring out, which also may be novel to this committee, is the recognized fact that in the men's wear industry brand names mean lower prices to the consumer. Opponents of this proposal claim that its passage would mean that the sky is the limit to the prices that consumers would pay for recognized quality brands. They say this despite the fact that the bill

permits quality stabilization only to those manufacturers whose products are in active competition with similar products.

But in the men's wear field, history proves these contentions wrong. In men's shirts for example, there are three leading nationally recognized brand names. The initial markup on these brands to the retailer—that is the difference between cost and selling price—is substantially the same, being approximately 41 percent. A nonbrand name shirt has only the store owner's label, normally, or some label that is not currently known. Here there is no nationally advertised price and the merchant can use his own discretion in pricing at 45 or even 50 percent.

As a matter of fact, whenever there is a trade convention you hear merchants complaining that brand name manufacturers do not permit the retailer a more realistic markup in view of the continually higher costs of doing a retail business. The brand name manufacturers meet this contention with the argument that because of the millions of dollars thsy spend on advertising, their merchandise is half sold when it gets on the retailer's shelves and therefore it costs the retailer less in selling costs. The debate rages on, but the point for this committee is that brand names distributed through historic outlets mean lower prices to the consumer.

Further proof of this contention is to be found in the Department of Commerce cost-of-living index. Brand names dominate in the men's dress shirt field. Despite the fact that the cost-of-living index from the base figure of 100 for the years 1947–49, in December last was 128.2, the figure for men's dress shirts was 104.7, approximately 24 points under the national average, one of the few items in the entire index study that has resisted inflationary trends. It is my contention that if it were not for the trade and consumer acceptance of quality brands in the men's shirts field the prices the consumer would now be paying would be materially higher.

We want to express appreciation to the committee for this opportunity to be heard on behalf of an important segment of truly small, independent business and to urge your prompt and favorable consideration of H.R. 10335.

May I interpose in conclusion that this bill is important. It has gotten the stigma of a drug bill. It is not a drug bill.

It is important to the men's wear field, the hardware field, the furniture field, the photographic field, the entire array of consumer items which are identified with reputable brands, known to the consumer and sold by reputable merchants.

Thank you very much.

Mr. MACK. Are there any questions?

Mr. DINGELL. Yes, Mr. Chairman.

Is your organization the only association of retail clothiers and furnishers?

Mr. ROTHSCHILD. We are the only national association exclusively speaking for retail clothiers and furnishers.

Mr. DINGELL. Are there any other retail clothier and furnisher associations?

Mr. ROTHSCHILD. There are a number, a limited number of State associations, such as the Illinois group, one in the Carolinas, a group

in New Jersey. There are a limited number of State groups, and also, of course, there is the National Retail Merchants Association, which is largely the department store associations.

Mr. DINGELL. What I was trying to figure out is do you have the authority to speak for all retail clothiers?

Mr. ROTHSCHILD. That is, of course, impossible to say, Mr. Dingell. I believe we have the authority to speak for our 2,700 members.

Mr. DINGELL. 2,700 members in how many States?

Mr. ROTHSCHILD. We are in 50 States, sir.

Mr. DINGELL. In all 50 States?

Mr. ROTHSCHILD. Yes, sir.

Mr. DINGELL. I was rather interested in your comment with regard to pricing of men's shirts. I was wondering, you said that the figure for men's dress shirt is 104.7. That includes name brands and off brands?

Mr. ROTHSCHILD. That is correct, sir.

Mr. DINGELL. You wouldn't want this committee to believe that name brands held the price down alone, the fact that the off brands and the private brands, the competition of the private brands, the imports and everything else didn't have a definite part to play in it, would you?

Mr. ROTHSCHILD. That is correct. The name brands do have a great influence on the price structure.

Mr. DINGELL. What percentage of the name brands are there, or rather what percentage of shirts marketed are marketed by name brands?

Mr. ROTHSCHILD. It is my recollection, and I would like to double-check this for accuracy, it is my recollection that 25 percent of the dress shirts sold in this ountry are one of the three big brand names.

Mr. DINGELL. There are only three brands?

Mr. ROTHSCHILD. Three big brands.

Mr. DINGELL. Three big brands?

Mr. ROTHSCHILD. Yes, sir.

Mr. DINGELL. For all intents and purposes 25 percent of shirts in this country that are marketed——

Mr. ROTHSCHILD. The dress shirts.

Mr. DINGELL. Are marketed by three manufacturers?

Mr. ROTHSCHILD. The dress shirts, yes.

Mr. DINGELL. Now, who are these three?

Mr. ROTHSCHILD. Cluett, Peabody, Arrow Shirts.

Mr. DINGELL. Oh, that is Arrow.

Mr. ROTHSCHILD. Manhattan Shirt and Van Heusen, Phillips Van Heusen.

Mr. DINGELL. Those three market 25 percent of the shirts?

Mr. ROTHSCHILD. That is the figure that I believe is accurate.

Mr. DINGELL. So that if we passed this bill, we will vest in three shirt manufacturers the power to fix the prices of 25 percent of the shirts that are sold in this country, is that correct?

Mr. ROTHSCHILD. No, that is not correct, sir.

Mr. DINGELL. Didn't you just tell me that 25 percent of the shirts are manufactured by three shirt manufacturers?

Mr. ROTHSCHILD. That is correct.

Mr. DINGELL. Now, then, if we pass this bill, those three manufacturers will have the power to fix the price of their shirts, is that right?

Mr. ROTHSCHILD. Let me——

Mr. DINGELL. And they market 25 percent, so it necessarily follows that if this bill passes, we will vest in three shirt manufacturers the power to fix the price of 25 percent of the shirts that are marketed in these United States. Is that a true statement or not?

Mr. ROTHSCHILD. That is not an accurate statement, and let me explain it.

Mr. DINGELL. Where is it inaccurate?

Mr. ROTHSCHILD. Let me explain it in this way: without this bill these three shirt companies' prices are practically identical like the automobile manufacturers.

Mr. DINGELL. That is correct.

Mr. ROTHSCHILD. Without this bill. Now, there still are a large number of shirts, 75 percent of the shirts, three out of four sold to the American consumer.

Mr. DINGELL. I recognize that.

Mr. ROTHSCHILD. Which are sold any place from the Japanese imports to the very high quality, high-type shirts sold by the Madison Avenue shop.

Mr. DINGELL. The simple fact of the matter, however, is though that if this bill passes, 25 percent of the shirts manufactured and marketed in these United States can have their prices fixed by three manufacturers; am I correct?

Mr. ROTHSCHILD. Well——

Mr. DINGELL. These are your figures; these are not mine.

Mr. ROTHSCHILD. Which is the case at present.

Mr. DINGELL. That is right.

Mr. ROTHSCHILD. It is no different.

Mr. DINGELL. That is right.

Mr. ROTHSCHILD. The only advantage of this bill to our industry is that it will help those manufacturers police their distribution and prevent their shirts from being bootlegged in discount houses.

Mr. DINGELL. That is right. It will vest, however, in three shirt manufacturers the power to fix the price of 25 percent of the shirts that are marketed in the United States; is that correct? These are your figures.

Mr. ROTHSCHILD. Which is no different than the situation before the bill was corrected.

Mr. DINGELL. But they fix it at the retail level, which they are presently not able to do.

Mr. ROTHSCHILD. Yes, they do now. They have suggested resale prices, which are pretty rigidly adhered to except when the shirts are bootlegged.

Mr. DINGELL. You raised a very interesting question with regard to the point of the Federal Trade Commission against your organization. This mater was terminated by a consent decree, was it?

Mr. ROTHSCHILD. A consent order; yes, sir.

Mr. DINGELL. In which your organization consented to the findings of fact and conclusions of law by the Federal Trade Commission.

Mr. ROCHSCHILD. That is correct.

Mr. DINGELL. Briefly summarizing the findings of fact with regard to the activities of your organization, was it your organization that violated section 5 of the Federal Trade Commission Act, is that correct?

Mr. ROTHSCHILD. That is correct, sir.

Mr. DINGELL. That you violated it in a series of regards, and that you conspired, your organization conspired——

Mr. ROTHSCHILD. We combined in restraint of trade; yes, sir.

Mr. DINGELL. And the conspiracy had these and other adverse results reading from a summary of the particular case:

1. To cause manufacturers or distributors to stop selling branded products from catalog and discount houses.

Is that correct?

Mr. ROTHSCHILD. That is correct.

Mr. DINGELL. And it also had the effect:

To eliminate competition between operators of catalog and discount houses and retailers in the retail sales of brand products.

Am I correct?

Mr. ROTHSCHILD. That is correct, but that is in the consent order. I could debate that at some length.

Mr. DINGELL. And your organization did consent to this?

Mr. ROTHSCHILD. Yes, that is correct.

Mr. DINGELL. You can't very well now come and challenge the contents of the consent order.

Mr. ROTHSCHILD. Well, I think we can still——

Mr. DINGELL. Do you challenge what you signed there by way of the consent decree? I am wondering, maybe you shouldn't have signed that consent order.

Mr. ROTHSCHILD. Oh, I know we shouldn't have signed it.

Mr. DINGELL. You don't now deny what you admitted in that consent decree, do you?

Mr. ROTHSCHILD. Oh, no, of course not, but I explained in my formal statement, Mr. Dingell, and sometime it will be well for this committee to investigate the high cost of litigating with the U.S. Government.

Mr. DINGELL. I am sure this would be a worthy measure, but the simple fact of the matter is these are things that you have consented to.

Mr. ROTHSCHILD. That is correct.

Mr. DINGELL. And that you admitted that your organization and you in addition to your organization had participated in.

Mr. ROTHSCHILD. Personally, yes, sir.

Mr. DINGELL. And you also agreed to the effect that "the conspiracy placed in the respondents hands," namely yourself and your organization, "control over the business practices of manufacturers and distributors of brand products."

Mr. ROTHSCHILD. That is correct.

Mr. DINGELL. "And deprived the latter of the right to choose their own customers."

Mr. ROTHSCHILD. That is according to the consent order.

Mr. DINGELL. And also to "unreasonably suppress competition in the sale of retail or branded products in Illinois and elsewhere." Is that right?

Mr. ROTHSCHILD. That is correct. May I point out, Mr. Dingell, that the preliminary to the actual consent has the usual words "without admitting any violation of law," which we also signed.

Mr. DINGELL. Without admitting any violation, but I am sure you recognize——

Mr. ROTHSCHILD. We consented to stop doing things without admitting that we had done them.

Mr. DINGELL. It is rather novel that you should consent to stop doing things that you had never done, isn't it?

Mr. ROTHSCHILD. Not at all, sir. You check many of the consent orders with the Federal Trade Commission.

Mr. DINGELL. I happen to be something of a jackleg antitrust lawyer. Now, it is rather novel—I notice here you state in your testimony that had this bill been law, you would never have been placed under the bane of this particular proceeding, is that correct?

Mr. ROTHSCHILD. That is correct.

Mr. DINGELL. I note down here, too, at the bottom of the page, page 6, and the top of page 7 of this legislation:

> No exercise of any right or remedy provided in paragraphs (7) to (13) inclusive——

Mr. ROTHSCHILD. I beg your pardon?

Mr. DINGELL (reading):

> inclusive of this subsection shall be construed to be a violation of any of the Antitrust Act—

this is in the proposed bill, House Joint Resolution-636, subsection 14, line 22, page 6. It reads as follows:

> No exercise of any right or remedy provided in paragraphs (7) to (13) inclusive of this subsection shall be construed to be a violation of any of the Antitrust Act.

Mr. ROTHSCHILD. I do not pretend to be a jackleg antitrust lawyer or any kind of an antitrust lawyer, but as I understand that provision in this bill, it is to permit, without violation of the antitrust law, a manufacturer whose product is in competition to fix the retail price.

Mr. DINGELL. I see. And also——

Mr. ROTHSCHILD. Now that provision in this bill would not give us a license to do all of the things that the Federal Trade Commission said we did.

Mr. DINGELL. I see. You are sure of that?

Mr. ROTHSCHILD. I am quite sure of that, sir.

Mr. DINGELL. Now let me ask you about this. Do you feel that it is wholesome that the manufacturer of a commodity should be permitted to fix your retail prices?

Mr. ROTHSCHILD. Yes, sir.

Mr. DINGELL. And at the same time engage in competition with you? Do you endorse that practice on behalf of your membership?

Mr. ROTHSCHILD. Let me answer it this way. When a manufacturer makes a product which is a competitive product, and that manufacturer openly and publicly competes with my retailer member, that is a legitimate practice, and I see no objection to it, because my retailer member can stop buying that article and buy a competing article.

Mr. DINGELL. Say he stops buying all three of the major brand name shirts?

Mr. ROTHSCHILD. He might make more money.

Mr. DINGELL. Thank you very much.

Thank you, Mr. Chairman.

Mr. MACK. Thank you.

Mr. ROTHSCHILD. Thank you. I am sorry to have held the committee so late.

Mr. MACK. We are sorry to have kept you waiting so long. I want to commend you for your fine statement.

The committee will stand adjourned until 10 o'clock tomorrow morning.

(Whereupon, at 5:25 p.m., the subcommittee was recessed, to reconvene at 10 a.m., Wednesday, June 13, 1962.)

QUALITY AND PRICE STABILIZATION

WEDNESDAY, JUNE 13, 1962

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10:18 a.m., pursuant to recess, in room 1334, New House Office Building, Hon. Peter F. Mack (chairman of the subcommittee) presiding.

Mr. MACK. The committee will come to order.

This morning we are continuing hearings on House Joint Resolution 636 and H.R. 10335 and related bills.

Our first witness this morning will be Mr. Bert Corgan, president of the National Association of Retail Druggists.

You may proceed, Mr. Corgan.

STATEMENT OF BERT CORGAN, PRESIDENT, THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS; ACCOMPANIED BY PHILIP F. JEHLE, WASHINGTON REPRESENTATIVE AND GENERAL COUNSEL

Mr. CORGAN. Thank you, Mr. Chairman.

I have a report here which with your permission I would like to read.

Mr. MACK. You may proceed.

Mr. CORGAN. I am Bert Corgan of Denver, Colo. For more than 35 years, I have practiced pharmacy in Denver and now own and operate two community drugstores in that city.

I appear here as the president of the National Association of Retail Druggists, a small business organization having a nationwide membership of more than 36,000 community drugstore owners. As you know, the NARD speaks for these family pharmacists on all legislative matters affecting their professional and competitive interests. Accompanying me this morning is Philip Jehle, Washington representative and associate general counsel of the National Association of Retail Druggists.

I deeply appreciate your kindness in granting this opportunity to offer my views on the need for House Joint Resolution 636, the quality stabilization bill. I can understand the many practical problems involved in arranging to hear the many witnesses desiring to testify on the proposed legislation. Accordingly, I shall try my best to keep my presentation brief and to the point. I seek only to call attention to an extremely grave threat to the continued vitality and growth of our economy.

I am referring, Mr. Chairman, to the quality and price corrosion which is eating away at one of our strongest economic bulwarks—the traditional, and truly productive, orderly marketing of respected brand name products in this country. Beyond question, this situation is of serious concern to all responsible segments of the business community, manufacturers, wholesalers, and retailers, alike. Yes, and to the American consuming public, as well.

The corrosive effects are apparent today in many forms. We see it in predatory retailing practices which are knocking out more and more of our small businesses; we see it in the tarnished images of well-known brand names that have been "footballed" by fast-buck merchandisers; we see it in the reduced quality of many American products which have been spawned to satisfy the discount craze; we see it in the price wars that destroy profits and eliminate jobs; we see it in our disenchanted consumers who more and more are understanding three important things about our economy:

(1) Quality must command a fair price;

(2) The manufacturer's name is the best guarantee of quality; and

(3) Stabilized pricing is the best assurance of continued wide availability of good products; otherwise consumer-favored products can and will be price cut out of normal distribution channels.

In short, the American consuming public—and all of us are consumers—is not really benefiting from the disorderly marketing practices prevailing today. Manufacturers of quality products are being victimized by reckless brand depreciation over which they have no control. No benefit to the consumer flows from the resulting product deterioration. Nor can the consumer find any benefit when wholesalers and retailers, unwilling and unable to handle profitless goods, drop entire merchandise lines or even give up their businesses. Nor is the consumer benefited when unscrupulous distributors exploit quality branded products by all sorts of unfair and deceptive practices.

Government officials, too, are becoming concerned with the price chaos and associated competitive evils existing in the Nation's marketplaces. These men, properly concerned as they are with consumer interests, are rightfully disturbed over the widespread abuse of property rights in valuable trademarks, brand names, and business goodwill. For the most part, these sentiments have been expressed up to now by Members of Congress. In fact, the most dramatic evidence of congressional realization that action must be taken to curb the marketing abuses that weaken our economy is the sponsorship of the quality stabilization bill by so many able and enlightened Members of the Senate and House. And, our experience has been that where the Congress leads, the executive branch is close behind. Even now, many of the more perceptive of our executive branch officials are gaining a better understanding of House Joint Resolution 636 and companion measures and, thereby, acquiring a warm sympathy for its objectives.

There is no question but that our highly competitive system with its dynamic blend of large and small businesses, with its consumer-oriented philosophy of doing business, its successful mass production and mass distribution techniques, is the source of our economic strength and our widely envied and imitated standard of living.

There is no perfect marketing system, but ours has unquestionably performed the best for the most people on this planet. We cannot afford to see it weakened or wrecked by irresponsible, quick-gain merchants. I, for one, find it very disturbing that we are encouraging more and more of the oriental bazaar-type distribution centers, with clusters of discounters using well-respected brands as merchandising bait. Of course, these places are well shopped and prices are shaved on many items, but the benefits are short term and all the bargains are not real. The truth is we cannot, as a nation, maintain a discount shopping economy for long without discounting more important things like product quality, steady employment, good wages, improved and new products from research and development, and, very importantly, the small businessman's place in our marketing structure.

As you are well aware, the nationally advertised, consumer-respected brand names are most important to the small merchant's success. Unlike the big companies, he cannot develop and establish a house or private brand. To survive, the small businessman depends on a reasonable turnover of well-established brands sold at fair prices. When these brands are devalued by loss-leader tactics, the consumer loses respect for the quality of the product and the integrity of the traditional retailer who sells the product at a reasonable profit to say in business.

This cycle of brand popularity, discount abuse and devaluation, and the disappearance of the product from the shelves of the legitimate retailer has been repeated many times and on many different types of products. What are the results of this type of marketing? Well, obviously the manufacturer is under pressure to produce the item for less money and quality suffers; the drying up of the manufacturer's normal channels of distribution wastes advertising dollars and cuts into profits; the loss of business on the popular brand name items leads to growing failures among small businesses.

This is a bleak picture, but it is well documented in many industries. I can speak from close experience about how it affects drug retailing. Retail pharmacists, as you know, are essentially service retailers operating in the vital field of drug distribution. These professional men represent small business in its most characteristic form. In a climate of fair competition, in which orderly marketing of brand name products is well established, our community retail pharmacists can hold their own against other retail outlets dealing in many of the same brands. This has been proved over and over again in cities and towns throughout the country, as you know.

Today, however, failures of drugstores are increasing, and the traditional services that our people expect from their community pharmacies are being cut back. This is happening even though independent drugstores are efficient operations by any set of standards. They have competed well and strongly against waves of competition; they are as skilled at low-margin retailing as any other outlet. But they know they cannot give a product away and still stay in business.

The Nation's retail pharmacists distribute the products of thousands of drug, toiletry, cosmetic, and sundry manufacturers. Through that relationship, we have come to know their marketing problems well. We know the merchandising efforts and advertising dollars that manufacturers invest to bring a good product to the attention of consumers.

We know the pride with which they bring out a new or improved item under their brand name or trademark. At the same time, we understand how unscrupulous retailers can devalue a manufacturer's quality products and thus obstruct the normal channels of distribution—with a resulting setback in the manufacturer's hard-earned profits.

When fair trade laws were in force, the manufacturer could choose to protect his brand name from such abuse. Today, in this era of reckless discounting, he has no such choice. He is being forced to permit his quality product to compete on a price level with lower quality products of his competitors according to the whim or avarice of the retailer. This is not good business; it is not sensible marketing; it is not fair competition.

Now, of course, all products compete for the consumer's dollar; those products in a similar class compete very keenly. In a free market this is highly desirable. The consumer has the right of choice which is freely exercised. Recognizing this, many manufacturers produce two or more kinds of the same product, which are sold at different prices according to their respective values. And there is always a competitor offering a cheaper product.

Everyone understands this and all the needs of the market are satisfied. But, if the manufacturer chooses to bring out a high-quality product, labels it with his brand name for ready identification, acquaints the consumer with its worth, distributes it widely through orderly channels of distribution, and popular demand makes a best-seller of his quality product, he—the manufacturer—has a valuable investment in that brand name which he should be allowed to protect. We are assuming, of course, that the manufacturer has established a price for his product which is in line with the value of the product. If he has not, he will not be in business long, nor will his brand name enjoy popular demand.

The need is clear today that this manufacturer must have some protection—other than normal copyright protection—for this investment in his brand name through distribution channels. Otherwise, he may well have secure rights to a worthless trademark.

Something must be done to enable manufacturers to stabilize the quality and price of their trademarked and brand named products. From a marketing point of view, these products represent an important national resource that is now being depleted by the unscrupulous. And, as I have said before, it is this national resource upon which small business, including retail pharmacy, depends for its continued existence.

As simply stated by Senator Hubert Humphrey, its Senate author, the—

> quality stabilization bill strengthens our antitrust laws by suppressing certain unfair methods of competition generally conceded as promoting monopoly in distribution. Toward this end, the proposed legislation empowers the owner of a product identified by his trademark or brand name to prevent distributors handling his products from using unfair methods in reselling the trademarked or branded products and thus damaging the mark or brand and associated goodwill.
>
> Whenever a trademark or brand name owner discovers his products being used by a distributor in any scheme involving (1) misrepresentation, (2) bait merchandising, or (3) sales at other than the established selling price, he may revoke the offending distributor's right to use his mark or brand in reselling

such goods. In addition, the trademark or brand name owner is entitled to injunctive relief if the offending distributor disregards the notice of revocation and continues the challenged sales practices.

In legal theory, too, the proposed legislation is easily understandable. Basically, no more is involved than recognition of first, the property value inhering in business goodwill and in the trademark or brand name adopted to maintain and extend it, and second, the need to protect by appropriate remedies such property rights from marketing practices producing injury.

In this light, the joint resolution is seen as merely an extension of our trademark and copyright laws—an extension enabling a trademark or brand owner to protect his property rights through the channels of distribution. Certainly, if we accept the right to own property and the corresponding right to protect such property—which are basic rights of every American citizen—then we must accept the objective of the quality stabilization joint resolution—protection of valuable investments in trademarks, brand names, and goodwill from ruinous marketing tactics. We seek to establish in the marketplace quality stabilization.

It should be noted that nothing in this joint resolution would bar a distributor from removing the trademark or brand name from the product, thus separating the physical property, which he owns, from the goodwill which is another's property—and then selling the commodity at his own price or in his own way, so long as he does so without making use of the goodwill of the latter to reach his end.

As thus viewed, H.J. Res. 636, the quality stabilization bill, can and will restore to our marketplace fair competitive practices and thus insure the continued vitality of small independent business in this country. I do not see how such legislation can fail to benefit the American consumers. The buying public will still be free to reject or accept a product, whether it is quality stabilized or not. The consumer will remain, as he should, the final judge of the value received for the price set. If he wants a lower priced product, he is still free to buy it, but not through the type of bait-selling of quality brand names that is so disruptive to orderly marketing and to the maintenance of quality standards. And, most importantly, the consumer will again be able to buy with confidence and assurance that his favorite brand name products will continue to be widely available, of the quality he expects.

I would like to conclude by making clear that America's independent retailers do not seek through quality stabilization to remove themselves from the arena of price competition. We know full well we must continue to meet price competition on all nonquality stabilized products. Moreover, we known that price competition will always exist among the various quality stabilized products and also between them and nonquality stabilized merchandise. We fully understand that quality stabilized competition can do no more than place us on an equal footing with all other retailers selling the same product, whether such competitiors be large or small. While our margin on quality stabilized products may be designed to yield us a fair return on our investment, we are in no sense guaranteed a profit. Whatever profit we may derive from our sales of quality stabilized goods will hinge upon business judgment and our relative efficiency.

Bearing in mind that the Nation's economic well-being depends to a large extent upon the health and prosperity of America's small business community, all threats to the stability and security of our independent enterprisers must be soundly resisted. As I see it, only House Joint Resolution 636 and its companion measures, the quality stabilization bill, can save the economic lives of the thousands of small businessmen now doomed to failure by predatory and irresponsible

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price-cutting practices and closely related unfair methods of competition.

Thank you for your kind and sympathetic understanding.

Mr. MACK. Mr. Dingell.

Mr. DINGELL. Did you endorse the provision of the quality brand stabilization bill during the recent Congress?

Mr. CORGAN. We had our own bill.

Mr. DINGELL. The NARD in fact opposed House Joint Resolution 636 during the previous session of Congress, did it not?

Mr. CORGAN. This was introduced in this session, as I understand, sir.

Mr. DINGELL. The provisions of House Joint Resolution 636 in the then quality brand stabilization bill were opposed by the National Association of Retail Druggists during the previous Congress, am I correct?

Mr. CORGAN. The principle and purpose was supported.

Mr. DINGELL. Didn't your organization oppose the quality brand stabilization bill during the previous session of Congress?

Mr. CORGAN. May I ask Mr. Jehle to answer that question? I was not present last year, sir.

Mr. MACK. Mr. Jehle, you may proceed.

Mr. JEHLE. Thank you, Mr. Chairman.

In response to Mr. Dingell's question I would like to say that the National Association of Retail Druggists first endorsed the new quality stabilization bill in January of this year. Prior to that time we were supporting somewhat similar legislation know as the fair competitive practices bill.

Mr. DINGELL. You say the other legislation is somewhat similar?

Mr. JEHLE. Somewhat similar in purpose and principle.

Mr. DINGELL. In other words, they fix prices at the retail level, do they not?

Mr. JEHLE. Yes. But this is one of the questions that requires an explanation. Yes, there is price fixing involved in a very restricted sense of that term. Unfortunately, the term "price fixing" has an unfavorable, unsavory connotation.

Mr. DINGELL. I didn't say it was unsavory, I merely said that both bills fix prices.

Mr. JEHLE. If that question has to be answered yes or no, I will answer "no," because it does not authorize price fixing.

Mr. DINGELL. Does either bill authorize price fixing?

Mr. JEHLE. In a broad sense, no. What it authorizes—and I think this should be made quite clear here, because there has been a great deal of confusion raised in previous sessions on this point. What this bill would authorize is the manufacturer's establishing a resale price on his branded or trademarked product when that product is in free or open competition with other merchandise of the same general class.

This vertical price maintenance, or price fixing, if you wish. But I will say one thing, Mr. Dingell, I am not interested in euphemisms necessarily—but I don't think it is fair to denominate or dub this bill as price fixing when it isn't such. Price fixing has a strict legal meaning which you are familiar with. It would be a violation of section 1 of the Sherman Act.

Mr. DINGELL. If this bill is a price-fixing bill, then it is a violation of section 1 of the Sherman bill, is that right?

Mr. JEHLE. No, sir; this would be an exemption.

Mr. DINGELL. I am not saying this is collusion in price fixing or anything else, I am just saying that this bill fixes prices. Doesn't it?

Mr. JEHLE. Under certain carefully prescribed conditions; yes, sir.

Mr. DINGELL. The fair trade bill in the last session authorizes fixing prices, is that right?

Mr. JEHLE. I can see that in principle and purpose the bills are very similar.

Mr. DINGELL. As a matter of fact, the National Association of Retail Druggists has very strongly militated against the consideration of the quality bill during previous sessions of Congress, have you not?

Mr. JEHLE. We had our own bill.

Mr. DINGELL. You had your own bill, and you were opposed to the quality brand stabilization bills, were you not?

Mr. JEHLE. It is not fair to say we were opposed to the other bill.

Mr. DINGELL. Were you for it?

Mr. JEHLE. If you are for one bill, you are not at the same time supporting the alternative.

Mr. DINGELL. I looked at your testimony in the previous hearing, and I can find nothing good you had to say about it.

Mr. JEHLE. In my previous testimony over here and in the Senate I have made no reference to the quality brand stabilization bill.

Mr. DINGELL. And no witness from the NARD had anything good to say about the quality bill during the previous session, is that right?

Mr. JEHLE. You are putting it negatively—Nothing at all was said about it.

Mr. DINGELL. Did anyone have anything good to say about the quality brand bills in the previous session?

Mr. JEHLE. So far as principle and purpose is concerned, I am sure that representatives of the NARD did have good things to say about the bill.

Mr. DINGELL. What are the differences, then, between this bill and the last bill that caused you folks to suddenly endorse it?

Mr. JEHLE. Well, there are a number of features. This bill has been revised to some extent. The preamble has been changed.

Mr. DINGELL. The preamble is not law.

Mr. JEHLE. I am starting at the beginning.

Mr. DINGELL. As a matter of fact, the preamble doesn't mean anything; it could be stricken and it wouldn't change it one bit. So the change in the preamble is not the reason for your organization endorsing this bill.

Mr. JEHLE. That would be one. The bill has been revised in other respects—I don't have a copy of the old bill, but I could prepare an interlinear comparison if that is what you wish, Mr. Dingell.

Mr. DINGELL. As a matter of fact, the principal revision in the bill is on page 6, line 22, where you have the exemption from the antitrust law; that is the principal difference between the two bills, isn't it?

Mr. JEHLE. No, sir. I want to make this clear. It was also decided by those forces that favor resale price maintenance that we should

unify our forces, there should be joint action in support of one bill. We thought it confusing to the Congress to be advancing two separate bills.

Mr. DINGELL. But it is interesting to note that the principal difference between the bill you endorse today and that which you did not endorse during the previous Congress is a change in language on page 6, line 22, which says that—

No exercise of any right provided in paragraphs (7) to (13) inclusive of this subsection, shall be violative of any of the antitrust acts.

Isn't that the principal difference between the quality brand bill of this as against the past session?

Mr. JEHLE. That is one difference.

Mr. DINGELL. Name me one other difference in the two bills.

Mr. JEHLE. As I say, I don't have a copy of the previous bill here.

Mr. DINGELL. I assume you have studied both bills?

Mr. JEHLE. Yes, sir; I have.

Mr. DINGELL. What other significant difference is there other than section 14 of this bill and the last bill?

Mr. JEHLE. Well, there are language changes here. You may not consider them material——

Mr. DINGELL. Name me one significant difference between the two bills. You have conceded already that the preamble does not mean anything. Name me one other difference between this bill and the last bill aside from this exemption of the antitrust law that is significant.

Mr. JEHLE. It seems to me that there were some changes in the language on page 4——

Mr. MACK. Could I interrupt?

Mr. JEHLE. Yes, sir.

Mr. MACK. The two bills that you are talking about——

Mr. DINGELL. The quality brand bill of the last session and the quality brand bill of this session.

Mr. JEHLE. I told you why we were supporting this bill. We want uniform action with respect to one bill.

Mr. DINGELL. But there is no significant difference between the two bills except for the exemptions offered by section 14, and the fact that this bill also offers an exemption from the antitrust laws to McKesson & Robbins on page 6, line 24.

Mr. JEHLE. That is an oversimplification.

Mr. DINGELL. You tell me one other difference other than the two differences I have mentioned between the two bills, that is militating for your organization to support in legislation. You name it and I will be happy to hear it.

Mr. JEHLE. I would like your permission to supply that for the record. If I had known you would ask that question I would have had a copy of the other bill and be prepared to give you an interlinear comparison of the two bills. But I find no significance to this point.

Mr. DINGELL. But you will concede that the only difference that you can recognize in the two bills at this time is the language of section 14 which gives exemption from the antitrust laws and which permits McKesson & Robbins to evade the force and effect of the consent judgment which they entered into earlier, am I correct? Can you name any other differences at this time?

Mr. JEHLE. It would apply to McKesson & Robbins and other companies similarly situated.

Mr. DINGELL. You had much to say in endorsing House Joint Resolution 636 and similar legislation, did you not?

Mr. JEHLE. Yes.

Mr. DINGELL. And at that time you had previous changes in another bill to make it acceptable to your organization? Did you or Mr. Anderson and his organization make that change?

Mr. JEHLE. Yes, it was decided by the persons who introduced the bill that this was a desirable bill.

Mr. DINGELL. Were you consulted about the other changes which you are now defending in section 14?

Mr. JEHLE. I find nothing embarrassing about this. We are not in any way ashamed of this. We found this a sound and constructive provision.

Mr. DINGELL. I am not asking you whether you are ashamed; I am asking you how you got the bill, and whether there is any other significant change in the legislation. I assume you were consulted on this, were you not? Did your organization endorse this change?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. As a matter of fact, wasn't it your organization that insisted that this change be included in the bill?

Mr. JEHLE. No, sir.

Mr. DINGELL. Did Mr. Anderson's organization insist that this exemption from the antitrust laws be included in the bill?

Mr. JEHLE. There was a common agreement that this provision should be included; yes.

Mr. DINGELL. Who was it that pushed this? Obviously it didn't get in by itself, somebody had to be for it. Tell me who was for this exemption from the national antitrust laws, the NARD or the quality brand stabilization people?

Mr. JEHLE. Both groups. And incidentally, I think there are some 70 organizations, sir, that support this legislation, and all 70 support this particular provision.

Mr. DINGELL. I recognize that. Was your organization the organization which insisted that this language appear in the bill?

Mr. JEHLE. No more so than any other organization.

Mr. DINGELL. Who did insist that this language be in the bill? Who insisted on this significant change in the last section of the quality brand stabilization bill and who did not? And I assume you were in on the negotiations, were you not?

Mr. JEHLE. Yes. This bill wasn't written with any tongue of fire—this isn't Holy Scripture—it can be revised.

Mr. DINGELL. Did your organization think this was desirable?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. And as a matter of fact, your organization asked to have this section included in the bill, did it not?

Mr. JEHLE. Was asked or did ask?

Mr. DINGELL. No; your organization asked to have section 14 included in the bill.

Mr. JEHLE. No, sir.

Mr. DINGELL. Who did?

Mr. JEHLE. I am trying to recall at the moment. I know the legislative counsel of the Senate was consulted at that time.

Mr. DINGELL. I recognize that the legislative counsel was consulted, but who wanted this language in the bill? Was it the sponsors of the bill who brought it up here to the Congress, was it the organization which endorsed the bill, was it the congressional sponsors who insisted this language be in, was it Mr. Anderson, or was it NARD? Who insisted that this language be in the bill?

Mr. JEHLE. I will take full responsibility for it. I don't know, sir——

Mr. DINGELL. I am not asking for a mea culpa; I want to know who is responsible for it.

Mr. JEHLE. There is no mea culpa involved in this; I want to make that clear.

Let's just say that Phil Jehle was all for this, if that ends it.

Mr. DINGELL. Let's not say it unless it is true. But what I think we are entitled to have in this committee, since you are here speaking on behalf of this bill, is to have you tell us who endorsed section 14 of the bill.

Mr. MACK. The Chair would like to make a statement on this matter. And I have no intention of limiting the scope of the questioning. But I wonder if it is pertinent at this time to ask this witness that question. The bill was sponsored by the chairman of this committee——

Mr. DINGELL. For whom I say I have a very high regard, personal, professional, and otherwise.

Mr. MACK. And cosponsored by a very distinguished member of the Rules Committee——

Mr. DINGELL. My regard for all the congressional sponsors is high.

Mr. MACK. And other Members of the House. And the Chair feels that it would be more appropriate to inquire this of the sponsors of the bill. I am not sure that the witness is in a position to answer that.

Mr. DINGELL. I want to make it plain that my remarks reflect no discredit on any of the congressional sponsors of the bill.

Mr. MACK. To be eminently fair, I think the witness is probably not in a positon to answer such questions in great detail, and I feel it would be more appropriate to ask the sponsors of the legislation.

Mr. DINGELL. All right.

Now, tell me this. The language on the bottom of page 6 and the top of page 7 makes available to McKesson & Robbins, and Esso, and Kodak, and anybody else who wants to manufacture and retail and wholesale in competition with their retail outlets, the power to fix prices of their retail competitors, their individual retail competitors, does it not?

Mr. JEHLE. Provided that such competing manufacturer or integrated distributor sells at the same price that is maintained or fixed for the independent. That is a very important qualification.

Mr. DINGELL. I am not even arguing that point; I am just asking you if it permits them to fix the prices of their retail competitor when they manufacture and retail and wholesale in competition.

Mr. JEHLE. Yes, sir, provided that they themselves sell at the same price set for their customers.

Mr. DINGELL. I recognize that. Now, this, in a sense—as a matter of fact——

Mr. JEHLE. That is the difference between fairness and unfairness.

Mr. DINGELL. This repeals the *McKesson & Robbins* decision?

Mr. JEHLE. It reverses it; yes, sir.

Mr. DINGELL. And it reverses *Esso* v. *Secatores?*

Mr. JEHLE. Yes, sir.

Mr. DINGELL. And it also repeals the *Parke Davis* decision, does it not, the antitrust decision in the *Parke Davis* case?

Mr. JEHLE. To the extent that——

Mr. DINGELL. To the extent that it repeals this particular construction of the antitrust laws; am I correct?

Mr. JEHLE. In what particular does it repeal the *Parke Davis?*

Mr. DINGELL. This says these organizations which have previously been denied the right to fix the prices of their retailers and at the same time to compete with them now have license to do it.

Mr. JEHLE. The *Parke Davis* does not have anything to do with this—the one involving Dart Drug, the *United States* v. *Parke Davis?*

Mr. DINGELL. It doesn't have anything to do with that case?

Mr. JEHLE. No, sir.

Mr. DINGELL. But at least you will concede that this constitutes a special exemption from the antitrust laws for big businessmen and not for small businessmen; am I correct?

Mr. JEHLE. No, sir. We are trying to do no more in section 14 than restore the law to what the Congress thought it was establishing when it passed the McGuire Act in 1952.

Mr. DINGELL. What did the Supreme Court say about the law at that time? The Supreme Court said that it was not the intent of Congress to permit prices to be fixed by manufacturers who also engaged in retailing in competition with his retailers.

Mr. JEHLE. Yes.

Mr. DINGELL. Is it your business to interpret the law or the Supreme Court's business to interpret the law?

Mr. JEHLE. I want to make it clear that it was, as you say, a narrow question of statutory construction. You are referring to the *McKesson & Robbins* case.

Mr. DINGELL. And also the *Esso* case, and other cases since then.

Mr. JEHLE. There were some very respected Justices in the minority—Justices Harlan, Frankfurter, and Burton. And since this question has been raised, with your indulgence, I would like to quote from the minority opinion.

Mr. DINGELL. This is the minority report, not the majority?

Mr. JEHLE. Yes. But remember, this is statutory construction, and so I think in that light this is relevant and will be helpful.

Mr. DINGELL. Before you answer that, you tell us; you are a lawyer, aren't you?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. And you know as a matter of fact that the law as it stands is, of course, a majority opinion; is that correct?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. And so the minority opinion really doesn't mean anything, it is not cited to prove a point or anything else?

Mr. JEHLE. Yes and no, sir. But we are not in a court of law, this is a legislative judgment.

Mr. DINGELL. The Supreme Court is entitled to construe the statutes of the United States; is that correct?

Mr. JEHLE. Yes.

Mr. DINGELL. It is not your business to construe them, or mine?

Mr. JEHLE. No.

Mr. DINGELL. So the Supreme Court, exercising its proper jurisdiction, held that this was a violation of the antitrust law?

Mr. JEHLE. But it so happens that I find the minority opinion more persuasive, sir. And here is what it said:

> If we accept the legislative judgment implicit in the act that retail price maintenance is necessary and desirable to protect the goodwill attached to a brand name, there is no meaningful distinction between the fair trade contracts of integrated and nonintegrated manufacturers.

There is no meaningful difference between their fair trade contracts, their respective fair trade contracts.

Mr. DINGELL. That is not the law, what you are reading?

Mr. JEHLE. No. But certainly the integrated manufacturer has as strong a claim to protection for his goodwill as a nonintegrated manufacturer, and the economic effect of the contracts is the same. As the dissenting Justices pointed out:

> In both cases price competition in the resale of the branded product is eliminated, and in neither case does the price fixing extend beyond the manufacturer's own products, and while the Government concedes the right—

And this is the Justice Department—

> concedes the right of a nonintegrated manufacturer to eliminate competition in his products between wholesalers, it finds the vice not contemplated by the act when one of the wholesalers is also the manufacturer, for then the contracts eliminate competition between the very parties to the contracts.

But in either case all price competition is eliminated, and I am unable to see what difference it makes.

Mr. DINGELL. I think there are a number of very important questions to be asked. And I will concede that the minority decision, which is not the law in this case, is precisely what you said.

Mr. JEHLE. Very well.

Mr. DINGELL. But it is an interesting circumstance that your organization did not endorse this bill until this particular exemption from the antitrust law was presented, isn't that a fact?

Mr. JEHLE. Yes, sir, a bare fact standing alone.

Mr. DINGELL. It is an indisputable fact; is that right?

Now, I am particularly interested in another section of this bill, section 8, line 19, appearing on page 3:

> (8) When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark, the right of any person to employ such brand, name,

and so forth and so on. I am sure you are familiar with that language.

Mr. JEHLE. Yes, sir.

Mr. DINGELL. Let's get into the pharmaceutical industry and take a look at the situation with regard to it. Let's take a look at the situation with regard to this. Does this authorize, first of all, does this bill authorize price fixing in commodities which do not bear a brand or trademark?

Mr. JEHLE. No, sir, those products would not be subject to the provisions of this quality stabilization bill.

Mr. DINGELL. Let's take, then, a pharmaceutical that bears no trademark, and so forth, this is not subject to price fixing, is that right?

Mr. JEHLE. No, sir.

Mr. DINGELL. Now, let's take a pill which bears a trademark which is not identifiable from any other pill. Is this subject to price fixing? Let's take a CIBA pill, that has CIBA stamped on it, is that subject to price fixing under this bill?

Mr. CORGAN. Not under the name of CIBA, as I understand it.

Mr. DINGELL. I just used CIBA as an example. Is that subject to price fixing under this bill?

Mr. CORGAN. What product did you have in mind, sir?

Mr. DINGELL. I am trying to interpret the statute now and find out what this means and see whether somebody has the right to fix prices. Let's just take a pill that has CIBA on it and nothing else. Is that susceptible to price fixing under this bill?

Mr. CORGAN. In my understanding, it wouldn't be.

Mr. DINGELL. Very good, sir.

Now, the next question I want to ask is, subsection 8 on page 3:

When goods usable for the same general purpose are available to the public from sources other than the owner of such brand name, or trademark. * * *.

I want to return to this. Let's say there are two manufacturers who manufacture a certain antiarthritic or antidepressant, are they eligible to participate in the price-fixing section of this bill, the two manufacturers of a specific antiarthritic, or say a special antidepressant, the same one, are they eligible to participate in the price-fixing sections of this bill?

Mr. CORGAN. It would seem that they could, each one under its own brand name, but not as one brand for both companies, because they must be in open competition to each other before they could stabilize the price on either one.

Mr. DINGELL. What I am trying to figure out is, does this give sufficient latitude in such competition that this bill authorizes the price fixing under those circumstances?

Mr. CORGAN. We believe that it does give sufficient competition, because there would have to be competition before they could stabilize it.

Mr. DINGELL. In other words, if there are two manufacturers who manufacture the same particular item, and it is not available from any other source, that they are thereby justified in engaging in price fixing, and that is sufficient competition to authorize price fixings, where there are just two manufacturers?

Mr. CORGAN. Yes.

Mr. DINGELL. Now, let's take the case where there are three or four but they engage in cross-licensing among each other of the same commodity, where there is one principal discoverer, inventor or entrepreneur in the field and he cross-licenses a number of other people to permit them to also manufacture the goods or the commodity on a royalty basis, are they therefore eligible to engage—are all of them therefore eligible to engage in price-fixing agreements with regard to this?

Mr. CORGAN. I think that gets into the legal aspects. I would like to ask Mr. Jehle to answer that.

Mr. DINGELL. I would like to have Mr. Jehle's comment on that.

Mr. JEHLE. My understanding is that in your hypothesis there are two or more different manufacturers.

Mr. DINGELL. Let's take the first two manufacturers, two manufacturers sufficiently in competition to authorize them to engage in price fixing under this bill.

Mr. JEHLE. My opinion is that it would be sufficient, yes, sir. Let me say one thing. I would prefer the phrase "in free and open competition." I find that the language——

Mr. DINGELL. Would free and open competition authorize price fixing by two manufacturers when they are the sole manufacturers of this particular antidepressant?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. It would?

Mr. JEHLE. Yes, it would.

The requirement that the commodity be in free and open competition with commodities of the same general class producer-distributed by others is a phrase that has general understanding, general legal significance. I find that test very satisfactory. Yes, I think, as a general rule, that where there are two or more manufacturers producing commodities of the same general class, they are competitive with each other.

Mr. DINGELL. Let's say there is one manufacturer who discovers, invents, engages in the initial investigation, and so forth, that leads to the marketing of a specific antidepressant, and he licenses another manufacturer to produce that commodity on a royalty basis, is he entitled to price fix under that?

Mr. JEHLE. No, sir, because I don't think they are in free and open competition under those conditions.

Mr. DINGELL. Let's say if he permits half a dozen to manufacture this under a royalty basis, is he entitled to price fix?

Mr. JEHLE. My answer would be no. I would like to examine that licensing agreement, but I am sure, sir, that there would be many restrictions and conditions in the licensing agreement which would negate any free and open competition.

Mr. DINGELL. I am trying to be fair with you. But since this bill contains an exemption from the antitrust laws, I would like to know how to draw the exemption.

Mr. JEHLE. As a lawyer, I would strongly advise any manufacturer from attempting to quality stabilize his products where a licensing agreement were in effect with competitiors.

Mr. DINGELL. Now, let me ask you this question. How many of your associations have been indicted for price fixing by the Federal Government, how many times? How many times has the National Association of Retail Druggists been indicted for violation of the antitrust laws?

Mr. JEHLE. I know of one such instance. I believe there were two. But that is ancient history.

Mr. DINGELL. They were indicted two times; they originally were indicted in 1906.

Mr. JEHLE. I wasn't even born at that time, sir.

Mr. DINGELL. Neither was I. But it was indicted in 1906 for violation of the antitrust laws in connection with the intimidation and coercion of manufacturers in connection with price fixing, is that right?

Mr. JEHLE. Yes.

Mr. DINGELL. And they engaged in the same practice subsequently and were again indicted for precisely the same thing, am I right, for violation of the antitrust laws?

Mr. JEHLE. Yes. I am not sure about that second time.

Mr. DINGELL. And also many of your constituent local organizations have been indicted for violation of the antitrust laws, is that right?

Mr. JEHLE. They are not constituent organizations, but they are affiliated. And incidentally, no one can in any way condone or justify antitrust violations, sir. And to the extent that they are guilty—and I am not in any way conceding that they are—I think it deplorable. But I want to make it clear, sir, that a year and a half ago the National Association of Retail Druggists became very alarmed over the antitrust involvement of certain individuals. We think they were misguided, they had the best of intentions, but they were misguided and were misinformed.

The NARD went out and retained a man who is considered the outstanding antitrust authority in the United States, a former Federal Trade Commissioner, Earl Kintner, to set up an antitrust educational program for the Nation's retail pharmacists. And under Mr. Kintner's leadership and educational program I think we have done a pretty good job.

What has happened in the past is just history. We regret it, but as of the date Mr. Kintner came with us—and incidentally, long before, as far as the NARD itself is concerned—there has been no antitrust involvement.

Mr. DINGELL. Did Mr. Kintner endorse this bill?

Mr. JEHLE. No, sir—you mean has he come up here to endorse this?

Mr. DINGELL. No, has he endorsed this bill?

Mr. JEHLE. No, sir.

Mr. DINGELL. As a matter of fact, when he was Chairman of the Federal Trade Commission he opposed it, did he not?

Mr. JEHLE. Yes, sir. And if I were down at the Federal Trade Commission I suppose I would be under instructions from the administration to oppose it too. But incidentally, those people in the Antitrust Division and over at the Federal Trade Commission, sir, have not thought this thing through. This Friday Judge Loevinger is going to be over here. And I hope someone will ask him what his position or what the position of his agency would be in respect to the Robinson-Patman Act if it were coming up for the first time today.

Those people measure everything in terms of the Sherman Act, and everything fails. And I have talked to them, sir—you know this, Mr. Dingell—I have got a lot of good friends over there, and I kept asking them, Why do you oppose this retail price maintenance? This is beneficial to the consumer, to the manufacturer and to the retailer. Why do you oppose this?

And they have never been able to give me any real good reason for it. They say it is price fixing. Well, if everything is to be measured

in terms of the Sherman Act, you throw out the Federal Trade Commission Act, you throw out the Robinson-Patman Act, and in fact the Clayton Act. Those people are real hard competition boys over there—they are good friends and all that—but they are mistaken in this respect.

In fact, I have never seen the Justice Department come up here before the Congress and support legislation that I think is truly helpful to the small businessman in the antitrust field.

I will take that back. They are good on antimerger legislation and legislation like that, but they have never supported this.

Mr. DINGELL. Let me ask you just one more question. How are you going to go back to your little retail druggists and put over to them the fact that McKesson & Robbins or any other large manufacturer is going to be authorized by this specific statute to engage in competition with them and at the same time fix these prices?

Mr. JEHLE. Let me make one thing clear, sir. McKesson & Robbins has never competed at the retail level with independent retail pharmacists, nor does it have any intention of doing so.

Mr. DINGELL. You authorized it specifically to engage in the practices they agreed not to, and the consent judgment was finally entered into that case where they agreed not to compete on the wholesale level. How do you justify it on the wholesale level?

Mr. JEHLE. I know a little bit about the dual distribution problem, sir. And the vice of dual distribution; that is, the manufacturer being in competition with his customers, lies not in the competition itself, but rather in the manufacturers undercutting his customers. And under existing law a manufacturer, the integrated manufacturer, may, and many of them do, compete with its resale customers. And they undercut the prices of their customers consistently. And the vice lies in the undercutting.

Now, this bill, sir, would make McKesson & Robbins or any other integrated manufacturer sell at the same price that that manufacturer sets for its customers.

Mr. DINGELL. Let me ask you this. Will you deny to me today that under this bill McKesson & Robbins or Esso, or any other manufacturer who has this exemption from the antitrust laws is entitled thereby to fix the profit levels on the ultimate resale of its commodities at the level most advantageous to it, and to its distributing systems, as opposed to that of its competing small business firms?

Mr. JEHLE. Yes, sir. The trademark or brand name manufacturer could, if it wishes—and incidentally, this is a permissive bill from all the way down—could set the margin.

Mr. DINGELL. But they could still fix that level and the level more advantageous to it, is that correct?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. And under the profit and loss system that we have in this country, it is pretty obvious that they would have a substantial incentive to so do, would they not?

Mr. JEHLE. No, sir.

Mr. DINGELL. No?

Mr. JEHLE. There are many considerations that would militate against it. Take McKesson & Robbins, or any supplier to the drug field—and I am not going to speak outside the drug field—but if a

manufacturer sets too small a margin for the customer, for the retailer, the retailer just doesn't handle that product. He is not interested in it. And that is against the self-interest of the manufacturer.

Mr. DINGELL. Let me ask you this. Is McKesson & Robbins a member of the National Association of Retail Druggists?

Mr. JEHLE. I don't believe so, sir.

Mr. DINGELL. Do they make a contribution to the NARD?

Mr. JEHLE. No, sir.

Mr. DINGELL. They have never made a contribution?

Mr. JEHLE. I don't think so, sir.

Mr. DINGELL. Would you deny that they have been members of any of the other pharmaceutical associations and the associations that endorse this bill?

Mr. JEHILE. No. I believe that McKesson & Robbins is a member of the National Wholesale Druggist Association.

Mr. DINGELL. Would you deny that McKesson & Robbins has ever made any contribution to the fair trade defense fund set up by the NARD and the other constituent organizations, local pharmaceutical and retail druggists associations? They have, haven't they, they have made substantial contributions running into thousands of dollars, have they not?

I am trying to find out how you folks on behalf of the businessmen are endorsing——

Mr. JEHLE. I want to make it clear, McKesson & Robbins has made no donation to the NARD. That is all I am aware of. I can't speak for the other organizations. But Mr. Nolen will be here Friday, and you can ask those questions of him.

Mr. DINGELL. Thank you.

Mr. MACK. Mr. Glenn.

Mr. GLENN. Mr. Corgan, I apologize for not having come in in time to hear your complete statement. I heard part of it, and I can assure you that I am in complete accord with what you seek to do. I am sympathetic with the statements that you have made in their effect on small business and the retail druggist.

There is a statement in there that I want to call to your attention and just comment on in passing. On page 3 you say that "Our experience has been that where the Congress leads the executive branch is close behind." That is right there in the first paragraph. I am glad to hear that you have had that experience, because we in Congress have not.

And I can only say that we would like to have the reverse—we would like to have it this way and not the reverse. And presently, while Congress is trying to lead, we are not getting very far, and I am afraid we are very far behind the executive.

Thank you, Mr. Chairman.

Mr. MACK. Mr. Hemphill.

Mr. HEMPHILL. Thank you, Mr. Chairman.

One of the things that concerns me about this legislation is the impact it is going to have on the consumer. We see these big chains come into a community, and the first thing you know two or three of the smaller businesses go out of business, which is a sad thing. And yet because of volume buying and what you call "bait" selling, sell-

ing below price on what you call loss leaders, the public does get the benefit of it in the form of lower prices.

Now, how can we compromise that conflict? We have an obligation to the small businessman, certainly, and we have an obligation to the consumer. That has me greatly concerned. How do you propose that we resolve that, or serve the interests of both? Or is it possible?

Mr. CORGAN. In many cases I believe that this could be attributed to price juggling, where they may sell one item at a cheaper price, and then they will increase the price on another item or the margin on another item. After all, there is a certain amount of overhead and expense to operate a business, and they cannot sell below their operating cost and stay in business.

Now, I was attending a convention the other day and heard a man make a statement of a survey that had been made with some discount houses as compared with the regular retailers. And I believe it was some 50 items that they had checked. His statement was this—I don't remember the exact figure, but the approximate figures were that 17 items were higher than the average price that they found in other retailers—perhaps it was 17 that were lower and 16 that were higher, but approximately that—and something like 50 percent of these items were practically the same price.

Now, they averaged all 50 of them out, and they found less than 2 percent difference in the price that was being sold at these discount houses as compared to the regular retailers. Now, this man made the statement from the floor of a convention.

Mr. HEMPHILL. I appreciate your answer, but it doesn't answer the question. Suppose a man has to take a lot of aspirin or something else for pain. By virtue of the fact that the retailer wishes to bring people in he buys a lot of goods to sell at a price at which he makes no profit, then what obligations do we have to a man that——

Mr. CORGAN. There are many brands of aspirin, and many prices, and as I understand this bill, if one particular manufacturer wanted to put his pill under quality stabilization, he could do that as long as he was in open and free competition with another brand. But another manufacturer could have another aspirin here, and he could sell it at whatever price he wanted to, or I as a retailer can buy whatever brand I want to, and if I don't want to buy the brand of asprin that comes under this quality stabilization, that is my privilege.

If I want to buy a brand that doesn't come under this quality stabilization, I can do that.

Mr. JEHLE. If I might add to that answer, I want to make it clear that we have no intention of driving out of business some of these so-called discount houses. We think that they can continue in business. And if they want to give their products away, fine. But they will no longer have the right to slash prices in a predatory fashion on products where the manufacturer wants to protect his brand name and goodwill.

And, incidentally, let's take the experience with fair trade. Out of the total retail volume, never more than 10 percent of all retail sales were of fair-traded products. I guess that would be $12 to $15 billion at the time when fair trade was truly effective. So we are speaking of a very small volume. And all manufacturers of branded

or trademarked products are not going to avail themselves of the benefit of this product. Many have already said they won't.

But some will. Those that wish to price their products under the quality stabilization bill should have that right. But the consumer that is interested in price and price alone will be able to go to the price cutters and buy their products at giveaway prices. And there will be many manufacturers that will continue to sell to the discount houses. And they will be very happy to have their products handled by them. But the manufacturer does deserve the right to choose whether or not to come under the provisions of this bill. But we frankly have no intention of trying to hurt the discount houses.

Mr. HEMPHILL. That wasn't my concern. The thing that bothers me is, if we enact this legislation, aren't we charging it to the consumer?

Mr. CORGAN. No. In many cases the consumer does not know the prices and the values, and they can be misled by someone who wants to take advantage of them. Now, I, as a retail druggist, believe in fair prices. All I ask for is a price that I can live with and make a return on my investment, and something for my efforts in my business. If I try to get my prices too high, sooner or later the consumer may learn that I am taking advantage of that person, and they will change drugstores.

So I must keep my prices in line with competition and with margins of profit. If my expenses go up, I am either going to have to get a little better price, or I am going to go out of business. So it behooves us as retailers to keep our expenses as low as possible and operate as efficiently as possible. And I think that we have proven that we can do that in many instances.

However, when you have large concerns come in with unlimited capital, and they can sell at a loss for a much greater time than we can and still stay in business, then that is unfair competition, to my way of looking at it.

Mr. HEMPHILL. Yesterday I bought some gasoline for 21 cents a gallon on the way to the airport. And I asked the retailer if he were being penalized. And he was not. He said that the oil companies were so big that they could absorb the loss.

Mr. JEHLE. I will say just one thing, Mr. Hemphill——

Mr. HEMPHILL. And that concerns me.

Mr. JEHLE. Yes, it would. The retailer is being penalized, for in order for him to maintain a margin on which he can operate, not profitably, but maybe satisfactorily, he has to give up his right as an independent businessman; he has to subject himself to a consignment agency agreement with the major oil company.

And that is the only way the major oil company, outside of fair trade or quality stabilization—that is the only way the major oil company would be able to legally guarantee a margin for that dealer. And the dealer is getting only 3 or 4 cents margin.

Mr. HEMPHILL. The dealer is still getting the margin, but the public is still getting the benefit of that 21-cent gas.

Mr. JEHLE. Temporarily, yes.

Mr. HEMPHILL. If I could get it at 21 cents I would keep buying it at 21 cents.

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Mr. JEHLE. But the major oil company has transformed that dealer from an independent entrepreneur into an agent, almost an employee. He has lost his independence. That may be an intangible, but it means a great deal to an independent businessman.

And I just want to say one other thing. It is unfortunate that these price wars are going on. And you are going to hear later this morning, sir, from John Dressler, of the New Jersey, Gasoline Retailers Association. He can tell you about the 6-year price war that was fought up in New Jersey—Mr. Glenn is familiar with this too—where one out of every three gasoline dealers in the State of New Jersey went out of business.

Sure, people had cheap gasoline prices for those 6 years. But those cheap prices came out of the blood and sweat of the gasoline dealers—it was at their expense. They were subsidizing that gasoline price war. That was no benefit to the economy of New Jersey, because a lot of independent small businessmen were lost. I think it was something like 3,000 over a 6-year period. That was a serious matter. That was a great tragedy.

That gasoline war, sir, was ended when the major oil companies up there went on fair trade. And since that time fair trade has been operating very well in New Jersey, as Mr. Dressler will tell you. And gasoline prices in New Jersey remain the lowest of any market on the east coast, except for these price wars that pop up from time to time here and there.

Mr. HEMPHILL. If this legislation were effected, and Standard Oil said to all its dealers, we will sell you the gas for such and such a price, and the dealer will sell at such and such a price, that would mean that you would have to do it all over the Nation, is that right?

Mr. JEHLE. Well, Esso Standard doesn't market everywhere.

Mr. HEMPHILL. Everywhere it markets?

Mr. JEHLE. Yes, sir. It would appear that a company availing itself of the benefits of this bill would have to quality stabilize its products wherever it marketed them.

Mr. HEMPHILL. What about the Amoco man down the street—if he didn't come under this particular legislation he could sell for what he wanted to?

Mr. JEHLE. Yes, sir. So you can see that there would be keen competition among the major oil companies. That is the virtue of this kind of legislation. The competition between the companies would make sure that the price wouldn't be too high. If Esso Standard put its price up at 24 when the Amoco dealer was selling at 21, all the business would go to Amoco.

Mr. HEMPHILL. But this doesn't make Amoco come under it?

Mr. JEHLE. No, it is entirely voluntary.

Mr. HEMPHILL. You say it is a voluntary proposition. Why would Standard even volunteer to come under it?

Mr. JEHLE. Perhaps, sir—they have testified in the past on similar legislation that it would be to protect their property rights and brand name and business good will, to prevent a few chiselers from using price as a come-on to lure people into their station. And Mr. Dressler will be able to discuss this much more helpfully than I am, sir.

Mr. HEMPHILL. I thank you. I am still confused on the matter, because it seems to me that if the companies had the control I think

they have they could do what they want to do without this legislation.

Mr. JEHLE. They are doing it by the consignment agency device. And I would like to point out that there are many ways to fix prices, as Mr. Dingell has described it, legally. First of all, a manufacturer who has got unlimited financial resources can open its own retail outlets throughout the country, and many of them have done that in the past. And these gigantic chains like A. & P. and Safeway, have got full control over prices in their stores. That is direct price maintenance there. That is done legally.

Sears Roebuck does $5 billion worth of business in its stores across the country, and the price uniformity at all stores is done legally.

Of course another way to do it is through the agency or consignment device. And I have never heard the people from the Department of Justice or the Federal Trade Commission condemn these alternative methods or modes of price maintenance. They only worry about resale price maintenance, the only method which is of benefit to the independent businessman—you have got to be big business to use those other methods.

Mr. HEMPHILL. Thank you, Mr. Jehle.

Mr. MACK. Mr. Curtin.

Mr. CURTIN. Thank you, Mr. Chairman.

Mr. Corgan, I want you to know that I am very sympathetic to what you are trying to accomplish here, because I am much concerned over the plight of the small businessman. I think the small businessman has long been the backbone of the American economy, and I would hate to see his number diminish on the American business scene.

Mr. CORGAN. Thank you.

Mr. CURTIN. Now, however, in this bill there is one feature that gives me some concern, and perhaps you can answer it. As I understand the proposed provisions, the manufacturer of a product can say, "This is a brand name product, and this is the price at which it must be sold." Is that your understanding?

Mr. CORGAN. That is my understanding.

Mr. CURTIN. Does that mean that that price is a uniform price for sales in all parts of the United States?

Mr. CORGAN. I would understand it to be a uniform price as the bill is now drafted.

Mr. CURTIN. Now, it seems to me that we have certain sections of the country—for example, up in Alaska—where the overhead and the cost of getting a product to that particular outlet is going to be very much higher than in another section; therefore, there the price would be normally much higher than it is in some other section of the United States where the operating costs are very much lower.

Now, can't you see the possibility of inequities if you are going to say this product must be sold at the same price in Alaska as it must be sold in other sections of the United States?

Mr. CORGAN. I can see that. And I think it is a very good point.

Mr. CURTIN. How are you going to answer that?

Mr. CORGAN. Perhaps it would be necessary to have an amendment to correct that, I wouldn't know, to allow some sort of flexibility, where you have those extreme cases such as—you are using as an example Alaska. And we all know that it does cost more to get merchandise to Alaska than it does to Colorado where I live. And I can see the trouble.

Mr. CURTIN. For example, in the area in which a product is manufactured—as the Campbell Soup Co., which has a plant in Camden, N.J.—obviously they can get their product on the market in adjacent Philadelphia, or even in my district, Bucks and Lehigh Counties, in Pennsylvania, cheaper than that product could be sold in Fairbanks, Alaska.

Therefore, I don't see how a trade name price could be uniform.

Mr. CORGAN. I understand that most merchandise does have uniform prices nationally, whether it would be under the quality stabilization bill or not. Now, I don't know about Alaska, because I have never been there. But I can see where there would be an additional cost. I don't know who stands that cost.

Mr. CURTIN. I was talking to a visitor from Alaska just last week who told me that the price of a loaf of bread in his part of Alaska is 48 cents—and that is not considered high—because of overhead factors and cost of materials. Now, 48 cents would be a pretty high price for a loaf of bread in this area.

Mr. CORGAN. That is right.

Mr. CURTIN. And I assume that that range or differentiation would apply to other products.

Mr. CORGAN. There would certainly have to be some adjustment there. How it would be done I don't know. If the bill permitted a price range, then I think that that could be accomplished, whereby there was a ceiling and a floor for a certain item, and then the ceiling could be what it cost to put it in Alaska, and the floor could be whatever the cost would be at the closest area to the manufacturing area.

Mr. CURTIN. One other thing, Mr. Corgan. I would refer you to your statement on page 8, the second paragraph. You say there that, "It should be noted that nothing in this joint resolution would bar a distributor from removing the trademark or brand name from the product."

Mr. CORGAN. Yes, sir.

Mr. CURTIN. How is he going to do that?

Mr. CORGAN. That would be his problem, it would be his prerogative to remove the brand name, and if he wanted to put his own brand name on it, and just label it, showing he complied with the labeling laws, and sell it as "whose-its" band, then it would not come under this bill.

But if I as a manufacturer owned that trademark, then I would have control of that item under that trademark. But if I as a retailer or distributor should remove that trademark, then it is no longer classified as the manufacturer owning that item. It must carry the trademark.

Mr. CURTIN. Do you mean by that that a distributor could buy a hundred cases of Heinz' baked beans and then he could take the labels off of those cans, and put his own label on them and then distribute them under another name?

Mr. CORGAN. Yes. But if you wanted to buy Heinz' beans you certainly wouldn't want to buy "whose-its" beans, even though you wouldn't know whether it was the same brand or not. I as a consumer, if I come in and find X brand of beans, that doesn't mean anything to me. But if I come in and see Heinz' beans, that means a quality product.

Mr. CURTIN. You mean, then—keeping to the Heinz beans example for the moment—that under this bill you think it would be perfectly legitimate for a distributor to buy a quantity of Heinz' beans and then take the Heinz label off the can and put his own label on it without the consent of Heinz?

Mr. CORGAN. As long as he didn't refer to it as Heinz beans.

Mr. JEHLE. Mr. Curtin, there certainly is an element of unfairness in that particular arrangement. But the point that we are making, sir, is that that would not be violative of this particular legislation. It might violate another law, either State—probably a State law, it might be violative of some other law, but it would not be violative of this.

And incidentally, the language that you have just referred to on page 8 is taken almost in toto from a unanimous opinion of the Supreme Court in the old *Dearborn* case. And similar legislation was construed, and the Supreme Court said there—

> There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity, thus separating the physical property which he owns from the goodwill, which is the property of another, and then selling the commodity at his own price, provided he can do so without utilizing the goodwill of the latter as an aid to that end.

So wherever a retailer is able to remove a label or identifying insignia from a product and sell it without in any way referring to the manufacturer's name, he may do so without violating this act. He may run afoul of other legislation, though, of other statutes.

Mr. CURTIN. Do you approve of that type of procedure?

Mr. CORGAN. I think anybody that would do that would probably be trying to trick his customer in other ways. I don't think he would be a very good economic citizen, Mr. Curtin. But I am just pointing out that we are not in any way foreclosing that avenue to any retailer that wants to take advantage of it. No, I wouldn't think he was a very high-class merchant.

Mr. CURTIN. This bill, as I understand it, is primarily to protect the manufacturer that has such a trade name.

Mr. CORGAN. Yes, sir.

Mr. CURTIN. Do you think, then, that you are protecting the manufacturer that has a trade name if you take his label off of it and put somebody else's label on his product?

Mr. CORGAN. I want to make it clear, we are not recommending that, sir. But you can see, Mr. Curtin, that would not be damaging or injurious to the property rights in the brand name, because the customer would never know that it was brand "X," he would have no knowledge of that whatsoever.

Mr. CURTIN. That is all, Mr. Chairman.

Mr. DINGELL. Mr. Chairman, this just occurred to me as I was sitting here.

Is there any requirement in this bill that prices be fixed uniformly across the country?

Mr. JEHLE. In express language, no, sir.

Mr. DINGELL. In H.J. Res. 636 or any of the similar bills, is there any language in any of those bills that requires that prices be fixed uniformly throughout the country?

Mr. JEHLE. No. But I think that is a reasonable and necessary inference to be drawn from reading them.

Mr. DINGELL. As a matter of fact, there is no language in the bills that requires that they be fixed uniformly?

Mr. JEHLE. That is my interpretation of the bills.

Mr. DINGELL. But there is no such language in the bills?

Mr. JEHLE. No, sir.

Mr. DINGELL. So, as a matter of fact, the manufacturers could fix a different price in any part of the country?

Mr. JEHLE. No, I don't believe he could.

Mr. DINGELL. Show me where in the bill he can't.

Mr. JEHLE. Reading all the provisions of the whole——

Mr. DINGELL. You tell me a section of this bill which forbids the manufacturer to fix different prices in different parts of the country, let's say to fix a different resale price in New York and New Jersey, right across the Hudson River. He can fix different prices across the country in different States, can he not?

Mr. JEHLE. I don't believe so.

Mr. MACK. The intention of this committee perhaps should be clarified by amendment. And if the gentleman has any suggestions along that line, I know that the committee would be happy to receive them.

Mr. JEHLE. We would be happy to propose an amendment along that line.

Mr. DINGELL. As a matter of fact, under the exemption of the antitrust laws he can sell at different wholesale prices to different ultimate retailers, can he not, by repeal of the Robinson-Patman Act?

Mr. JEHLE. No.

Mr. DINGELL. You tell me how a court is going to construe the language:

(14) No exercise of any right or remedy provided in paragraphs (7) to (13) inclusive of this subsection shall be construed to be a violation of any of the Antitrust Acts.

Now, the Robinson-Patman Act is an antitrust law, is it not?

Mr. JEHLE. Yes.

Mr. DINGELL. And under sections (7) through (13) of this bill a manufacturer would be able to sell at different prices to different wholesalers and different prices to different retailers and come under the very broad shoulder of the antitrust exemption, wouldn't he?

Mr. JEHLE. No, sir.

Mr. DINGELL. Why not?

Mr. JEHLE. If that were the case I am sure you would have a lot of these big discount houses who are so often the beneficiaries of price discrimination coming in here and supporting the bill.

Mr. DINGELL. Will you tell me what in the bill denies the manufacturers a right to do that?

Mr. JEHLE. Very simply, sir. No right or remedy provided in paragraph (7) to (13)—there is no right or remedy to discriminate in price given in paragraphs (7) to (13). The only right or remedy—the only right really is for a manufacturer to establish his resale prices. That is the right referred to, or remedy. That is all.

Mr. DINGELL. I am very happy to hear that.

Thank you, very much.

Mr. MACK. I wish to commend you on a very fine statement which you made this morning.

Mr. CORGAN. Thank you, sir.

Mr. MACK. The next witness is Mr. John Dressler, executive secretary, New Jersey Gasoline Retailers Association.

(No response.)

Mr. MACK. Mr. John A. Gosnell, counsel of the National Small Business Association.

STATEMENT OF JOHN A. GOSNELL, COUNSEL, NATIONAL SMALL BUSINESS ASSOCIATION

Mr. GOSNELL. Mr. Chairman, I have a prepared statement which I would like to submit for the record and make a few observations which I hope will clear up some of the major points under discussion.

Mr. MACK. Without objection your entire statement will be included at this point in the record.

(The statement of John A. Gosnell follows:)

STATEMENT OF JOHN A. GOSNELL ON BEHALF OF NATIONAL SMALL BUSINESS ASSOCIATION ON HOUSE JOINT RESOLUTION 636 AND H.R. 10335

Mr. Chairman, the membership of the National Small Business Association fully endorses House Joint Resolution 636 and H.R. 10335, known as the quality stabilization bill. Our position was not developed hastily. Establishment of the consensus of our membership followed a long period of analysis and study, and a thorough sounding of those members who represent all phases of our distributive economy.

The primary reason for our unqualified support is that the bill provides a mechanism for relief against certain unfair methods of competition which are byproducts of the great evolutionary changes which have taken place in the pattern of distribution during the past several decades.

Mass distribution has by now become commonplace, and the resulting competition between mass distributors has spawned some dubious trade practices relatively unknown to the ancient law of unfair competition. Notable among these is the practice of using a reputable trademarked product as a loss leader or as bait advertising. Several persons are damaged by this practice—the manufacturer of the trademarked item and the consumer who usually arrives after the supply of the trademarked item runs out, and is switched to other goods of less value. The manufacturer of the trademarked item is damaged because the sacrificial price tends to lead the consumer to entertain the doubt that perhaps after all the trademark does not represent the quality and value claimed. Competitors also suffer in this situation, because the trademarked item generally represents a quality product designed to be sold at a price which will encompass both a fair profit and a fair wage scale.

The quality stabilization bill is based on a sound philosophical approach to treatment of the problem. It provides a private voluntary remedy in recognition of the property rights of the trademark owner. For many years it has been well known that trademarks are absolutely indispensable to the functioning of a free enterprise system. Development of the common law and the statutory law over the years attests the fact that the validity of, and property rights in trademarks must be protected. The basis of this protection, of course, is the legal concept that the owner retains some degree of protectable interest in his mark and the goodwill incident thereto so long as it remains in the channel of trade. Speaking as one with considerable background in this field of law it is my considered opinion that this concept is completely in harmony with the fundamentals of trademak law as developed over the years.

Apparently some resistance to this proposed legislation emanates from Federal regulatory officials who fear that enactment of this bill will somehow enable trademark owners to set retail prices to the detriment of the consumer. As a matter of fact one official went so far as to recommend that the bill include a provision requiring Federal approval of resale prices which impliedly could be established under the bill. This wholly overlooks the fact that trademarked goods have to compete in the marketplace and any trademark owner who endeavors to hold an arbitrary price level which is noncompetitive will soon find himself without a market.

Nor is there any basis for the fear that this legislation will somehow weaken the antitrust laws, or any of the other trade regulation statutes. The provisions of the bill which are designed to eliminate unfair trade practices certainly could not be responsible for such a conclusion. It follows, therefore, that this conjecture must be based on the limited right the manufacturer would have under the bill to hold a price line on his trademarked product. As has been pointed out this right is wholly subject to the competitive forces of the marketplace. It certainly cannot be said that this is any way weakens the antitrust prohibitions against conspiracy to eliminate competition, discrimination in prices, or price fixing. None of these prohibited areas are weakened or even slightly affected by the terms or the implications of the bill.

In view of the current pressures on profits it is vitally necessary to recognize that both our economy and the Federal revenue are dependent on healthy profits from the business system. From a practical standpoint it is necessary to recognize also that the heaviest drains on business earnings are taxes and wages and that these costs are fixed—and not in any respect susceptible to reduction as a result of judgment or efficient management. Therefore, legislation which seeks to provide a modest degree of protection for profits and wages ought to receive official sanction especially where, as in the case of this bill, free play of competitive forces is unhampered and no violence is done to traditional antitrust concepts.

Under no circumstances should the function of the bill be confused with the so-called fair trade laws. For many years this association opposed those laws for sound reasons which need not be reiterated here. This bill provides a purely voluntary private remedy which is both practical and legally sound. No one has yet been able to demonstrate that either competition or consumers will suffer in any way whatsoever. To the contrary, the consumer is protected against switching and against degeneration of trademarked products. On the other hand a method is provided to eliminate methods of competition which are unfair and damaging. Profits will be protected to the degree permitted by competition, and rights of trademark owners will be afforded a degree of proper protection.

Respectfully submitted.

JOHN A. GOSNELL,
General Counsel, National Small Business Association.

Mr. MACK. You may proceed.

Mr. GOSNELL. I will be glad to Mr. Chairman. The National Small Business Association was organized in Akron, Ohio, in 1937. It moved to Chicago some years later. I do not know the exact date of that move. It started out with a small membership and ran up to about 7,000 or 8,000. In the early 1950's the founder and the first general counsel died. In 1956 the trustees moved the organization to Washington. And this was my first contact with it.

Since that time the organization has been greatly expanded. We have a board of trustees which represents most of the geographical sections of the country. We have members representing all types of small business in almost, I believe, every State of the Union. The membership will run somewhere in the neighborhood of 35,000, although it is difficult at any one point to say precisely how many members are paid up as of a given time, because the next month that figure will change.

As a matter of fact, we are having a trustees' meeting of the organization this next weekend here in Washington. The president of the organization is Mr. Frank M. Cruger, who is president of the Indiana Manufacturers Supply Co. of Indianapolis. He also serves on the advisory committee of the Small Business Administration. The chairman of the board is Mr. Harry E. Brinkman, who is president of the Cincinnati Lithographing Co. of Cincinnati——

Mr. MACK. Thank you very much.

Mr. GOSNELL. Is that enough background?

Mr. MACK. Yes. I did want to ask whether it is necessary to be a retailer or a manufacturer, either or both?

Mr. GOSNELL. No. At one point we were about 50-percent manufacturing, but that has been reduced now to about 35 percent. And, all types of business are represented, retail, wholesale, service trades, and so on.

Mr. MACK. Is there any qualification or limitation on membership?

Mr. GOSNELL. Generally speaking we try to follow the size standards of the Small Business Administration, although we realize that this is a relative matter and we have to have some flexibility in setting up the standards.

Mr. MACK. So you do represent some manufacturer or some businesses of substantial kinds?

Mr. GOSNELL. Yes. But on a relative basis we do not take in any of the largest corporations, of course, nor is there any opportunity for a larger company to have any great influence on the policy of the association.

Mr. MACK. Thank you very much.

Mr. GOSNELL. I might say that we began to support this bill only after a long period of investigation. The association had a long record of opposition to the fair trade laws, for reasons that it is probably not necessary to go into here. However, we have recognized that over the years there have been some revolutionary transitions taking place in the distribution of goods in this country. As you know, these have caused severe dislocations. And we have been struggling for methods to try to alleviate some of these conditions. And for this reason we followed with great interest all of the hearings which had to do with the possibility of establishing functional discounts which would protect the place and distributions of those organizations which traditionally had served a specific function in the distribution of goods. But none of these plans seem to hold water, because they called for too much regulation and control in order to provide relief.

By degrees we became interested in this so-called quality stabilization bill as a method which might remedy some of the problems which beset distribution at this time without at the same time requiring further regulatory control, because we were convinced that the play of market forces will still control this situation.

That is why we do not believe that it will really be possible to fix prices under the terms of this bill. I think it is perfectly clear, at least in my opinion, that the antitrust laws, such as the Robinson-Patman Act, the laws against collusion and conspiracy, will still be in complete effect.

Now, I would like to go back just a little and get to the major question that is presented by this proposed legislation. Is it not whether this change will tend to promote or will tend to interfere with the process of competition which over the years has been the guiding star of our economic system? A variety of unsupported opinions and conclusions have been submitted on both sides of this question, but apparently there has been little official effort to recognize that the evolutions in the distributive system within the past several decades have greatly changed the nature of the problems which beset the competitive system.

In the early days of our industrial development there was a sellers market—and I don't believe there can be any quarrel with that. And our efforts to protect the competitive process were primarily aimed at protection of the consumer. But competition, as a fundamental part of the free enterprise system, consists of far more than the element of consumption at a fair price.

Of equal importance is production at a fair price. And this of course relates to the vital necessity of making a profit. In our preoccupation with traditional solicitude for the consumer, we seem to have forgotten that our whole economy, including our tax structure, is dependent on profit. There are great pressures which have had a devastating effect on profits, the impact of taxes, the arbitrary increases in wage structure, the emergence of power buying for multiple unit distribution, the development of discount methods of distribution, all of these have put pressures on the manufacturer to settle for the manufacturing profit, and to force him to disregard the well-being of a sound distributive establishment. These are the reasons behind this legislation. They are hard facts of life which have a direct bearing on the livelihood of a large number of small business people. There is a compelling need here for an objective consideration of the effect of degeneration of profits on the competitive system as a whole.

We cannot sit back with complacency and say that this situation favors the consumer and therefore all is well with the whole system. I do not believe that we have reached the point where we can dispense with the profit system.

In spite of all combined idealistic effort, the desire for self gain is still the paramount human drive, and we will not change that situation for a long time to come. We have only to look at the record. The free enterprise system has carried us a long way, in spite of human imperfection, and it will continue to do so. But we need to realize that we are now facing new problems with a new point of impact which are now causing a severe reaction on the system.

These problems will not disappear by dismissing this proposed legislation as a self-serving effort to fix resale prices. There have been many statements professing great concern for the welfare of small business, but little recognition of the fact that the problems discussed here are largely small business problems. There is no mystery about what will happen here. The profit of a small distributor on a quality trademark product will be protected within certain limits, but these limits will be established by the competitive market.

It is of great significance that this will take place without the need of regulatory control. No trademark item can long maintain an arbitrary or an artificial price position. Even with patent protection, in this day of advanced technology alternative competition will soon appear. Nor is there any substance to the argument that the small distributor would suffer from the competition of house brands of mass distributors.

The competitive brands are freely available at all price levels. And furthermore, quality trademark items have long held their own as against the house brands.

In my opinion, it would be utterly impractical and entirely unnecessary to provide regulatory control of resale prices which might be

established under the bill. Even if physically possible, which it is not, the expense and delays involved would be nonsensical. The need for such control is entirely eliminated by the normal play of market forces.

Now, we have tried to view this bill objectively, Mr. Chairman, and have tried to reason out every single objection that has been raised. We believe it would be of substantial benefit in helping to meet some of the problems raised by the evolutionary transitions in the distribution system.

I believe that is all we have to say, unless there are some questions.

Mr. MACK. Thank you very much. Mr. Dingell?

Mr. DINGELL. No questions.

Mr. MACK. Mr. Glenn.

Mr. GLENN. Just one question.

What is your position with the association?

Mr. GOSNELL. I am the secretary and general counsel of the association. I beg your pardon, I should have stated that.

Mr. MACK. Our next witness is Mr. R. J. Wilkinson, executive manager of the Master Photo Dealers & Finishers Association.

Mr. Wilkinson.

STATEMENT OF R. J. WILKINSON, EXECUTIVE MANAGER, MASTER PHOTO DEALERS & FINISHERS ASSOCIATION

Mr. WILKINSON. Mr. Chairman and gentlemen, my name is R. J. Wilkinson. I am executive manager of the national trade association in this field, the Master Photo Dealers & Finishers Association whose home offices are located in Jackson, Mich. This organization is composed of member firms comprising over 1,800 of the principal retail photographic stores, photofinishing processors and others engaged in the photographic business in the United States. Its members are conservatively estimated to be handling over 65 percent of the total of all retail sales of photographic goods, equipment, and services sold in such stores.

I will skip over parts of my statement with your permission, because I want to save your time, and you will have this in the record anyway.

In addition to the statements and observations made as executive manager of this national association, in which capacity I have served for over 28 years, I have, until a few years ago, been an owner-operator of a typical member establishment, composed of a retail photographic store and a photo film finishing laboratory operated in combination. This statement, therefore, is based not only on experiences and contacts with the industry as a whole, but from the close personal observations of the problems faced in my own business.

This statement will make no attempt to explore the background of legal viewpoints surrounding the important legislation before you, as these matters are being adequately covered by other witnesses who are better qualified in that field. Rather, it will undertake to discuss quite frankly the direct impact on the people and firms engaged in the photographic business, that has resulted from the vicious and withering attack on quality brand-name products, upon which they depend almost exclusively. This attack has come from thousands of new firms (and some older ones) who proudly call themselves discount houses or "mass

merchandisers" and who claim to be champions of the consumers' interests.

Far from benefiting the consumer, such activities are driving quality brand-name products off the counters and out of reach in thousands of service-type stores, both large and small, and forcing them into putting their sales efforts elsewhere. The reason is simple—they cannot sell these quality branded goods and equipments at a profit, and they cannot meet the deep-cut prices used by loss leader sellers, unless they, too, adopt the other tactics of such sellers; namely to "bait them in" and then pressure them into buying substitutes or other long-profit items.

QUALITY BRAND PRODUCTS BECOME A PROFITLESS PAWN

We see the current spectacle on television on Sunday night—Mr. Ed Sullivan last year, or Mr. Walter Disney's program this year, concludes with some excellent commercials on a photographic sponsor's products done in very good state, extolling the fun of picture making and concluding by focusing attention on a new quality brand product of one of our industry's finest camera makers, who finished the pitch with a quotation of a legitimate retail price for which the product is presumably to be sold. Then what happens?

As one of our large downtown Chicago dealers on Wabash Avenue said to me, "It's futile for me to attempt to even stock their line any more because before I can get the first customers downtown next morning, the local discount houses—who aren't even in the photographic business—have offered these spotlighted items in headlines in Chicago morning papers at the actual cost price in Rochester, N.Y.—sometimes even below. We'd quickly go broke if we tried to promote such products these days; so naturally we've turned to goods they don't feature and imported makes that neither the public nor the discounters know the value of."

Thus the nationally advertised quality brand products become a profitless pawn for the exclusive advantage of those sellers who pursue a consistent policy of loss-leader and discount selling schemes. Neither the conventional service retailer nor the discounters can make a profit from the stocking and sale of such products.

SUBSTITUTION AND "SWITCHING" HURTS THE QUALITY BRAND PRODUCT AND THE CONSUMER

No phase of the attack on quality brand name products is so insidious and so effective as the advertising in big headlines of literally profitless prices on a nationally known, highly desirable brand name product, and then when the customers are baited into the store in droves to secure these bargains, they are offered a substitute, or "sweet-talked" into a substitute brand upon which the house is making a substantial profit. It's the old shell game, "now you see it, now you don't," or converted it says "Yesterday (or an hour ago, or 10 minutes ago), we just sold the last one. We'll have some more in next month." Then the clerk comes up with the switch product and starts his pitch with "Actually we've found something that's better and at the same price," and on and on goes the sales pitch to switch the customer. It works in a profitable percentage of the contacts

made. The significant thing is that whatever is finally sold to the customer, whether it's good or bad, the sale was started by the use of the name and product integrity of a nationally advertised quality brand name product through misrepresentation and trickery. The customer did not get what he came for and both the brand product manufacturer and the legitimate service retailer lost sales. The quality brand product did not get distribution.

As I said a moment ago, this whole statement will be in the record. I would like to depart and cut my statement short by reading an answer to an editorial that appeared in one of your local papers. This answer was prepared by myself. And I think it is more pertinent in some respects than the formal statement. I said:

We want no Federal price fixing of any kind, and we certainly would hate to delegate the business of price setting to self-appointed Federal judges of what is and what is "not good for the people." What's wrong with an individual manufacturer of a quality product, packaging his good product, putting his brand or trademark on it, guaranteeing it to the public, and deciding for himself, what price shall be charged for it in open competition with all other products of the same usage? If he is stupid enough to overprice it, the ravages of real competition will quickly terminate his sales.

I want to doubly emphasize it, because I think it is the heart of the real situation.

If it is priced properly, why permit every sharpie in the country to drive it out of the market so far as legitimate honest sellers are concerned and find it in use only as profitless "bait" for use in deceptive, misleading, loss-leader advertising? And how long do you think even the discounters will sell it when the service retailers no longer handle it because it cannot be sold at a price that even recovers the cost of sweeping out the store?

Sure, this legislation, if it is passed, would permit a manufacturer—if he chooses voluntarily to do so—to set his own price competitively—

And I emphasize "competitively," he cannot set it on any other basis—

on his own products which carry his brand name or trademark. Just as certainly as such a procedure requires that there be a choice for the consumer, there is also a choice for the retailer who will, under this legislation, have a choice of what he will sell and offer to sell to his customers. Today that choice is eliminated on the recognized brand quality products, because to offer and promote most of them has become a profitless procedure and condemns him to bankruptcy. He is being forced to abandon a choice and concentrate on substitute brands of imported goods or go broke. The public's free choice becomes limited accordingly.

A commentator said in criticism of the bill: "With a price established for him by the manufacturer, the retailer would be powerless to make adjustments to conform with his own selling situation." How absurd. The fact is the independent service retailer today is powerless to make any price adjustments on brand quality products. They are already adjusted by deceptive and loss-leader advertising, to the point of not even recovering the freight to bring them to his place of business.

And that can be documented anywhere you want to look. If it is possible that this kind of thinking on the part of the staff represents honest conviction, then in our opinion there is a crying need for his basic research for the facts that should be undertaken before any more such editorials are written. This was in answer to an editorial.

We certainly believe that thousands of good, sound, taxpaying, employee-hiring independent business owners know what is good for them and their customers. We have respect for the integrity and good intention of Mr. Loevinger when he says "No significant benefit to small business in terms of survival would result

from this legislation," but we respectfully decline to share his opinion. And I say thank God for the dedicated Members of Congress who are willing to stand up in public office and be counted in their efforts to keep the independent businessman in business, and to resist the obvious current trend toward establishment of giant retailing monopolies.

The retailers of the country should not be forced to adopt dishonest scheming and trickery to exist in business, nor should a manufacturer of quality products have his hands tied behind his back, while the jackals of mass merchandising wreck the market value of his reputation and trademark to the point where no other kind of retailer can handle his product and survive in business.

We are as insistent as we believe you should be, that whatever legislation is passed to correct this evil, it must be founded on the firm determination to keep competition in the marketplace, to give all customers a free choice of products and the right to buy what they please (and find it available on all the dealers' shelves) and give all retailers a free choice of quality products to offer their customers.

(Discussion off the record.)

Mr. WILKINSON. I think I can finish up with a little emphasis on a point here that I think is very important. I contend that the retailers of the country, the independent retailers of the country should not be forced to dishonesty, scheming, and trickery in trying to exist in business. The first decline in business is going to see a slaughter of small distribution establishments that will continue at an accelerated rate unless the Congress provides some available controls to restore orderly competition.

And on behalf of the hundreds of photo dealers and photo-finishers that I represent, along with the other retailers with whom they do business, I want to thank you for your courtesy and consideration.

I would like to add this thought too, that is not in my statement. Our association has at no time gone on record as saying we believe this is the only bill, this is it, because we are not lawyers. We know the need is very great. And we believe that you men in Congress are smart enough to take this legislative formula that is presented in this bill, and if it has some obvious defects, then make the necessary amendments, adjust it until it will do the job. But for heaven's sake, men, face the fact that the independent retailer is on his way out, unless you can find some way of stopping him from being a victim of this predatory type of so-called mass marketing. He has so few choices. In our own business today we don't have a lot of junk that we can sell to make it up, quality brands are all there is in the photographic business, practically speaking, and they are all well known. And I say that anyone of our manufacturers who chooses to operate under the terms of this proposed legislation, if he is stupid enough to set a price that is too high, whether it is Kodak or Ansco or someone else, inevitably the others in the market are going to pin him to the cross, and real competition will keep that price where it belongs.

The big thing we are crying for is some way to stop people from taking these brand names that have been nationally advertised in newspaper headlines and are well known to the public, established values, if you please, that the mass marketer didn't establish himself, and picking them up and using them almost exclusively as bait to switch the masses of people into their stores and create that image of saving them money while they peddle a lot of junk at ridiculous prices.

(The prepared statement of Mr. Wilkinson follows:)

STATEMENT OF R. J. WILKINSON, EXECUTIVE MANAGER OF THE MASTER PHOTO DEALERS' & FINISHERS' ASSOCIATION

Mr. Chairman and gentlemen, my name is R. J. Wilkinson. I am executive manager of the national trade association in this field, the Master Photo Dealers' & Finishers' Association, whose home offices are located in Jackson, Mich. This organization is composed of member firms comprising over 1,800 of the principal retail photographic stores, photofinishing processors and others engaged in the photographic business in the United States. Its members are conservatively estimated to be handling over 65 percent of the total of all retail sales of photographic goods, equipment, and services sold in such stores. However, the association, now in its 38th year, serves the entire industry on all such projects as affect the entire industry's welfare, and our sectional and national meetings and conventions are open to all members of the industry, and are participated in by them without regard to membership. Our members and the others engaged in the retail photographic business, are about evenly distributed throughout the entire 50 States in nearly direct ratio to the population totals of the various States.

In addition to the statements and observations made as executive manager of this national association, in which capacity I have served for over 28 years, I have, until a few years ago, been an owner-operator of a typical member establishment, composed of a retail photographic store and a photo film finishing laboratory operated in combination. This statement, therefore, is based not only on experiences and contacts with the industry as a whole, but from the close personal observations of the problems faced in my own business.

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The nationally advertised quality brand products of the Nation's finest producers are the key to their operations, because they provide qualities and values widely recognized by consumers and from which all vestige of profits are then cut to create, for these discount houses, an image of tremendous savings for the customer, that are alleged to be applicable to all the goods they are offering. Far from it, the unsuspecting customer is then either subjected to sales switching to other more profitable, self-owned, or private brand similar products, upon which a profit can be made, or is paraded past vast arrays of nonbranded, unidentifiable goods in a wide variety of alleged "bargains," which, in fact, generally have several hundred percent of gross profit attached.

Far from benefiting the consumer, such activities are driving quality brand name products off the counters and out of reach in thousands of service-type stores, both large and small, and forcing them into putting their sales efforts elsewhere. The reason is simple—they cannot sell these quality branded goods and equipment at a profit, and they cannot meet the deep cut prices used by loss-leader sellers, unless they, too, adopt the other tactics of such sellers; namely, to "bait them in" and then pressure them into buying substitutes or other long profit items.

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Thus the nationally advertised quality brand products become a profitless pawn for the exclusive advantage of those sellers who pursue to consistent policy of loss-leader and discount-selling schemes. Neither the conventional service retailer nor the discounters can make a profit from the stocking and sale of such products. Thousands of the conventional service-type retailers eventually abandon the product and when that happens, the discounters can't or won't try to sell it, either. The manufacturer finds his quality brand product losing its place in the market, and we see the gradual destruction of the value of his brand name and trademark which he may have spent years and millions of dollars to establish in the market. His sales reduced, production is curtailed, and unemployment sets in, with the long chain of economic reactions this creates in wages, profits, and taxes. The consumer's free choice of products is now limited to second-place or nonbranded goods, or imports.

SUBSTITUTION AND "SWITCHING" HURTS THE QUALITY BRAND PRODUCT AND THE CONSUMER

No phase of the attack on quality brand name products is so insidious and so effective as the advertising in big headlines of literally profitless prices on a nationally known, highly desirable brand name product, and then when the customers are baited into the store in droves to secure these bargains, they are offered a substitute, or "sweet talked" into a substitute brand upon which the house is making a substantial profit. It's the old shell game—"now you see it, now you don't," or converted it says, "Yesterday—or an hour ago—or 10 minutes ago—we just sold the last one—we'll have some more in next month." Then the clerk comes up with the switch product and starts his pitch with "Actually we've found something that's better and at the same price"—and on and on goes the sales pitch to switch the customer. It works in a profitable percentage of the contacts made. The significant thing is that whatever is finally sold to the customer—whether it's good or bad—the sale was started by the use of the name and product integrity of a nationally advertised quality brand name product—through misrepresentation and trickery. The customer did not get what he came for and both the brand product manufacturer and the legitimate service retailer lost sales. The quality brand product did not get distribution.

There are many variations of the switch procedure, and even in stores that do carry sufficient quantities of the called for brand and it is placed into the customer's hands, highly skilled sales people are frequently paid according to their ability to talk the customer out of the "bait" item which is profitless and into something "just as good." Here the significant thing is that the customer would never have come into the store except for the advertisement of a profitless "bait" price. Some of these discount stores do deliver the advertised "bait" product without hindrance, and rely on their ability to make the store traffic pass by vast arrays of unidentifiable "bargains" in all kinds of other consumer goods but upon which there are substantial profits—sometimes 200 to 300 percent.

SERVICE RETAILER FORCED TO ABANDON QUALITY BRANDS

Contrast this switching procedure with what then takes place in the legitimate service-type establishment, whose aim is to sell the quality brand product. First, he comes to realize that many of his customers—many of them folks he has given time-consuming demonstrations to—walk out with the remark "I'll think it over" or "I'll be back later with the wife" when actually they are merely anxious to fortify their technical knowledge of the product and which model or size to buy. They then flock to the discount house that's running these tremendously big ads on savings to be made on national brand products. They never come back. The service dealer knows the facts of life. He

knows what's going on and one after another the quality brand products he has built his business on, become absolutely profitless. He has no possible alternative than to mimic the discount house and adopt their trickery or go out of business—unless he too can find some way of switching the customers away from the asked for quality brand product which is now a profitless item in the trade. So what does he do? He quits handling the brand name product that's under price attack, and then puts his investment, his advertising, and his sales efforts behind other products that are not under attack. This, in the photographic business, means he switches his effort to imported products upon which the retail price is not so well established as to make it attractive for attack by the discount sellers. In plain English, he too is switching the customers from his quality brand lines of U.S. products that are being highly advertised, except that he at least is not deceiving the customer. He sells them an honest product on a straightforward basis without any bait prices or misleading trickery. What he is really doing is diverting a disproportionate share of the U.S. retail market to imported goods. I don't think there is anything wrong or immoral in that poilicy but certainly when it is becoming a necessary policy, to be pursued by thousands of harassed Main Street retailers, who don't have any other good alternative except to go out of business—then I think you gentlemen are aware of the far-reaching impacts that this can have and is having right now on employment, on total gross national product, and in turn on taxes and the soundness of our dollar. This is one of the reasons it is getting worth less by the minute.

In the face of these scheming and profitless techniques applied to quality brand products, we face the fact that the consumer soon finds that the quality brands products are frequently hard to find, his choices become limited to "also rans" and he no longer has a free choice. The manufacturer who makes the quality brand products soon loses his retail distribution outlets who had in the past done promotional advertising and selling, and all he has left are the discount houses or others who have used his product as bait. When the promotional dealers don't handle, service, and promote the sale of the brand quality product any more, even the discount house discovers that "people don't call for it any more" and he too quits using it and turns to some other nationally advertised or "wanted" item.

DESTRUCTIVE PRICE CUTTING FORCES DILUTION OF QUALITY PRODUCTS

At this point we might add that when this situation has been reached, manufacturers come under pressure to dilute the quality of their brand product and thus lower the production cost to the point where a retail profit can again be offered, even at the currently accepted discount price. Here the cycle starts all over again and the consumer as a user, and the consumer as an employee requiring a job, the retailer as a consumer—and even the consumers as stockholders—all take a growing loss of quality and value—all produced by the relentless and dishonest attack on quality brand products that is permitted to continue, in the absence of such legislation as you are now considering.

The retail photographic dealer differs from most other "merchandising" establishments in the retail field in that practically everything he sells is highly recognized, quality branded merchandise that is nationally and locally advertised. He has no place to secure, nor is he able to load his counters with unbranded photographic goods of dubious quality or price, and he certainly does not have the facilitis to attempt to sell a volume of little known nonphotographic shoddy merchandise to bolster his profits. Unless he can sell the popular brands of equipment and materials at a price that permits a normal profit, he is doomed to certain failure. Because his products are exactly the kind of branded items of popular appeal that makes good "bait" advertising for predatory sellers, nearly everything he sells is now being offered at near cost prices by someone with whom he must compete.

UNEMPLOYMENT AT BOTH MANUFACTURING AND RETAIL LEVEL

His certain failure is clearly written into the current chaotic market situation, yet when he goes out of business and is no longer available to promote and service this business, even the discount house will no longer find it practical to advertise photographic goods as loss leaders and will forthwith drop such goods because they will no longer serve as bait and attract buyers. It

is not hard, then, to show that with reduced sales, there is reduced employment in the photographic factories and all the others affected, and the very consumer who gloast over his "bargain" finds himself paying over and over again in lost earnings, as an employee.

You gentlemen may or may not be concerned with the fact that such service photo retailers are going broke. I might shut my eyes to it. Today, the manufacturers haven't much of any control over the situation that they can legally pursue—but this fact stands out—when the service photo retailer and his personnel are liquidated and disbanded because of this discount selling, you face two or three inevitable facts:

1. Photographic business will decline because the consumer failing to secure good pictures abandons it as a hobby.

2. Next, the discount sellers will cease to find that it is appealing as a "bait" for loss leader selling, and cease to handle it at all.

3. Both at the retail level and at the factories that make the goods, unemployment sets in progressively.

4. The whole economy suffers a decline in business activity and the Federal and State Governments secure less taxes of all kinds.

This chain of circumstances does not require a seer to recognize. If photography were the only business at stake and suffering for lack of protection from this destructive situation—we could all forget it, but when you multiply this situation by the same impact on literally hundreds of other businesses built on quality identifiable brand name products, where the end result is predictably the same—you can see that the effect on the country is substantial. We can make no mistake about it, the selling techniques of the discount houses or others like them are destroying business. They create nothing. The photographic retail business cannot survive even in discount houses unless the service retailers are able to continue somehow to operate without a profit. So far no one has found out how to do that—not even the discount houses.

COMPETITIVE PRICE STABILIZATION TO PROTECT PROPERTY RIGHTS IN QUALITY BRAND NAMES AND TRADEMARKS

Because this quality stabilization bill includes provisions entitling the owner thereof to protect his brand names and trademark by restraining sellers from use of these brand names and trademarks "in furtherance of bait merchandising practices" and in violation of the "established resale price or prices" established by the trademark owners as a condition of resale, it is inevitable that the testimony of opponents of this bill will raise the cry of illegal "price fixing" as a basis for opposing this legislation. Such a term is simply not justified nor is it based on the facts. It is always raised by those who want to retain the legal right to prey on the value of a quality brand name or trademark through destructive loss leader selling schemes and trade on the selling efforts of those who legitimately promote and retail such products.

We most vigorously maintain that this bill provides for the certainty of a continuation of real competition through continuation of quality brand products and their availability to the consumer, because of its provisions for the producer to voluntarily establish a stabilized price under the following conditions and no others:

1. When the consumer has a free choice of other similar products for the same purposes.

2. When the consumers are completely free to buy any other product for the same purpose at a higher or lower price as may be offered.

3. When the retailer is completely free to offer and sell in competition any other brand product or nonbranded products for the same purpose, at either a higher or lower price.

4. When the brand name and/or trademark is attached and a part of the product being offered for sale.

5. When the producer uses "due diligence" to see that all resellers of his product are subjected to the same restraints against "bait merchandising practices," "loss leader selling," and "published misrepresentation" concerning his product.

Under these conditions, the quality stabilization bill provides that the producer may, at his own peril, establish a competitive retail price for his own product.

He cannot act in collusion with other producers of similar products without incurring the same legal penalties that have always existed against price collu-

sion. This is not an immoral fixing of price because it has to be competitive. It is established at his own peril in a competitive atmosphere and, clearly, if any producer is stupid or greedy and sets a retail price of a brand quality product to the public, that is too high in comparison with other prices set by his competitors for other products of a like kind, the public can and will leave him and his product stranded for lack of sales. The bill offers no right to stabilize a price in any situation where a producer's product does not have the outright competition of other similar goods for the same general purpose. The bill, further, does not restrain or limit in any way the sale of brand quality products to any specific kind of retailer and the discount house or others who generally feature loss leader selling are not restrained from selling the brand quality product.

Open competition must continue to exist, but it should be restrained to prevent chaos and destruction. Legislation has been necessary to prevent such destruction in other fields. Hundreds of retail photographic stores have gone bankrupt or silently quit business in the last few years because of their inability to longer sell quality brand products and recover their normal expenses and a profit. Their sons no longer look to the day of taking over the business of their fathers and instead are forced to seek employment in other areas.

DESTRUCTIVE "LOSS-LEADER" ATTACKS ON QUALITY BRANDS HURT LABOR

Most of you gentlemen are consistently concerned with the welfare of U.S. labor, therefore you may well take a hard look at the effect of this discount evil on the welfare of the American workman. Here are some facts that you can confirm in your own home city or right here in Washington, D.C.

For lack of reasonable controls, such as is provided in this legislation, photographic dealers are turning, in desperation for profits, to imported quality brands of photographic equipment, giving such imports a disproportionate share of their selling effort and stock investment. Some stores no longer handle U.S. brands except in a very minor way. There is a legitimate share of U.S. sales that quite rightly go to worthy imported equipment, but this should not be so extensive as to exclude photographic equipment manufactured in the United States by American workmen who are paid on wage standards that are the highest in the world. What are the reasons?

U.S. photographic equipment is among the finest in the world and it is without question the most highly advertised in the United States market. Its value and recommended resale price is advertised and recognized throughout the country. That very fact makes it peculiarly a target for the discount sellers who must have an established value product so that their advertised discount prices can reflect "fantastic savings" etc. The result is that the established value U.S. products are being sold by discount sellers at prices near cost, at cost itself, and sometimes even below cost as "bait" to wheedle customers into their stores.

Many U.S. photo dealers would prefer to put their major effort behind products of the American factories and workmen, but they can't stay in business selling them at prices that do not even recover the simplest costs for doing business. You can guess the rest, and what effect it has on our economy.

The elementary fact is that no retailer, big or little, no traditional service retailer nor even the predatory discount house, is going to make it easy for customers to secure articles in any volume upon which there is no profit or in fact a loss. They inevitably go under the counter and sooner or later out of the dealers' stocks entirely. This has the clear affect of punishing or destroying the manufacturer of quality brand name products, encourages the producer of shoddy, and tends to certainly force consumers to accept inferior goods, frequently at a higher price. As the honorable Col. Charles H. March, a previous chairman of the U.S. Federal Trade Commission, said: "If you want monopoly, then loss leader selling is a way to obtain this. Loss leader selling is one of the most remorseless enemies of healthy competition." He said a lot more on the subject but the obvious truths of these few statements can be verified on any main street in America today.

EFFECT OF PRICE CUTTING ON PHOTO FINISHERS

The photo finisher is a firm that operates a processing laboratory to develop, print or enlarge the snapshots made by camera users. They are operating a service business and usually it is servicing several hundred retail outlets, such

as drug stores and retail photographic stores who do not operate their own photo finishing or processing laboratories. As a service business, you might conclude that they are relatively unaffected by the destruction that is taking place on brand name photo equipment and films, yet quite the contrary is true. There are about 60,000 drug stores in the country who sell film and take in such photo finishing from the public. Such stores are successful directly in proportion to the effort and investment they make in operating a retail photographic department. The more successful of them are in fact running small camera shops as a department of their drug business. The photo finishers collectively spend thousands of dollars and millions of man-hours of time trimming windows, helping with photo department installations and assisting them with promoting and advertising brand quality photo products in such photo departments. He must do this in order to expand his own income from such dealers through the growth of their photo department business, which in turn leads to more and bigger sales of photo finishing.

Today many of these stores are throwing out their photo departments or at least cutting down their advertising and efforts, reducing their investment in such departments simply because they cannot sell brand name photographic goods at the deep cut prices that are being offered by professional price cutters and discount houses and make any profit. In this business there isn't any other kind to turn to. These stores are the mass distribution outlets for photo films and inexpensive camera equipment. They are important to the photo finisher, they are important to the photographic manufacturers and they are supplying a convenient local service for the consumer, right where he lives. Their forced withdrawal from the business hurts the whole economy, yet why should they provide such local services for the consumer if they can't make a profit? Our members who are photo finishers are naturally being hurt, too, by the activities of these loss leader sellers who are slaughtering the prices on the popular items that make such business possible, even though the photo finisher does little direct retailing of photo equipment himself.

At about this point, you gentlemen may well ask certain questions—If the quality stabilization bill (S. J. Res. 159) now under consideration is a bill to protect the manufacturer's rights in the brand and trademarks of his quality products, then why is the matter of so great concern to the retailers? What are their interests? The answers are very simple: We want to stay in the photographic business; we can stay in the business by selling only quality brand name goods that will perform properly and bring customers back to us, and in the photographic business we can't adopt the scheming, deceptive, and sometimes disgusting tactics of the present discounters' market. We think that if this legislation is passed, a considerable number of the manufactures of quality products in the photographic business will find advantage to the public, to themselves, and to their retailers to justify the adoption of straightforward policies of selling their products on their merit and for what they are worth for their own utility—and not as profitless bait to promote the sale of tons of shoddy nondescript, nonphotographic merchandise. Because this legislation permits a manufacturer, of his own volition and at his own competitive peril, to prescribe selling conditions for his own product that will stop the destruction of, and the value of his brand names in the market, all those retailers who are willing to eliminate destructive loss leader selling tactics can continue to build on independent, tax paying, retail business on every main street in America that will provide for community growth, and increased employment, and make a sound contribution to the economic progress of the country.

The quality brand stabilization bill won't bar discount houses from selling any quality brand product they choose to distribute. They will continue to have and probably should have the same rights as any other retailer, but they should be stopped cold from preying on their competitors through the destructive, dishonest loss-leader and baiting tactics with which they are destroying the value of one brand product after another, as they exploit it to the point where no one can afford to stock or sell it.

We face this elemental fact: No one can regularly provide the services of retail distribution without a profit. This simple fact is just as true in the so-called discount house, the large department store or the smallest camera dealer on Main Street. The basic costs of salaries for sales personnel, rent, light, heat, and taxes, to say nothing of all the other essential and inescapable expenses, must be paid by every retailer. They must be added to the cost of every manufactured product. It thus becomes clear to anyone giving it any study, that offers to sell brand name products of quality at prices that barely recover the cost of the manufactured product alone, stand clearly indicated on the face of it as engaged

in a conspiracy to mislead the public and in some way trick them into other purchases that will provide the necessary profit. Competition should be preserved by our laws and control of monopoly is a function of good government, but the preservation of open competition does not require nor imply that chaos or demoralization should be the end result.

You men are quite rightly concerned with the effect of any legislation that affects the consumer, for certainly if it is not good for the consumer, as a consumer, or the consumer as an employee, requiring a job, or the consumer as a local businessman, it is not good legislation. It seems to us to be very clear that so long as the terms of this bill require and demand that quality brand products, the brand name and trademark of which are placed voluntarily by the manufacturer under the protection of this legislation must be in open competition with other like goods, then you need have no fear of a bad result for the consumer. If he has a free choice he will inevitably abandon any brand item of mechandise that does not compete favorably with other like goods offered to him. Any manufacturer of brand name quality goods who is so foolish as to place his retail price for a brand quality product too high, will surely lose his place in the market—and quickly. There is nothing in the legislation proposed that requires discount stores to stop offering low-priced merchandise for what it is worth, or that any store may not continue to offer other, unbranded, goods in competition at lower prices, and you know they will. They may have to work a little harder, when they can no longer create the impression of "vast savings" to the public at the expense of all others concerned. The "all others concerned" clearly includes service retailer, the manufacturer, their employees, and the State and Federal Governments' income from various taxes. The loss leader selling technique clearly is operating to the disadvantage of all of these.

Gentlemen, the backbone of the American economy is in the operations of thousands of "small business" units, providing one-the-spot distribution of the products of our vast production lines. Prosperity at the "grassroots" is represented by well-paid jobs and improving opportunity at the local level on Main Streets all over America Any legitimate step you can take to stabilize the growth and progress of small business is a step to strengthening our resistance to all the foreignisms and communistic scheming.

Small business wants no subsidies nor does it want competition eliminated. All they want is trade legislation giving independent retail business an opportunity to operate honestly and thus eliminate the tendency to concentration of business in the hands of a relatively few big retail predatory merchandising monopolies.

Gentlemen, we urge your favorable consideration of the quality stabilization bill, because we believe that in its present form, as a byproduct of its protection of a manufacturer's brand and trademark rights, it will go far toward the reestablishment of the Main Street retailer as a sound part of the Nation's economy. We believe that it represents an important and necessary roadblock to the establishment of monopolies in the retail distribution field, and as previously mentioned, we think that monopoly in retail distribution is possibly more damaging of the public interest than monopoly in the manufacturing field where much effective legislation already exists.

The retailers of the country should not be forced to dishonest scheming and trickery to exist in business. The first decline in business will be seeing a slaughter of small distribution establishments and it will continue at an accelerated rate unless the Congress provides some available controls to restore orderly competition. On behalf of the hundreds of photographic dealers and photo finishers I represent, and the thousands of other retailers with whom they do business, I want to thank you for your courtesy and consideration. In conclusion I would be glad to answer any specific questions relating to the problems of photographic dealers.

Mr. DINGELL (presiding). Are there any questions?

Mr. GLENN. No questions.

Mr. DINGELL. Mr. Keith?

Mr. KEITH. No questions.

Mr. DINGELL. I have a couple of questions I would like to ask.

How many manufacturers of photographic film are there in this country?

Mr. WILKINSON. There are four, I think.

Mr. DINGELL. And they are ——

Mr. WILKINSON. Eastman, Ansco—there are several foreign brands marketed here.

Mr. DINGELL. There are two domestic brands?

Mr. WILKINSON. There is a third, Dynacolor.

Mr. DINGELL. Now, Eastman and Ansco manufacture how much of the film that is sold in this country?

Mr. WILKINSON. Well, I wouldn't attempt to give you statistics, because I don't have them that close.

Mr. DINGELL. But to all intents and purposes——

Mr. WILKINSON. They are in a major position, yes.

Mr. DINGELL. And if we vest in them the power of fixing prices we will give two manufacturers in the United States the power to fix the price of, to all intents and purposes, all the manufacturers in the country?

Mr. WILKINSON. A great deal of it. But they have got to fix it competitively.

Mr. DINGELL. I understand. But if this bill is passed we will vest in two manufacturers of photographic film in this country with the power of fixing the price for—I would say offhand about 90 percent, and I think this would be a very charitable figure.

Mr. WILKINSON. I think that is a little high. It is important, but it is a little high. There is quite a lot of inroads from the foreign market.

Mr. DINGELL. Would you say it would be 85 percent?

Mr. WILKINSON. Possibly.

Mr. DINGELL. I see. So if we do this—now, there is just one other question I want to ask. Do you endorse on behalf of your organization the authority in this bill for Eastman Kodak to engage in wholesaling and retailing in competition with your members at the same time that under this bill Eastman Kodak would be authorized to fix the prices of your membership on their commodities?

Mr. WILKINSON. We wouldn't endorse the authority for any manufacturer competing directly with us.

Mr. DINGELL. Would you endorse——

Mr. WILKINSON. Eastman has in the past had their retail stores but they are doing away with them.

Mr. DINGELL. But this bill would authorize them to fix the prices of your membership, but at the same time subject them with respect to the retail sales to violating the antitrust laws of the United States?

Mr. WILKINSON. I don't know. When it comes to the legal niceties of this bill you have to count me out.

I don't endorse life or death to my membership.

Mr. DINGELL. Do you endorse that particular thing?

Mr. WILKINSON. I wouldn't try to answer that without further study.

Mr. DINGELL. The committee will stand adjourned until 2:30 this afternoon.

(Whereupon, at 12:30 p.m., the committee adjourned, to reconvene at 2:30 p.m. of the same day.)

AFTERNOON SESSION

Mr. MACK. The committee will come to order.

Is Mr. Arnold A. Schiffman, director and past president of the Retail Jewelers of America present?

Mr. SCHIFFMAN. Yes, sir.

Mr. MACK. Mr. Schiffman, we are glad to have you with us today. It appears there will be ample time for you to present your testimony this afternoon.

STATEMENT OF ARNOLD A. SCHIFFMAN, DIRECTOR AND PAST PRESIDENT, RETAIL JEWELERS OF AMERICA, INC.

Mr. SCHIFFMAN. Thank you, Mr. Mack.

Mr. Chairman and members of the subcommittee of the House Committee on Interstate and Foreign Commerce, my name is Arnold A. Schiffman. I am a director and a past president of Retail Jewelers of America, Inc., an organization composed of over 4,000 retail jewelers located throughout the United States. In all but 9 of the 50 States, we have as affiliates of Retail Jewelers of America, autonomous State jewelers associations whose members are likewise members of the national organization.

Our organization in its present form was founded in 1957. One of our two predecessor organizations, the American National Retail Jewelers Association, was continuously in existence before that since 1906. Of our membership, 75 to 80 percent is composed of stores with three or less employees. We estimate the average volume of our average member to be about $75,000 per year.

My personal background is that of owner of a local jewelry store in Greensboro, N.C., where, since 1893, my family has lived and worked in the retail jewelry field. I have spent many years traveling over the country talking to jewelers about their problems for the Retail Jewelers Association. I know jewelry problems intimately. I know the people in the industry and I speak today for a united point of view in support of H.R. 10335, which bears the wholehearted endorsement of the rank-and-file leadership of Retail Jewelers of America.

The picture for the average American retail jeweler is not a rosy one. During the past decade, there has been a substantial drop in the number of independent retail jewelry stores.

There has been high mortality among small individual retailers and, from my own experience, I know that the jewelry industry is no exception. This has not shown up in bankruptcy figures, but many small operations have simply discontinued business because they can no longer compete.

I do not believe it to be the function of Government to support marginal retail operations, but it is my understanding that it has been our national policy as expressed by the Congress, particularly in its legislation relating to small business, to recognize the fact that individual small businesses are at a disadvantage when competing with giant organizations and, as a matter of public policy, we, the Retail Jewelers Association, have tried to help efficient small business continue in existence.

The best available statistics show that the retail jewelry industry is operating at a dangerously low margin of net profit after taxes. The latest published statistics are for the year 1958 and show this to be a little over 2 percent. Currently it is my belief that this 2-percent

figure has been almost cut in half. The exception to this general pattern has been large retail jewelry chains, where giant size has made possible a better profit picture.

I believe there is a place in our economy for the typical local retail jeweler serving his community as a skilled professional in his field, offering his knowledge and background and know-how where they are particularly needed, in such areas as precious stones—particularly diamonds—and service and advice in the bridal area. This merchant cannot exist entirely on his profits on the sales of merchandise which is not trademarked and nationally branded. It would be a conservative estimate to say that over 50 percent of his business might well be from quality brand merchandise.

I would not presume to take your time to repeat information which is well known to you, with reference to the changes we are going through in retail distribution. The low-cost or discount operation is not only here to stay, but growing larger. I believe in the freedom of opportunity that our country offers and I believe that there is a place in our economy for the so-called discount house.

For 30 years price maintenance legislation has been opposed by certain administrative agencies of our Government. If this policy is to direct retail distribution of merchandise entirely into the hands of giant chains of discount operators and if the small individual retailer, in any field, tends to fall by the wayside, then I believe it is the consumer who ultimately will suffer.

I believe that unless we take steps to give some degree of protection to small individual retailers, we are going to have power of retail distribution so concentrated in this country that we will have effective monopolies, such as I have observed in certain South American countries.

Based on my recent travel and personal contacts throughout the entire country, it is my understanding and belief that small individual retailers are overwhelmingly in favor of H.R. 10335.

In earlier testimony in the hearings held on the Senate companion bill, Senate Joint Resolution 159, a witness for one of the great names in the jewelry field—an honored name in the American business community—made some comments about the necessary place of the retail jeweler. When the distinguished chairman asked how the ordinary citizen would purchase a watch in the present day overabundance of business names, the witness responded that the only way would be to buy a reputable brand from a trustworthy jeweler. This then is one of the roles of the traditional jeweler.

Nor is this the view of the watchmaking community alone. In the field of sterling silver, silver flatware, stainless steel, jewels, rare metals, and other products made to meet the special occasion in the lives of every American family, the local jeweler has become a trusted family adviser. By comparison the modern discounter is a store stripped of service and counseling, and cannot act as a replacement in the jeweler's traditional role of reputable adviser and consultant.

In addition, it is only the old line retail jeweler who, today, carries a broad inventory to fill all the immediate needs of his customers and, indeed, serves as a showcase for the merchandise that is available.

May I repeat that it is this local jeweler who relies on the time-honored national brands for perhaps 50 percent of his business. As

the retail jeweler departs from the business scene, it is the consumer who suffers.

Our industry is composed of small manufacturers as well as small retailers; manufacturers who do not have the economic power of a giant manufacturer in other industries. If the distribution of one of the famous jewelry or silver trademarks comes under the effective control of one or more giant discount chain operators, that trademark will surely be debased and devalued in a short time. The retail jeweler will suffer, the manufacturer will suffer, and, most of all, the ultimate consumer will sustain the real loss because no longer will the trademark have the meaning and degree of protection for the consumer that it once had.

Unless the time-honored brands that we carry in our inventory are given the protection of H.R. 10335, we, along with the jewelry manufacturer, may find ourselves out of business. As demonstrated earlier, the dropoff rate in our retail industry is frightening. As we look up and down Main Street in any community in this whole land of ours, we realize full well that our fellow retailers are faced with a similar plight. We know that retail jewelers are not alone in needing the beneficial assistance of H.R. 10335.

In conclusion, may I say that, in addition to all of its other excellent features, this bill makes it optional for the owner of a trademark to distribute his merchandise as he sees fit. This bill does not deny the manufacturer the right to sell all or part of his output to a discount chain or any other type of outlet, but it does give the manufacturer who wishes to protect his trademark, a reasonable and sensible way to do so.

As I have said, discount store distribution is here to stay. I only hope that the small individual Main Street merchant is here to stay, also.

Mr. MACK. Does that complete your statement?

Mr. SCHIFFMAN. That does complete it.

Mr. MACK. It has been suggested that, perhaps, this is not the proper approach to solving this problem of small businessmen and that, perhaps, we should offer them a direct subsidy rather than offering them a fair opportunity to compete with the discount houses as set forth in this bill.

Do you have any comment with regard to that suggestion?

Mr. SCHIFFMAN. Very frankly, I do not beleve in subsidies. I think that the American businessman wants to be an independent merchant. I think he wants fair protection, but I do not think he needs or should have subsidies.

Mr. MACK. Thank you.

Mr. Dingell, do you have some questions?

Mr. DINGELL. No questions.

Mr. MACK. Mr. Curtin?

Mr. CURTIN. No questions.

Mr. MACK. We appreciate having your testimony.

Mr. SCHIFFMAN. Thank you very much.

Mr. MACK. If there are no further witnesses this afternoon, the committee will stand adjourned until 10 o'clock tomorrow morning.

(Whereupon, at 2:55 p.m., the committee adjourned, to reconvene at 10 a.m., Thursday, June 14, 1962.)

QUALITY AND PRICE STABILIZATION

THURSDAY, JUNE 14, 1962

HOUSE OF REPRESENTATIVES,
SUBCOMMITTTEE ON COMMERCE AND FINANCE OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to recess, in room 1334, New House Office Building, Hon. Peter F. Mack (chairman of the subcommittee) presiding.

Mr. MACK. The subcommittee will come to order.

This morning the Subcommittee on Commerce and Finance is continuing hearings on House Joint Resolution 636, introduced by the chariman of this committee, the Honorable Oren Harris, and H.R. 10335, introduced by our colleague, the Honorable Ray J. Madden, of Indiana.

On Monday of this week we set aside time for all of the Members of Congress to testify, but since we have a former member of this committee and one of our very distinguished colleagues for whom all of us have high regard, we are making an exception and permitting our colleague to testify at this time, the Honorable Bruce Alger of Texas.

Bruce, we will be glad to hear from you.

STATEMENT OF HON. BRUCE ALGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. ALGER. Mr. Chairman, it is a real pleasure to come back to the committee. I must say I have missed you and the members of the subcommittee as well as the committee on which I had the honor to serve, and I have not forgotten the courtesies and the enjoyment of those days in this room and I must confess I have been homesick more than once, no more so than this week when we have had at least four different matters juggling at once in the Ways and Means Committee which I can partially plead was the reason for my not being here Monday, and I appreciate the leniency of you and the committee in permitting me these few minutes now.

Mr. MACK. We are very happy to have you.

Mr. ALGER. Mr. Chairman, I would relate my remarks immediately to the statement which I believe this committee has, as well as joining with the Governor of Texas, Price Daniels. Am I correct in understanding his statement has been filed for the record prior to this time?

Mr. MACK. He has submitted a statement, and it will be included in the record.

Mr. ALGER. Then I will not include it with my statement. Otherwise I would have asked that permission. First of all, I would like to

say that I am principally opposed to quality stabilization in this bill because it does violate States rights. Texas is one of those States that has antitrust laws which the quality stabilization would violate, and secondly, I am opposed to this bill partly because of my background and the knowledge gained when I was a member of the manufacturing, the distribution, and the retail outlets, each at different times in different capacities. I feel this bill, quality stabilization, permitting the manufacturer to set the price at the retail level would actually harm retailers, and I recognize that many retailers do not agree with this conclusion, but as a former retailer I hold this would harm more than help the retailers, while in the same breath I will admit there are problems such as the loss-leader merchandising, bait advertising, and other unfair practices, but these problems must be met, as I see it, with other solutions than this bill.

It would be entirely possible for the large manufacturer—indeed I was a member of the firm that did this, entirely legitimately, when I was with the RCA Victor Manufacturing Co., to not only market its own product through its distributors and dealers but also manufacture a radio, for example, for Sears, Roebuck who priced this product under their own trade name. The manufacturer has it both ways.

Under this bill the manufacturer could set the price that dealers must sell the trademark item for, a price that the manufacturer could undercut, if he chose, through another outlet by manufacturing the same product to be put out under another firm's trade brand.

I would like to refer also to the figures that Governor Daniels gave in his statement, as you will find on page 5, where he points out that the retail failures throughout the United States were far greater than they were for each year in those States of Texas, Vermont, and Missouri, which never had a fair trade law, and the failure rates were substantially lower than the national average.

Those figures, I believe, have already been given. I would like to include them at this point in my statement, Mr. Chairman.

Mr. MACK. Without objection they will be included at this point.

(The information mentioned follows:)

Figures compiled by Dun & Bradstreet from U.S. Census data for the years 1948, 1954, and 1958 (the most recent years in which a census of retail business was taken) show that in each of these years the retail failure rate in Texas, Vermont, and Missouri, the three States which never had a fair trade law, was substantially lower than the national average retail failure rate.

Thus, in 1948, when the national retail failure rate in the United States was 12.33 per 10,000 retail businesses, the retail failure rate in Texas was 3.97 per 10,000, 3.94 per 10,000 in Vermont, and 7.89 per 10,000 in Missouri.

In 1954 the national retail failure rate was 31.89 per 10,000; in Texas it was 15.01; in Vermont, 6.48; and in Missouri, 12.70.

In 1958 the national retail failure rate was 42.02 per 10,000; in Texas it was 22.50; in Vermont, 14.65; and in Missouri, 20.28.

On the basis of these figures, I do not see how it can be argued that the absence of price maintenance laws damages retail merchants.

Mr. ALGER. I feel, therefore, that there are other laws and other ways to counteract the unfortunate developments in the retail trade which I have previously mentioned, such as bait merchandising and deceptive practices in advertising and selling. It seems to me that what we are talking about here is the substitution of price fixing, with the Federal Government's blessing, by the manufacturer for honest-to-goodness competition, and competition is at the heart of our entire

economic system, so that no matter what the problems we seek to solve here, we will create greater problems. This bill, as I see it, therefore would harm the dealers, would harm the consumers, would harm the marketplace, and therefore would harm our entire economic system and jeopardize private enterprise.

Secondly, it seems that we are putting the FTC into the Federal supervision and enforcement of price infractions and I think that is wrong.

Thirdly, it seems to me that in establishing what will be substantially artificially held prices, somewhat removed from the open competition that normally sets our prices, though of course the manufacturer would try to be competitive in the price he sets, we are actually working toward and encouraging inflation and higher prices to our consumers. I have mentioned, of course, this would eliminate States rights. I believe also that the danger would be imminent of flooding our Federal courts with various price litigation suits. It seems to me also, that this bill, if adopted, would reduce the incentive to the manufacturer for better merchandise, better quality, finer standards, and greater values, because it would, to a degree, remove the manufacturer from the competition that he now is forced to meet in the present free play of the marketplace. It seems to me that this would take away from the small distributor and small dealer one of his chief weapons, which is his price, and to that degree would certainly stifle private initiative. It would give a large advantage, as I said, to the larger dealers and distributors because a large distributor or dealer could easily, unlike his smaller competitors, engage a manufacturer to make the same product, put his name on it, sell it for less, and yet the dealer up the street selling the identical product by the same manufacturer could not reduce his price.

Of course, this could be called a subsidy to the consumer, that the consumer will pay, and it seems to be that all in all this bill will provide an unfair competitive atmosphere for our industry today.

I am particularly impressed by the testimony given this committee by Mr. Loevinger, the Assistant Attorney General. I might also call to the committee's attention, not facetiously, but with some humor, that this committee and the public should be forewarned. You have such formidable opposition alined as Mr. Reuther, John Dingell, Bruce Alger, so you see all shades and complexions of political thinking have joined, it seems, against this bill, which ought to be, I would say, something of a warning that maybe this bill is amiss.

I would like to quote, if I may, a statement made by Mr. Loevinger, which I would like to incorporate as part of my statement, and I am almost through, Mr. Chairman.

Price maintenance legislation would subject independent retailers to severe competitive disadvantage turning them into distributive appendages of the manufacturer, and depriving them of their right to exercise independent judgment in establishing prices. With a price established for him by the manufacturer, the retailer would be powerless to make adjustments to conform with his own selling situation. This price could be fixed high to cover all retailers, efficient and inefficient, large and small, urban and rural, independent and chain, under an umbrella of protection. Conversely, it could be deliberately fixed low to drive out the small independent retailer, especially where the manufacturer is competing at the same level of distribution, as he would be specifically authorized to do by this legislation. Either way, the independent retailer would be barred from using competitive pricing. He could only sit and wait for customers, since personal initiative and incentive would be stifled.

I do want to relate this bill now briefly, if I may, to the trade bill. As of midnight Tuesday we filed the reports on the trade bill which shortly will be before the House. In the trade bill we recognize the competitive situation of American industry against foreign competitors. These foreign competitors have, to a degree, hidden behind their own tariff walls, which in many instances are considerably higher than ours, wherein they have not met our concessions at the negotiating table with the tariff reductions we have extended.

An obvious example that is probably known well to this committee in transportation would be automobiles, where the European tariff now is something like 22½ percent and we have reduced ours to 6½ percent, and this is only one of many products, large and small.

Other nations have many other use taxes, turnover taxes, licensing fees, quotas, embargoes, so it is obivous that they are not going to permit the importation of automobiles. Now I agree that is an extreme case but it makes this point—our manufacturers go over and set up plants there, in order to build and market automobiles, because of the tariff wall. That is an extreme. But it at one end of the spectrum points out the danger. When we lower our tariffs, as the present trade bill will do even further, giving the President tremendous negotiating power to further lower tariffs, and this country is flooded with imports of various kinds, some very fine products, offering good quality at lower prices to our people, so the consumer has benefited, the products brought in under the trade bill can hardly be matched competitively by our own dealers who seek to sell products when a quality stabilization bill imposed by the manufacturer prevents them from lowering their prices to meet competition. Yes, the manufacturer has something at stake, but he can have his cake and eat it too. He can hold the price up in the market through the dealers who could not cut their price and at the same time he can manufacture through other trade names and sell at a much lower price to meet foreign competition, but the poor dealer is caught in the bind. He cannot meet competition by price.

I want to stress this because photographic equipment, for example, which is one of those items whose dealers are affected by this bill, as I see it, these are the ones that are in trouble from imported goods from abroad. Those who are for the quality stabilization bill, had better study this bill in relation to the foreign trade bill, the Trade Expansion Act of 1962, which will shortly be before the Congress.

Finally, my closing thought, Mr. Chairman, is I believe that this bill is really an infraction of property rights. It seems to me that, while the manufacturer does indeed have an interest in his trademark and his trade name, yet when he relinquishes title to the goods at a price to a dealer or distributor or who legally buys that product, he then relinquishes the right to dispose further of that at whatever price the distributor and the dealer see fit to sell in the market.

Mr. MACK. May I interrupt the gentleman at this point, if you don't mind an interruption?

Mr. ALGER. Yes.

Mr. MACK. He doesn't relinquish the right to service the product at that point, though, does he?

Mr. ALGER. No, but a servicing arrangement as I see it, would be an entirely different arrangement under warrantees that could be

worked out. I see this as a different matter from title itself to the product so far as pricing.

Mr. MACK. It is done to protect his trademark and his good name in the business, so he continues that interest in the product.

Mr. ALGER. I think the point is well taken, Mr. Chairman, and I would not disagree with the chairman on that point. Yet I do feel that when he relinquishes under our law, and I am not an attorney—I am perhaps wrong in my construing of the law at this point—title to the property, he also relinquishes control over price, and I believe we might find ourselves counter to existing law if we tried to alter it. Whether it would get to the Supreme Court and be ruled to the contrary, I don't know, but I see there a possible danger and I thought that the Assistant Attorney General has pointed this out, too. Mr. Chairman, I trust I will be able to revise my remarks which grammatically are often inaccurate, and I have appreciated this opportunity.

Mr. MACK. The gentleman has made his usual fine statement before this committee. I did want to call to the attention of the gentleman the fact that the Assistant Attorney General has not testified before this committee, but I am sure that he was referring to the hearings which were recently held in the Senate.

Mr. ALGER. Yes, Mr. Chairman. This testimony was before the special subcommittee of the Senate Commerce Committee on April 19 and was the statement of Mr. Lee Loevinger, Assistant Attorney General.

Thank you for correcting me.

Mr. MACK. I just wanted to mention that so that you could correct it.

Mr. ALGER. Thank you very much for correcting my misunderstanding.

Mr. DINGELL. I want to welcome our former colleague on this committee and good friend back to the committee and say I have enjoyed his presentation.

Mr. ALGER. Thank you.

Mr. MACK. I am glad that witness this morning made note of the fact that Mr. Dingell is in complete agreement with him on this subject. I have observed the time when I served with both of them on this committee that they were not always in complete agreement.

Mr. ALGER. Mr. Chairman, we are not only in agreement, we have conspired together and shall further on this matter.

Mr. DINGELL. Is it fair to say that we believe in this protection of the free capitalistic system of this country from its friends as well as its foes?

Mr. ALGER. Indeed, and I certainly join with the gentleman and I hope to see him downstairs later on another matter.

Thank you very much.

Mr. MACK. Our next witness is Mr. Matt Triggs, assistant legislative director of the American Farm Bureau Federation.

STATEMENT OF MATT TRIGGS, ASSISTANT LEGISLATIVE DIRECTOR, AMERICAN FARM BUREAU FEDERATION

Mr. TRIGGS. Thank you Mr. Chairman and members of the committee.

Mr. MACK. We are happy to have you testify before the committee. I know that you have an interest in another matter that is going to be considered by the Congress soon and I am pleased to know that you have been able to take time this morning for your testimony on this subject.

Mr. TRIGGS. May I assure you it hasn't been easy. We appreciate this opportunity of presenting the views of the American Farm Bureau Federation with respect to House Joint Resolution 636 and similar bills titled "Quality Stabilization Act."

Farm Bureau is a general farm organization wholly supported by dues voluntarily paid by 1,600,000 farm family members in 2,674 county farm bureaus in 49 states and Puerto Rico.

For many years we have opposed legislation which would authorize the fixing of resale prices by manufacturers. At our last annual meeting, the official voting delegates of the member State farm bureaus unanimously reaffirmed this position in the following language:

> So-called fair trade pricing practices are inconsistent with the principles of a competitive economic system. We oppose Federal resale price maintenance legislation. We recommend that State farm bureaus support repeal of State fair trade laws.

The interest of farmers in this issue need not be labored. Not only do farmers buy essentially the same consumption items as other consumers, but in addition they buy large quantities of production equipment and supplies. The resale prices of many of these consumer and production items could be controlled by manufacturers under the provisions of House Joint Resolution 636.

It is our conviction that the enactment of House Joint Resolution 636 would be materially adverse to the interests of farmers in particular, and consumers in general, and that any asserted benefits to retailers are mostly illusory.

In support of these convictions we respectfully submit the following arguments:

1. In the past 15 years the wholesale price of drugs has declined, the retail price of drugs has gone up, and drug marketing margins have increased.

It is, of course, appreciated that pending legislation would be applicable to most brand name products. Nevertheless, it is clear that the major support for the bill comes from retail druggists. The drug industry has been the largest user of resale price maintenance practices in those States where such practices are legal.

It is, therefore, significant to note that since 1947–49, wholesale drug prices declined 8 percent, whereas during the same period retail drug prices increased 21 percent. (The 1961 annual average of the Wholesale Price Index for drugs and pharmaceuticals as reported by BLS was 91.9. The 1961 annual average of the Consumer Price Index for prescriptions and drugs as reported by BLS was 121.3 percent.) The divergence of these trends indicates that "fair trade" pricing has been a factor in widening marketing margins in retail drug merchandising. The impact of "fair trade" pricing on distribution margins and consumer prices is dealt with in more specific detail in section 4 of this statement.

2. The argument that resale price maintenance is necessary to protect small merchants is not valid.

Small concerns are less adequately capitalized, are often quartered in less desirable locations, have less expensive facilities, and less ade-

quate delivery, credit and other services, than larger concerns in the same business. They commonly have less complete merchandise lines, food service, et cetera, than the large stores. Large mass retailers can utilize lower priced private brands not available to small retailers.

If small businesses are not permitted to compete pricewise to offset these disadvantages, their competitive status is weakened.

Take the Washington picture for example. Such small drug concerns as Dart Drug, Tates, Save Mor, Discount Drugs, Standard, and other small concerns, are able to compete with Peoples and Drug Fair because they sell cheaper. If they could not sell cheaper than their big competitors, it appears unlikely that such concerns would have grown and prospered.

3. Resale price fixing denies the consumer the opportunity of sharing in savings made possible by lower cost merchandising.

Many consumers are content to shop in less commodious stores with poorer service if they are able to save money by doing so. The consumer who wishes to save money in this fashion should not be denied the right and opportunity to do so.

Retailers who are able to serve the public more cheaply than others, should be encouraged, not forbidden to share such savings with their customers.

4. Resale price maintenance practices mean higher prices.

We do not agree with those who assert that there is anything in this bill to benefit consumers.

In a statement presented to the Senate Select Committee on Small Business on June 25, 1958, the Justice Department reported on a survey of prices in States where fair trade practices had not been authorized compared with fair trade prices. The total fair trade price for the 119 items selected was $2,829.46. The lowest selling price of these 119 items in non-fair-trade cities was $2,280.34, even though many items were priced at fair trade levels even in non-fair-trade cities. This is a saving of 19.41 percent.

The Department's survey also reported on a comparison between fair trade and non-fair-trade prices of only those items that sold below fair trade prices in the non-fair-trade cities. The consumer could buy such items for $1,281.73 in non-fair-trade cities, compared with the fair trade price of $2,033.20, a saving of 27.12 percent.

The following summary is extracted from page 3 of appendix III, attached to the aforesaid Department of Justice statement, except that the data in the final column are calculated from the two preceding columns.

Retail prices of survey items in non-fair-trade cities compared with fair trade prices

City	Total number of survey items offered for sale	Fair trade prices of all survey items offered for sale	Actual retail prices of all survey items offered for sale	Reduction below fair trade price
Washington, D.C.	129	$3,422.31	$2,327.02	$1,095.29
Rutland, Vt.	107	2,199.61	2,064.07	133.54
Kansas City, Mo.	124	3,204.89	2,636.87	568.02
Burlington, Vt.	110	2,052.13	2,040.68	11.45
Dallas, Tex.	122	3,007.75	2,408.77	598.98
El Paso, Tex.	112	2,705.64	2,110.03	595.61
Houston, Tex.	126	3,013.36	2,385.67	627.69
St. Louis, Mo.	119	3,029.99	2,269.57	760.42

If a buyer in one of the cities listed bought all of the items surveyed on the date of the survey and in each case purchased them from the low-priced seller the entry in the last column of the table would be the savings that he would enjoy.

The size of consumer savings below fair trade prices in non-fair-trade cities, as reported in the final column above, will indicate the toll taken on consumers by fair trade pricing practices in other States.

A complete copy of the survey report, appendix III of the aforesaid Department of Justice statement, is attached hereto; that is, to our statement. If it has not been incorporated in the record heretofore I suggest that it might be.

"Fair trade" laws are, we submit, a bitter jest on consumers. The enactment of House Joint Resolution 636 would establish means for much more effective nationwide resale price maintenance programs than provided by present law. Such enactment would materially affect the cost of living. We submit that the weight of the argument is for repeal of present price maintenance legislation rather than the enactment of more effective price maintenance statutes.

5. The argument that consumers need protection against loss leader sales is irrelevant.

The argument is reiterated at hearings on this issue that consumers are enticed into retail stores by loss-leader sales and while there are sold other high-priced items.

In the first place, it should be noted that House Joint Resolution 636 is not loss-leader legislation. This is price fixing legislation. All price reductions are not loss leaders. H.J. Res. 636 would prohibit all price reductions by retailers of items for which prices are fixed by manufacturers.

In the second place, this argument insults the intelligence of consumers. Consumers who can be fooled in this way are the exception, not the rule. Observation of consumer buying at cut-rate drugstores will evidence this. The reduced-price items move fast, the regular-price items more slowly.

6. National resale price legislation would override State authority, State law, and State constitutions.

Despite persistent pressure of "fair-trade" advocates, some States have refused to enact State resale price maintenance statutes. In 19 or 20 other States, resale price maintenance has been held by State courts to be in violation of State constitutions.

The enactment of national price maintenance legislation would override State law. State authority, and State constitutions. One more major step would have been taken to subordinate State to Federal law.

7. The argument that manufacturers are hurt by price reductions in the retail prices of their products is not valid.

It is customarily reiterated at hearings on this issue that the reputation of manufacturers' products is damaged by sales of their products at reduced prices.

If this argument had any weight, the reputation of thousands of non-fair-traded but respected brand name products that are frequently or occasionally sold at "sales" prices would be hopelessly damaged.

For example, few if any food products are fair-traded at the present time. The reputation of the hundreds of branded food products has not in our opinion been harmed by grocery store sales.

8. The concept of resale price fixing is inconsistent with free enterprise principles.

It is a fundamental defense of the private competitive enterprise system that competition compels the passing on to consumers of savings made by increased efficiency. This defense would be partially destroyed by the enactment of national price maintenance legislation.

We believe in the competitive enterprise system. We believe that the disciplines or competition are the best guarantees of our interests as consumers. Competition should apply to retail margins and services as well as to wholesale prices. The competitive principle contributes to the vitality and dynamic growth of the economy. It establishes a premium for finding new and more efficient ways of doing business.

We assume the proposal before the committee would include manufacturer control of retailers' use of "trading stamps" since otherwise the purposes of the bill could be defeated by increasing the number and value of such stamps offered the consumer. This raises a variety of complicated issues.

Our conclusion is, of course, for these reasons, we respectfully recommend that legislation providing for resale price maintenance by manufacturers not be enacted.

Thank you, Mr. Chairman.

Mr. MACK. Mr. Dingell.

Mr. DINGELL. Nothing other than to compliment the witness for a very fine statement, Mr. Chairman.

Mr. MACK. Mr. Hemphill?

Mr. HEMPHILL. No questions, thank you, Mr. Chairman.

Mr. MACK. We have the distinguished chairman of a subcommittee here. Mr. Roberts, do you have any questions of this witness?

Mr. ROBERTS. I have no questions.

Mr. MACK. I have a couple questions I would like to ask. I am wondering, if it were possible to fair trade your farm products, if we wouldn't be able to save about a billion dollars a year on farm subsidies?

Mr. TRIGGS. That is a new suggestion I haven't thought about. I think there are better ways of saving money on the farm program.

Mr. MACK. We had the Federal Trade Commission members before the committee the other day and if such a proposal were passed, they felt that a Government agency should have the authority to control the prices rather than a private organization. Do you have any comment on that?

Mr. TRIGGS. Yes, sir. We don't have any specific policy on this point, but I am a hundred percent sure—

Mr. MACK. You are aware of the suggestion that has been made?

Mr. TRIGGS. Yes, sir. I am sure that if any such proposal were submitted to our responsible policymaking body they would be just as firmly opposed to that as to delegating to private manufacturers the authority to fix prices. We believe competition is the best means of determining marketing margins.

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Consumer retail sales saving opportunities in non-fair-trade cities as of May 14, 1956

Product class	City	Total number of survey items offered for sale	Total fair trade value of all items offered for sale	Total number of survey items offered for sale below fair trade price	Total actual selling price of all items offered for sale	Percent saving on all items offered for sale compared with total fair trade price	Total fair trade value of all items offered for sale below fair trade price	Total actual price of all items offered for sale below fair trade price	Percent saving on all items offered for sale below fair trade price compared with total fair trade price
Prescriptions, drugs, and drug sundries.	Washington, D.C.	36	$91.50	32	$75.51	17.48	$89.96	$73.97	17.77
	Rutland, Vt.	35	89.75	33	78.66	12.36	88.53	77.44	12.53
	Kansas City, Mo.	36	91.50	19	86.75	5.19	44.61	39.86	10.65
	Burlington, Vt.	32	63.01	6	64.30	(1)	11.09	10.68	3.70
	Dallas, Tex.	34	86.90	31	75.33	13.31	75.70	64.05	15.39
	El Paso, Tex.	32	71.85	13	68.87	4.15	42.20	39.21	7.09
	Houston, Tex.	36	91.50	11	92.29	(1)	28.14	24.36	13.43
	St. Louis, Mo.	27	40.50	13	38.80	4.20	20.24	18.48	8.70
Toiletries	Washington, D.C.	21	18.99	18	16.80	11.53	17.40	15.21	12.59
	Rutland, Vt.	21	18.99	19	16.99	10.53	16.54	14.53	12.15
	Kansas City, Mo.	19	17.32	9	16.19	6.52	7.60	6.47	14.87
	Burlington, Vt.	20	17.92	4	17.73	1.06	2.66	2.47	7.14
	Dallas, Tex.	21	18.99	18	16.64	12.37	15.46	13.11	15.20
	El Paso, Tex.	17	16.35	5	15.74	3.73	4.72	4.11	12.92
	Houston, Tex.	21	18.99	12	17.92	5.63	10.19	9.12	10.50
	St. Louis, Mo.	21	18.99	7	18.07	4.84	7.07	6.15	13.01
Cigars	Washington, D.C.	3	18.10	3	16.37	9.56	18.10	16.37	9.56
	Rutland, Vt.	3	18.10	3	16.25	10.22	18.10	16.25	10.22
	Kansas City, Mo.	3	18.10	2	17.89	1.16	10.60	10.14	4.34
	Burlington, Vt.	3	18.10		18.15	(1)			
	Dallas, Tex.	3	18.10	3	17.05	5.80	18.10	17.05	5.80
	El Paso, Tex.	2	10.60	1	10.74	(1)	4.60	4.49	2.39
	Houston, Tex.	3	18.10	2	17.51	3.26	12.10	11.51	4.88
	St. Louis, Mo.	3	18.10	2	17.89	1.16	10.60	10.14	4.33
Cameras and photographic equipment.	Washington, D.C.	21	1,477.20	21	1,072.68	27.38	1,477.20	1,072.68	27.38
	Rutland, Vt.	17	1,172.25	5	1,148.68	2.01	205.35	181.78	11.48
	Kansas City, Mo.	21	1,477.20	8	1,398.80	5.31	348.80	270.40	22.48
	Burlington, Vt.	19	1,054.20	3	1,041.15	1.24	213.75	198.95	6.92
	Dallas, Tex.	21	1,477.20	13	1,286.39	12.92	1,195.45	1,004.64	15.96
	El Paso, Tex.	20	1,129.20	19	910.64	19.36	1,049.70	831.14	20.82
	Houston, Tex.	21	1,477.20	19	1,244.32	15.76	1,119.45	886.57	20.80
	St. Louis, Mo.	20	1,397.70	19	1,125.11	19.50	1,049.70	777.11	25.97

Houseware and small appliances	Washington, D.C.	30	815.51	30	479.59	41.19	815.51	479.59	41.19
	Rutland, Vt.	19	466.33	15	372.75	20.07	404.98	311.40	23.11
	Kansas City, Mo.	27	722.63	22	517.44	28.39	634.18	428.99	32.36
	Burlington, Vt.	22	457.88		458.33	(1)			
	Dallas, Tex.	25	726.76	19	529.11	27.20	576.60	377.65	34.50
	El Paso, Tex.	25	676.73	25	512.01	24.34	676.73	512.10	24.33
	Houston, Tex.	27	714.66	19	539.57	24.50	563.93	388.84	31.05
	St. Louis, Mo.	29	750.56	24	496.17	33.89	673.21	418.82	37.79
Cleaning supplies	Washington, D.C.	2	1.98	1	1.88	5.05	0.59	0.49	16.95
	Rutland, Vt.	1	0.59	1	0.55	6.78	0.59	0.55	6.78
	Kansas City, Mo.	4	4.86	1	4.82	0.82	0.59	0.55	6.78
	Burlington, Vt.	3	3.47		3.47	0.00			
	Dallas, Tex.	4	5.52	2	4.49	18.66	2.88	1.85	35.76
	El Paso, Tex.	2	2.88	1	2.58	10.42	2.29	1.99	13.10
	Houston, Tex.	5	6.11		6.21	(1)			
	St. Louis, Mo.	5	6.11		6.11	0.00			
Typewriters	Washington, D.C.	3	360.48	3	248.74	31.00	360.48	248.74	31.00
	Rutland, Vt.								
	Kansas City, Mo.	2	235.73	2	167.85	28.80	235.73	167.85	28.80
	Burlington, Vt.								
	Dallas, Tex.	2	235.73	1	204.59	13.21	124.50	93.36	25.01
	El Paso, Tex.	3	360.48	3	314.11	12.86	360.48	314.11	12.86
	Houston, Tex.	2	249.25	2	190.18	23.70	249.25	190.18	23.70
	St. Louis, Mo.	3	360.48	3	280.13	22.29	360.48	280.13	22.29
Jewelry, silverware, and pens	Washington, D.C.	13	638.55	13	415.45	34.94	638.55	415.45	34.94
	Rutland, Vt.	11	433.60	4	430.19	0.79	56.20	52.79	6.07
	Kansas City, Mo.	12	637.55	10	427.13	33.00	547.85	337.43	38.41
	Burlington, Vt.	11	437.55		437.55	0.00			
	Dallas, Tex.	12	438.55	12	275.17	37.25	438.55	275.17	37.25
	El Paso, Tex.	11	437.55	11	275.34	37.07	437.55	275.34	37.07
	Houston, Tex.	11	437.55	11	269.67	38.37	437.55	269.67	38.37
	St. Louis, Mo.	11	437.55	10	287.29	34.34	432.60	282.34	34.73
All classes	Washington, D.C.	129	3,422.31	121	2,327.02	32.00	3,417.79	2,322.50	32.05
	Rutland, Vt.	107	2,199.61	80	2,064.07	6.16	790.29	654.74	17.15
	Kansas City, Mo.	124	3,204.89	73	2,636.87	17.72	1,829.96	1,261.69	31.05
	Burlington, Vt.	110	2,052.13	13	2,040.68	.56	227.50	212.10	6.77
	Dallas, Tex.	122	3,007.75	99	2,408.77	19.91	2,447.24	1,846.88	24.53
	El Paso, Tex.	112	2,705.64	78	2,110.03	22.01	2,578.27	1,982.49	23.11
	Houston, Tex.	126	3,013.36	76	2,385.67	20.83	2,420.61	1,780.25	26.45
	St. Louis, Mo.	119	3,029.99	78	2,269.57	25.10	2,553.90	1,793.17	29.79
Average, all cities		119	2,829.46	74	2,280.34	19.41	2,033.20	1,481.73	27.12

[1] No saving.

Mr. MACK. Don't you think that it would be better for us to have the competitive forces at work rather than to have a regulatory agency regulating the price of any one product?

Mr. TRIGGS. Well, I certainly agree with your conclusion that the competitive forces should be at work. That is why we are opposed to this bill. We feel it is a crucial restriction on the operations of the competitive principle.

Mr. MACK. You understand that under price stabilization the price could be stabilized by an individual manufacturer only when there are other products available in competition with that product.

Mr. TRIGGS. Yes, I understand that this involves some limitation. I don't know what would be excluded by this.

Mr. MACK. I am quite familiar with your organization.

Mr. TRIGGS. Yes, sir.

Mr. MACK. You have always seemed to speak in terms of free competitive prices. I would think it would be an easy decision to make between the suggestion of the Federal Trade Commission and the proposal that we have before us today.

Mr. TRIGGS. We won't want to choose between them, sir. We would like to oppose both of them.

Mr. MACK. I have noted that your organization has taken quite a stand on many subjects and proposals and has been quite consistent in taking a negative view. I think that the Farm Bureau has a great responsibility with regard to the small communities and the small businessmen. Without the small businessmen the small communities no longer exist, and I have felt for some time that the Farm Bureau which is one of the great farm organizations of this country, ought to come forward with a program of some nature designed to protect the interest of the small communities, which are in turn, of course, supported by the agricultural community and provide greater services at, I feel, reduced costs to the farmers.

If the farmers around Springfield, Ill., and some of the smaller communities in that area had to go into St. Louis to have their tractors repaired or buy parts whenever it was necessary to do so, it would be a financial burden for them. Yet, as I understand your statement, you are suggesting that they do that and with regard to purchases of other items from the discount houses.

Mr. TRIGGS. Well, this is a conclusion. There is no question that many small businesses, particularly in rural communities, are having "tough sledding" at this time. Their real problem is the declining population in so many rural areas, plus the fact that there is a trend by farmers and other buyers toward shopping in a smaller number of larger towns where there is a larger source of supply available, which, of course, is made possible by the increased use of the automobile.

Now, concerned as we may be with respect to this trend toward the decline of many small towns, certainly these trends are too powerful to be reversed or to be slowed down by any measure such as House Joint Resolution 636.

Mr. MACK. Do I understand you to be saying that nothing can be done to give the small businessman an opportunity to exist in these small communities?

Mr. TRIGGS. Well, we are convinced that this bill would not be helpful to most small businesses.

Mr. MACK. Actually, what I am wanting to know is are you in favor of abandonment of all of the small communities in America?

Mr. TRIGGS. No, sir, no, sir. I don't think this bill will prevent that from happening where the decline of the rural population is resulting in a decline of many small towns.

Mr. MACK. A suggestion was made informally to me a couple of days ago by a witness who I think will appear before this committee, that perhaps we ought to subsidize the small businessman as we are subsidizing the farmer today, and I would like to ask you do you think that is the answer to this problem?

Mr. TRIGGS. No, I don't think that is the answer. Subsidies only perpetuate inefficiency.

Mr. MACK. Then are you saying we should eliminate all of the farm subsidies today?

Mr. TRIGGS. We are in favor of moving as rapidly as we can toward curtailment of Government participation in pricing and marketing of farm products.

Mr. MACK. I want to know whether you are in favor of eliminating the farm subsidies today?

Mr. TRIGGS. They can't all be eliminated just overnight.

Mr. MACK. Don't you think you are being somewhat unfair when you say that the farmers should be subsidized and the small businessmen should not be subsidized?

Mr. TRIGGS. I am not saying the farmers should be subsidized.

Mr. MACK. You said that they should not be eliminated.

Mr. TRIGGS. We must necessarily start from where we are. The whole effort of our organization is to move toward less dependence upon Government, move as fast and as far as the political realities of the situation permit us to do. To take an extreme position would be unrealistic politically.

Mr. MACK. Do you consider that your position is somewhat extreme in saying flatly that we should not subsidize the small businessman, especially when we are subsidizing the farmer?

Mr. TRIGGS. No, I don't think it is extreme. Let me illustrate what we mean by eliminating dependence upon government. The dairy price support a year and a half ago was raised to an unsound level, as a result of which huge surpluses were quickly acquired by the Federal Government. The balance between supply and demand which had prevailed in 1960 was destroyed and now we are faced with demands for control of production of dairy products. We say that is the wrong answer. We say that the objective should be to lower the level of price support. We supported the reduction in the level of price support on dairy products and already we see corrective influence coming to bear which will reduce costs to the Federal Government.

Mr. HEMPHILL. Will the gentleman yield to me?

Mr. MACK. I will in just a minute. A representative of a Farm Bureau affiliate, the Illinois Agriculture Association, was in my office just 2 days ago and informed me that the surpluses were substantially reduced as a result of the feed grain bill which was passed by the Congress and that would reduce tremendously the cost of storage,

which has been a burden to the taxpayers of America, plus the fact that it has made possible some very unusual transactions, if not scandals, in this country. It seems to me that you are speaking this morning contrary to what he said in my office.

Mr. TRIGGS. I don't think so, Congressman. The feed grain program has been successful in reducing surplus stocks of feed grain to some extent. It has done so at an extraordinarily high cost to the Federal Government. You can easily compute that the cost is between $3 and $4 a bushel for the Federal Government to reduce production of feed grains under the emergency feed grain program. We opposed the program. We opposed this particular subsidy as hard as we were able to, without success. That is why I say we have to start from where we are in farm legislation and move in the direction we want to go rather than take a doctrinaire position on one extreme or the other.

Mr. MACK. Are you telling this committee this morning that the Farm Bureau doesn't favor subsidies?

Mr. TRIGGS. This is a generally correct statement.

Mr. MACK. Is it not true that you have a program that you refer to as your Federal crop retirement program?

Mr. TRIGGS. This is correct, we do.

Mr. MACK. And that is a subsidy to the farmers?

Mr. TRIGGS. It involves payments for diverting lands out of crop production into nonuse. To this extent it involves a subsidy.

Mr. MACK. I know you don't want to use the term subsidy, but it is a subsidy to the farmers, isn't it?

Mr. TRIGGS. I will concede this point. It is a question of semantics, but it is a subsidy. We feel that it will involve smaller subsidies.

Mr. MACK. I don't think it is a question of semantics. I think it is a subsidy in the true sense of the word and the same sense that I was referring to when I asked whether you felt that the small businessman should be subsidized.

Mr. TRIGGS. It is a subsidy. It is a smaller subsidy than those currently in effect. As I say, you have to move from where you are in the direction you want to go, and that is the politically realistic position today.

Mr. MACK. Let's see if I understand this. You are not in favor of big subsidies, but are in favor of little subsidies, is that correct?

Mr. TRIGGS. We haven't taken any firm position wholly opposing subsidies. We recognize that there may, for example, in the merchant marine business, if we are to maintain a merchant marine at all——

Mr. MACK. I don't want to interrupt. I want you to have plenty of time to proceed, but I got the distinct impression this morning from your testimony that you were opposed to subsidies to the small businessman. I thought it was somewhat unusual for a witness, or perhaps even unfair, who opposed subsidies for one group and wanted them for himself.

Mr. TRIGGS. I would say that this would be our general position, that we would be opposed to subsidies for small businessmen. Yet I wouldn't say we would, under any and all circumstances. I think you ought to have a specific proposition in front of you before you can really answer that question very intelligently.

Mr. MACK. I strongly feel that the small towns and rural communities are in great trouble today because of the trend that has taken place in recent years and that they are in an unfavorable competitive situation. The trend has been to enlarge the metropolitan areas and for the small communities to become smaller. Many of them are becoming extinct, as a matter of fact. Many of them that used to serve very useful purposes for the farming community in my area now find themselves without post offices because the small businessmen failed or decided to go out of business, and I do look upon this as a very serious, critical problem area. We talk about a Department of Urban Affairs and I think we might even need a Department of Rural Communities because I think the problem there is even greater than what exists in the cities today.

I didn't mean to cut you off.

Mr. TRIGGS. I agree with you as to the seriousness of the problem.

Mr. MACK. I yield to recognize the gentleman from South Carolina, Mr. Hemphill.

Mr. HEMPHILL. When you were talking about support prices a while ago, did you speak of the time the Secretary raised the support prices on milk from $3.30 to $3.40 a hundredweight?

Mr. TRIGGS. Yes.

Mr. HEMPHILL. And that increase was last year, wasn't it?

Mr. TRIGGS. That increase was in January of 1961, if I recall correctly.

Mr. HEMPHILL. Now, at that time did the American farmer or the American Farm Bureau Federation oppose the raising of support prices?

Mr. TRIGGS. It wasn't a legislative question. The Secretary just did it overnight. He didn't ask us.

Mr. HEMPHILL. What did your federation do?

Mr. TRIGGS. I don't recall that we were involved in any way. Now when the question became a legislative question and legislation was submitted to the Congress this past spring to increase the level of price support on dairy products above what it would otherwise be, or to tell the Secretary of Agriculture to increase the level of price support above what would be called for by the Agriculture Act of 1958, we vigorously opposed it, because we realized what the end consequence of that action would be. The end consequences would be that production of dairy products would be stimulated, consumption would be reduced, surpluses would build up even faster than they have been building up, and dairy farmers would be faced with the need to accept production controls, which they are virtually 100 percent opposed to. We like high prices, but we don't want them at any cost.

Mr. HEMPHILL. I believe the present Senate farm bill doesn't have any dairy provision; isn't that correct?

Mr. TRIGGS. Beg pardon?

Mr. HEMPHILL. The present Senate farm bill, as I understand it, doesn't have any provision for either marketing orders or controls?

Mr. TRIGGS. It does not deal with dairy products at all.

Mr. HEMPHILL. Yes.

Mr. TRIGGS. The House bill does have provisions for voluntary dairy payments, which we are opposed to.

Mr. HEMPHILL. I believe those voluntary payments are similar to what was called the soil bank some years ago to get paid for not producing, almost $3 I believe it is.

Mr. TRIGGS. I believe it is $2.50 a hundredweight.

Mr. HEMPHILL. That is right, $2.50 a hundredweight.

Mr. TRIGGS. For each hundredweight of production reduced below a base period. I think it is 1959–60.

Mr. HEMPHILL. And the American Farm Bureau Federation is in favor of that?

Mr. TRIGGS. No, we are opposed to that.

Mr. HEMPHILL. I am happy to hear you say that because it appears to me that the farm program over a period of years has degenerated into a program which puts it—which puts the little farmer out of business and helps the big farmer get richer, and that includes the soil bank and many other programs. I am opposed to them. I am not opposed to the farm bill.

Mr. TRIGGS. I hope you will be, Mr. Hemphill.

Mr. HEMPHILL. I may be, but I want to say this. It looks to me that you have an opportunity as an organization to do a great service to this country in cleaning up the thing. I don't know just how to do it, but it has to be done and I have been distressed over what has been happening. I don't mean any criticism of anybody, but at the time that we were having trouble getting money for people who wanted to put marginal lands into the soil bank some of these big companies were getting all sorts of land and putting it in timber and just making fortunes out of it, and it was pretty sickening to me to see what was happening and how it was diverted. What I want to know is if the present farm bill is in danger of that happening with this program.

Mr. TRIGGS. I think the long-range consequences of the feed grain provisions, particularly, of the proposed farm program, would be disastrous to farmers.

Mr. HEMPHILL. We had this experience with the feed grain. The idea was, as I understand it, to make the feed grain available and to conserve the product so you wouldn't have a storage cost and a surplus, and we had some instances in which we tried to get grain for people in the beef cattle business and we found out its great differential was sitting there so it didn't do any good. It was just somebody's idea, I reckon, and without the practical potential.

Mr. TRIGGS. We think the best answer to bringing about a balance between supply and demand of feed grains and to eliminate Government costs and Government involvement is to lower the level of price supports. This will accomplish these results, and it won't take as much of a reduction as is sometimes supposed.

Mr. HEMPHILL. I think the tobacco program is the best program of all, if I am any judge of agricultural programs.

Mr. TRIGGS. It is the one that has obtained greatest acceptance. We do not propose any revision in the tobacco program. I would make this comment, though; the circumstances under which the tobacco program is administered are basically different from the circumstances under which feed grains are produced and marketed. Feed grains are mostly consumed on the farm where produced. They don't move into warehouses. To restrict the amount of corn or grain sorghums or

barley that a farmer might produce to feed his own livestock is to us an unconscionable limitation on his right and freedom to operate.

Mr. HEMPHILL. I hate to mention my difficulties but I have a local problem in which we are unable to get the milk we want for industrial plant users. If we put restrictions on feed grains, we are going to say to the farmers, "You can't increase your production volume."

Mr. TRIGGS. That is right.

Mr. HEMPHILL. Therefore, we can't supply this industrial plant. Wouldn't that be the effect of it?

Mr. TRIGGS. Yes, sir. Even in the so-called deficit areas where they are not going to cut production, even in those areas the proposed legislation still limits production by prohibiting each individual farmer from producing in excess of his base acreage.

This is a guarantee that all small farmers will have to remain small, that an individual who wishes to expand would no longer be permitted to expand.

Mr. HEMPHILL. I have seen them take farmland in my part of the country, which maybe was not suitable, under the theory, for farms, and put in pines and grass, lands that used to be growing crops. I suppose it is a good thing but of course I always thought the good Lord gave us the land to be used.

Maybe that is still elementary but that is the way I feel today. It concerns me that it is not being used and I say chickens will come come home to roost if we don't have or find a better solution than we have.

Thank you, Mr. Chairman.

Mr. MACK. Mr. Keith, do you have any questions?

Mr. KEITH. Just one. Mr. Triggs, do you believe in marketing orders?

Mr. TRIGGS. We believe in the use of marketing orders on a local basis where this is desired by the farm people in that area for limited purposes. We do not believe in marketing orders on a nationwide basis and we do not believe in the use of marketing orders as a production control device.

Mr. KEITH. Marketing orders do result in price control to some extent, do they not?

Mr. TRIGGS. Not the kind that we are talking about, no, sir. Of course the end purpose and the end result is hoped to be an improvement in farm incomes as a result of the operation of the program. Most marketing orders in the fruit and vegetable area are quality control orders and regulate the flow to market without regulating total production or total marketing. Many of these, carefully administered, can be helpful without disrupting the commercial enterprises involved.

Mr. KEITH. They are exerted for the benefit of the farmer?

Mr. TRIGGS. Beg your pardon?

Mr. KEITH. The purpose of the marketing order is to help the farmer obtain a fair price for his product?

Mr. TRIGGS. This is the underlying purpose. It is most commonly endeavored to do so by regulating the quality of the product that is shipped from an area. I am not talking about milk marketing orders. That is another problem.

Mr. KEITH. Thank you, Mr. Chairman.

Mr. MACK. Mr. Triggs, we appreciate your testimony this morning. It is always a pleasure to have you before our committee. Thank you so much.

Mr. TRIGGS. Thank you, Mr. Chairman.

Mr. MACK. Mr. Otis H. Ellis, general counsel, National Oil Jobbers Council, Inc.

Mr. Ellis, is that an organization representing the oil jobbers?

Mr. ELLIS. That is correct, Mr. Chairman.

Mr. MACK. Exclusively?

Mr. ELLIS. Exclusively.

Mr. MACK. And are there other oil jobber associations in the country?

Mr. ELLIS. What we are, as I explain here in my statement——

Mr. MACK. You may proceed.

Mr. ELLIS. I will answer your question in the course of my statement, I think, Mr. Chairman.

Mr. MACK. Very good. You may proceed.

STATEMENT OF OTIS H. ELLIS, GENERAL COUNSEL, NATIONAL OIL JOBBERS COUNCIL, INC.

Mr. ELLIS. My name is Otis H. Ellis. I am engaged in the general practice of law in Washington, D.C., maintaining offices at 1001 Connecticut Avenue, and am appearing here today on behalf of the National Oil Jobbers Council in my capacity as general counsel for that organization.

The National Oil Jobbers Council is a trade group composed of 33 State and regional associations of independent jobbers and distributors of petrol products. These associations, covering 40 States, represent the greater majority of the thousands of bona fide independent petroleum jobbers in the United States. Following is a list of the member associations:

Alabama Petroleum Jobbers Association, Inc.
Arkansas Oil Marketers Association.
California Petroleum Marketers Council (Jobber Division).
Colorado Petroleum Marketers Association.
Connecticut Petroleum Association.
Empire State Petroleum Association (New York).
Florida Petroleum Marketers Association, Inc.
Georgia Oil Jobbers Association.
Illinois Petroleum Marketers Association.
Independent Oil Men's Association of New England (Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont).
Independent Oil Marketers Association of Indiana, Inc.
Intermountain Oil Marketers Association (Idaho, Nevada, and Utah).
Iowa Independent Oil Jobbers Association.
Kentucky Petroleum Marketers Association (Jobber Division).
Louisiana Oil Marketers Association (Jobber Division).
Michigan Petroleum Association.
Mississippi Oil Jobbers Association.
Missouri Oil Jobbers Association.
Nebraska Ptroleum Marketers, Inc.
New Mexico Petroleum Marketers Association (Jobber Division).
North Carolina Oil Jobbers Association.
Northwest Petroleum Association (Minnesota and North Dakota).
Oklahoma Oil Jobbers Association.
Oregon Oil Jobbers Association.
Pennsylvania Petroleum Association.

South Carolina Oil Jobbers Association.
South Dakota Independent Oil Men's Association.
Tennessee Oil Men's Association.
Texas Oil Jobbers Association.
Virginia Petroleum Jobbers Association.
Washington Oil Marketers Associations.
Wisconsin Petroleum Association.
Wyoming Oil Jobbers Association.

I might add at this time, in more direct response to your question, there is one other organization called National Oil Marketers Association that has I don't know how many members, but from the best information at hand very few. It is a rather loosely knit organization. I don't really know what they do. They oppose a lot of things and they are for a lot of things, but most of the jobbers that are members of that organization as individuals are also members of the State associations that are represented by me here today.

Mr. MACK. May I ask about that organization, the membership in that organization would be less than yours, is that correct?

Mr. ELLIS. Oh, very definitely, very definitely.

Mr. MACK. You have about 25 associations in your membership?

Mr. ELLIS. There are 33 that comprise the organization that I represent, some are State associations and some are regional associations, the regional in some instances covering more than one State.

For example, the Independent Oilmen's Association of New England covers all of the New England States with the exception of Connecticut and they have a separate organization, but we are recognized in the petroleum industry as the jobbers organization of the United States.

Since some of the members of this subcommittee may not be aware of what an oil jobber is and does, and further because of the unusual nature of the pending legislation as related to the marketing of petroleum products, I deem it necessary to define the term independent oil jobber, briefly describe the role these jobbers play in the distribution of petroleum products, and of equal importance to show that the nature of the petroleum marketing arena is completely different from the conventional methods of marketing most other products in the United States.

An independent oil jobber is a person, partnership or corporation that owns its own bulk storage and transport facilities and engages in the sale of petroleum products, primarily in bulk quantities for delivery into bulk storage tanks. Many jobbers own service stations which they lease to independent dealers and in turn sell products to these dealers. The jobber's sales, dependent on each individual jobber's type of operation, are wholesale or retail, and in most instances jobbers engage in both wholesale and retail sales, dependent on the definition of these terms. The independent jobber owns his own properties and even though the majority of them sell the branded products of a major oil company the jobber nevertheless is his own boss, provides his own financing, carries his own accounts receivable and in all other respects is independent, as contrasted to commission agents and consignees who are sometimes used by major oil companies for wholesale distribution of their branded petroleum products.

Independent jobbers distribute approximately 30 percent of all gasoline delivered to the service stations of the country, well over 50

percent of all bulk petroleum sales to farmers, 85 percent of home heating oils, and more than 50 percent of the imported residual or commercial fuel oils. In addition, jobbers sell to what is known in the trade as commercial consumer accounts. However, this phase of their business has been greatly diminished due principally to the predatory pricing practices of branded suppliers.

The marketing of petroleum products differs greatly from the marketing of most other products sold in this country in that the refiners or manufacturers of these products engage in the wholesale distribution of well over 50 percent of the gasoline sold throughout the country. Most of these refiners are branded suppliers and all of them engage to some degree in retail distribution. Some of these branded suppliers utilize independent jobbers as a means of bulk distribution to a greater extent than others. For example, the Mobil Oil Co. sells to approximately 2,800 independent jobbers as contrasted to the Gulf Oil Corp. which probably has less than 500 jobbers. The market or price leader at all stages of petroleum distribution is a large major company whose abilities to establish such prices as it sees fit are limited only by consumer resistance and the competition of private brand products. It is peculiar but true that the 32 leading oil companies of the Nation supply a substantial part of the volume sold by the private brand or sometimes called unbranded marketers. This means that a branded jobber or dealer who received its products out of the same tank and from the same supplier.

I do not believe that anyone could successfully contend that any predatory pricing in the petroleum industry is attributable to branded wholesalers or branded retailers. Predatory pricing in the petroleum industry has thus far been engaged in principally by some—I repeat some—private brand marketers and the major oil companies.

From this limited statement of petroleum marketing and the role played by jobbers it is quite obvious that the jobber is in effect a hybrid marketer. By that I mean that he is both a wholesaler and a retailer of products. Even though the jobber neither owns or operates any service stations he nevertheless, for example, sells gasoline, diesel oil, motor oils, and greases to farmers and to commercial accounts. These sales are sales at retail as contrasted to the service station type of sale which is also a sale at retail. It is also obvious from the foregoing that jobbers, from a competitive standpoint, must compete with other jobbers, with major oil companies and in many instances with their own suppliers, branded and otherwise. Most branded jobbers sell only one brand of petroleum products and do so by virtue of a franchise agreement under the terms of which their branded suplier allocates to them a given geographical area for the handling of this brand exclusively. Unfortunately some of these suppliers also sell to unbranded outlets in the same territory at prices and under conditions that create difficult competitive situations for their own branded customers.

It should also be noted that the use of the so-called private brand service station has grown considerably in the ast 20 years. As a result branded suppliers, even though they may continue to supply unbranded outlets, nevertheless are engaged in a death to the finish struggle to recoup the business taken by these private brand stations, and as a result many areas in the United States are today plagued with price

wars which if not stopped within a reasonable period of time will bankrupt many jobbers and many retail dealers as well.

I go into these explanations in detail for the purpose of laying the premise for our opposition to H.J. Res. 636 and H.R. 10335. These bills, to us, are nothing more than fair trade bills, the likes of which we have vigorously opposed for years. The only real basic difference is that in the pending bills the various States have nothing to do with implementation or application, but for all other practical intents and purposes it is the same old woman of ill repute who has tried to upgrade her moral standards by the simple expedient of putting on a clean negligee. I do not feel that the price-fixing provisions of this bill could ever be made to work in the petroleum industry without (1) collusion between the principal petroleum companies of the country or (2) a form of prise parallelism by these companies which amounts to the same thing. As a matter of fact we do not think price maintenance for branded products would work in the petroleum industry even with collusion or parallelism of prices due to the strong position of private brand marketers, the strength of whose position varies from one section of the country to another. As a matter of fact, fair trading of gasoline has been tried and resulted in miserable failure. Unfortunately if the brand owners in the petroleum industry were given this right to fix prices, sooner or later some of them would attempt to do so and in the process of trying to make the system work they would ruin some of their independent reseller customers, both wholesalers and retailers, in the process.

The general objections of our organization to this type of legislation are premised on the following beliefs and conclusions:

First, oil jobbers are independent businessmen and look with a jaundiced eye on any legislation that would create artificiality in the free enterprise system with the probable chance of depriving the consumer of the benefit of fair but free competitive enterprise and deprive the jobber of the ability to quickly respond to the competition in his market.

Second, the record of legislation relating to fair trade laws reflects nothing more than a hodgepodge of legalistic verbiage that has served better as a springboard for the promotion of litigation than it has for the stimulation of trade and the preservation of the small businessman.

Third, the preamble of "whereas" clauses to Senate Joint Resolution 159 presuppose certain conditions necessitating the action proposed in the bill when, as a matter of fact, these presuppositions are invalid as related to the petroleum industry, or to the extent they may be valid the blame for the adverse conditions does not lay at the door of the independent reseller but rather at the door of the branded manufacturer whose sacred brand they have themselves defiled yet this bill so sanctimoniously seeks to protect.

Fourth, this resolution is drafted in such a manner that when we attempt to relate its provisions to the petroleum industry it leaves many questions unanswered, and in our judgment creates confusion and to such an extent that the nebulous and vague provisions of the bill could only be clarified by extensive litigation which the independent jobber is financially unable to stand.

Fifth, the provisions of the proposed legislation if applicable—and that is doubtful—to the petroleum industry—would vest in the

giant oil companies the legal right for such companies to determine the margin of profit for the petroleum jobber and dealer, at all stages of distribution, while at the same time competing with that jobber or dealer.

Sixth, this legislation, if uniformly applied by the 32 leading branded oil companies in the United States, would do one of two things: (1) It would either set prices at levels which would drive independent private brand marketers out of business, or (2) it would set the price of petroleum products so high that independent resellers of branded products—who are by far the largest majority of resellers—would lose position in the market to those engaged in selling private brands. In brief, one of the principal purposes of the bill as indicated by some proponents is to save the small businessman—certainly this will not be achieved in the petroleum industry but rather the reverse will be the result.

Seventh, some of the proponents argue that if a reseller does not like the price established by the brand owner then he may refuse to sell the product and switch to another brand. Unfortunately, however, this is an alternative that exists in theory but not in actuality in the petroleum industry, since the independent reseller of branded petroleum products only handles one brand and there are not a multiplicity of brands of equal acceptance available to him. Therefore, his only alternative from a practical standpoint, would be to go unbranded which would cause a serious deterioration of his assets since all of his facilities were built and designed for branded operations as distinguished from the lower cost unbranded type of operation.

Before proceeding to point out a few specific examples of the adverse effect of this legislation, I would like to pose some very pertinent questions which this legislation does not answer but which we feel should be answered, either in the language of the resolution itself or at least in the report of this committee.

1. Let us assume that Esso imposed a retail price on its branded regular grade of 31.9 cents per gallon. Would it be a violation of the law for the retail dealer to sell gasoline at 31.9 cents per gallon but in addition thereto give to the customer trading stamps, some premium, or other article of value, such as tableware, books, balloons, or other merchandise? Further, under these same conditions would the dealer be prohibited from giving a nominal discount for payment in cash as distinguished from the charge made for a credit sale?

Might I point out that under existing fair trade laws there are some court decisions which have held that it is not a violation of fair trade pricing for a merchant to give trading stamps, the premise of those decisions generally being that the giving of the trading stamps was something in the nature of a minor cash discount. I point that up as a matter of litigation that has been adjudicated under existing laws and if this thing is passed, unless the committee does something about it, you have invited nothing else but further litigation.

2. If, for example, Atlantic Refining Co. imposed a resale retail price on its regular grade of gasoline of 31.9 cents per gallon, would this mean that Atlantic's jobbers must charge this price? To their farmer customers who purchase gasoline in bulk quantities? Certainly this is a retail sale since it is made to the ultimate consumer

and not for resale. (Special note: If the answer to this question is "Yes," then it will mean that the average price charged a farmer for gasoline will be increased from 3 to 6 cents per gallon over the current price.)

3. If Esso imposed a fixed retail price of 31.9 cents per gallon on its regular grade of gasoline, would Esso be in violation of the law if Esso sold direct, in bulk quantities, to a truckline or to other commercial consumer accounts at a lesser price—obviously this is also a retail price? (Note: If such is the case, this will increase the price of gasoline to this category of consumer, the commercial customer, from 2½ cents to 4 cents per gallon.)

4. Could Esso, for example, establish a fixed resale price for its service station customers but at the same time state that such retail or resale prices did not apply on sales made by Esso or by Esso jobbers customers to farmers and commercial consumer accounts?

5. Could Texaco, who markets in every State in the Union, establish a different retail price for its products in each State in which it operates, or possibly different prices within different sections of each State of the country, or if Texaco establishes a fixed retail price must this be the price everywhere that Texaco's branded products are sold, regardless of freight differential or other cost of distribution? The bill certainly does not answer that question.

6. Let us assume that Gulf Oil sells gasoline to an Army post exchange service station and, in addition, sells gasoline to independent retail dealers who have stations adjacent to the Army post. Let us further assume that Gulf imposes a fixed retail price on its regular grade of gasoline of 31.9 cents per gallon. Does Gulf have the legal right to force this subsidiary agency of the Federal Government, the post exchange, to observe these fixed prices? (Note: An opinion of Attorney General Homer Cummings, which has not to date been repudiated, maintains that the provisions of the Robinson-Patman Act are not applicable to sales to the Federal Government.)

These are but a few of the questions which this legislation does not answer. There will be hundreds of others which could only be resolved by protracted litigation and how many small jobbers and retailers are able to afford this in the face of the vast resources of the large oil companies? There is one other big question, as applied to the petroleum industry, and that is what are the real and practical rights that a one product reseller—such as a jobber or retailer of gasoline—has under this bill? We do not deny that a brand owner is justified in insuring the quality of the product which he advertises is not deteriorated, diluted, or diminished. Nor do we deny that this brand owner should have the right to stop some reseller customer from acts which actually devalue the brand in the eyes of the consuming public. We are aware, however, of any significant number of instances where branded resellers of petroleum products have ever been guilty of such acts.

The language of this bill vests in a branded petroleum supplier the power of life or death over its independent reseller customers. As an example, let us assume that the supplier imposed a fixed price on sales to retailers of 20 cents per gallon, and in turn imposed a fixed resale price on sales by retailers of 25 cents per gallon. Let us further suppose that this same supplier then proceeded to charge his jobber

customer of these branded products 19 cents per gallon. Obviously the jobber could not stay in business with a 1 cent per gallon gross profit margin and would thereby be forced to find another supplier who would give him a reasonable margin of profit or go out of business. Using the same hypothetical set of facts, let us assume that this same supplier had no fixed resale prices to a class of purchasers known as the commercial account and the farmer, and to these categories of trade the supplier proceeds to sell, in competition with his jobber customer, the same product for 20 cents and 21 cents, respectively. Obviously the jobber could not meet this competition. Further, we should consider the impact on the retailer who is compelled to sell at 25 cents per gallon while his supplier is selling to farmers at a non-fair-trade or fixed price of 21 cents per gallon. In such instances the retailer customers of the jobber and the supplier are selling to consumers at widely divergent prices and the retailer could not meet this competition of his supplier for the farmer's business because his sales were limited by a fixed price, this legislation would be—would vest the optional authority in a major oil company to do as it pleased, and the term independent as applied to a petroleum jobber or retailer would become extinct.

I am aware that you might say that no major oil company representative in his right mind would engage in such practices. I only wish I could take this subcommittee by the hand out into the gasoline marketplace today. I will show you major oil companies who are selling gasoline at prices that do not even return enough to pay for the cost of the crude oil from which the product was manufactured. If this committee thinks we can rely on the intelligence of major oil company representatives for proper implementation of the provisions of this bill, then I can so assure you that your beliefs are founded on unsound premises.

Is there any member of this committee or for that matter any motorist who believes that the quality of Esso gasoline is lessened simply because its reseller customers are engaged in a price war and are selling their branded products at absurdly low prices. So far as the petroleum industry is concerned, quality stabilization is no problem except to the extent it is impaired by the action of the branded owners themselves. I sincerely doubt if one single representative of the Nation's leading 32 branded oil companies will have the unmitigated gall to appear before this committee in person and ask for passage of this bill.

Certainly any who appear or who may approach this committee or other members privately are not motivated by a concern over quality stabilization but to the contrary are motivated by their own greedy desires to have vested in them the right to fix prices, and may the jobber and their independent reseller customers be damned. I am advised that some independent refiners and private brand resellers are quietly urging passage of this bill. Do you know what their real purpose is? It is this: They hope that if the bill is passed the branded oil companies will be stupid enough to fix prices so high that these unbranded refiners and retailers can gain more and more of the market at the expense of the branded independents.

Here again a motivation which has nothing to do with this sanctimonious and supposedly sacred purpose of stabilizing quality. We

certainly hope that no member of this subcommittee will be fooled into thinking that giving the right to fix prices to the major oil companies will save one single independent businessman from extinction. To the contrary, we predict that if the authority granted in the bill is used by these companies it will ruin many independents and particularly the independent jobbers that I represent. Admittedly, small merchants throughout the United States are facing difficult times in trying to meet the competition of discount houses, chainstores, and similar types of merchandise. We too face that difficulty, but we are certain that this legislation is not the panacea that will solve our problems. We are likewise of the opinion that many panic-stricken small businessmen who are supporting this legislation will ultimately find that if it works to the benefit of anyone it will be the manufacturer or brand owner and not the independent merchant.

We predict that if this legislation is passed many of the organizations which purport to support it will ultimately return to this Congress asking for repudiation.

Thank you, gentlemen.

Mr. DINGELL. Mr. Ellis, yours has been a very excellent and very forceful statement. It has certainly impressed me.

Mr. HEMPHILL. Thank you very much. On page 7 of your prepared statement in the middle of the page you have a list of arguments, one designated as your fifth argument, in which you make certain statements. One is "the provisions of the proposed legislation if applicable" and so forth. Why do you doubt its applicability?

Mr. ELLIS. I do not personally doubt its applicability, Mr. Hemphill. In conversations with a few Congressmen there are some who labor under the impression that this bill is applicable to packaged merchandise and not to merchandise sold in bulk quantities. I might also add that there are some legal representatives in the petroleum industry that are doubtful about the applicability of the bill to the petroleum industry.

Mr. HEMPHILL. To use a lawyer's term, it is just hearsay with you, that it might not have any applicability?

Mr. ELLIS. Yes, that is why I put that in.

Mr. DINGELL. Will you yield to me at this point?

Mr. HEMPHILL. Yes.

Mr. DINGELL. As I recall it, and I was reading up on some of the fair trade cases, fair trade and price figures have been held applicable to gasoline and to coal which are not branded commodities; am I correct? Which do not bear a branded name on the commodity itself?

Mr. ELLIS. Yes, that is true, but I am talking about the language of this particular bill. There is some question of the applicability and I think that Congressmen who have talked with me about it and indicated their belief of what the bill contained had not read the bill and they were laboring under an assumption rather than an opinion predicated on reading the bill.

Mr. DINGELL. Thank you.

Mr. HEMPHILL. You also say it would vest in the oil companies the legal right for such giant companies to determine the margin of profit for the petroleum jobber and the dealer, at all stages of distribution,

while at the same time competing with that jobber or dealer. Would you explain that a little bit please and tell me just what you mean?

Mr. ELLIS. This bill provides that, if the brand proprietor or owner competes with his reseller customers in the sale of a commodity on which a fixed price has been established by the brand owner, the manufacturer must sell at the same price. For example, if Esso, and I could pick any company—I am not pointing them out for any reason other than as an example—imposed a retail price on its gasoline of 30 cents a gallon at the service station level and they imposed on the jobber a wholesale price, that is a sale to the service station, of 28 cents per gallon, and let us say Esso competed in the same area for service station customers, the jobber cannot live on 2 cents a gallon as a gross profit margin. Esso can live and the reason that Esso can live is that Esso makes most of its money out of production of oil and gas, not in the marketing of the products.

They as an integrated operation can dip into other phases of their operation for money to subsidize their marketing operations. A jobber who only engages in marketing must make it or break it out of marketing profit alone, so that is what I mean by vesting in them the right to establish these prices. Even though they must sell at the same price then if they compete with the reseller customer they, nevertheless, can drive him to the wall if they want to. You might say, "Well, surely Esso would not want to drive one of its jobbers to the wall." You would be amazed at some of the stupid ideas that are conceived in Rockefeller Plaza.

Mr. HEMPHILL. I am not a Rockefeller man; I am a Democrat.

Mr. ELLIS. I am not either. You would be amazed at the ideas that might be conceived in Rockefeller Plaza and have been conceived there about the extent of the gross profit necessary for a retailer, that is, a gasoline service station operator, or a dealer to do business. We are under this squeeze now.

Mr. HEMPHILL. That is what bothers me. It is my impression, perhaps erroneously, that the oil companies today can set the margin of profit for the retailer to make 3 or 4 cents a gallon or the boy pumping gas down in a little town like I live in.

Mr. ELLIS. They can do it and they do do it.

Mr. HEMPHILL. Would it be worse under this legislation?

Mr. ELLIS. It would be worse in this respect. I will put it this way. Most supplying companies of course want their dealers to do well and prosper and sell a lot of products. Suppose X supplying company imposed a retail price on a dealer of 30 cents a gallon and they sold the product to him at 25 cents a gallon, giving him a 5 cent gross markup?

Mr. HEMPHILL. They don't give him that much, though?

Mr. ELLIS. No, but there are a lot of them who get that in normal price conditions, Mr. Hemphill, but I suppose they do that. Then they impose that on him. They say that is going to be the fixed price. They like that. They like him to have that 5 cents particularly if they get the 25 cents, because the net back to them is what they are concerned with, and with that 25-cent price, even though the dealer gets 5 cents, they have a healthy net back price, so they like to hold it there. But one morning the dealer goes to his place of business and a private brand operator, say the Atom Age Gasoline Co. across the

street, who has nothing but a roof over a cash register and six multi-pumps out front, and they don't sell anything but gasoline, no service, opens up that morning with a 25-cent price on regular gas. And here sits this brand dealer across the street with a 30-cent price hung around his neck. This dealer must respond to that competition and he must respond fast.

Well, oil companies are sort of like the Federal Government. They just don't respond fast. The dealer calls the salesman. The salesman calls the district manager. The district manager calls the regional manager. The regional manager in turn sometimes gets around to calling the vice president in charge of marketing in Houston, or Bartlesville, or Chicago, or wherever he may be located and the vice president in charge of marketing is not in. He won't be back for a week. So this little guy has to sit there with a 30-cent price hung around his neck for a week, while the station across the street, the private brander, who may have been sold gasoline by the same supplier, unbranded, sits there and raids his business.

Now we do not want to have to rely on a major oil company, with the machinations of the machinery of a major oil company having to function in order for us to be competitive.

Mr. HEMPHILL. Thank you. I must say that your comparison is a little extreme. I have never noted that the oil companies were like the Federal Government, but I wish the Federal Government was like the oil companies and smart and used the business methods that the major oil companies do, including Esso Standard Oil and the others.

Mr. ELLIS. I concur as a taxpayer in that statement.

Mr. HEMPHILL. I remember the Suez Canal crisis and I reckon they can really drop the price of gasoline after they got what they made out of that. It looks like to me that they dropped the price of gas to everybody in the United States for awhile out of that mistake we made. The thing that concerns me is the consumer. We have an obligation to the American consumer to make sure that he gets the best quality and the best volume. Do you feel that in your field of application he gets the best quality at the best price?

Mr. ELLIS. I am certain of that because let's take your State, South Carolina.

Mr. HEMPHILL. Down there don't they all ship out of the same tank and brand it in after they get to the station?

Mr. ELLIS. In some instances. There may be some exchanges worked, but the jobber doesn't do that. That is done before he ever gets it, Mr. Hemphill. In your State there are a number of independent jobbers. Most of them are in the rural areas, small towns, and the smaller communities, for the simple reason that in this country the situation is that in the cities and the large volume areas they have in most cases moved in and do their own marketing direct, and the part of the business that my people get primarily, other than household fuel oil, is in the smaller rural areas. We have the high cost delivery business, and you have in your State and every State in the Union jobbers battling their hearts out competing with each other for the farmer's business, the homeowner's business, and the consumer gets the benefit of that free play of competition. That is, insofar as that level of competition is concerned.

If suppliers prior to the time these independent merchants get the products they price that product by collusion, parallelism, or what have you, up so high, then the independent jobber must compete with their margin above that price. But there is plenty of competition as between the 12,000 to 15,000 jobbers in this country, and the homeowner and the farmer certainly get the benefit of it, except to the extent we are being run out of business in a lot of rural communities by these petroleum marketing co-ops that pay little or no tax, where our people do, and all of that with the sanction of the Federal Government.

Mr. HEMPHILL. That is the reason that I said that an oil company does not operate like the Federal Government.

I want to thank you for your statement.

Mr. ELLIS. Thank you, sir.

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

Mr. ELLIS. The one point I wanted to make in this is this, if I make no other one. Whatever you do on fair trade as far as other commodities are concerned, we as citizens and buyers oppose it in principle, but as far as this petroleum product is concerned we want to point out, if I have not done it already, that the nature of marketing in this industry is such that it simply will not lend itself properly to application of this so-called quality stabilization bill. Certainly it would not do it with the mere words that are in the bill now.

Mr. DINGELL. Mr. Keith?

Mr. KEITH. No questions.

Mr. DINGELL. Mr. Curtin?

Mr. CURTIN. Thank you, Mr. Chairman.

Mr. Ellis, I would presume that you have examined the resolution and the bills pertaining to this legislation pretty carefully, is that correct?

Mr. ELLIS. Yes.

Mr. CURTIN. Is it your understanding that these bills provide for uniform prices in all the States of the United States on a name brand product, or do you think that they provide that there can be different prices in different parts of the United States?

Mr. ELLIS. That is one of the questions that I posed in my statement here. I find nothing in there about it. I do not believe you were here at the time I posed the questions that I think this committee would have to have the answer to, and the one of them specifically as related to our industry was this, and I repeat:

> Could Texaco, who markets in every State of the Union, establish a different retail price for its products in each State in which it operates, or possibly different prices within different sections of each State of the country, or if Texaco establishes a fixed retail price must this be the price everywhere that Texaco's branded products are sold, regardless of freight differential or other cost of distribution?

The bill does not answer it.

Mr. CURTIN. I fear, if such brand name price is going to be on a uniform rate, you might have a person who is selling at prices that would be fair in Hawaii, and another dealer in Pennsylvania would make a very substantial profit on such price.

Mr. ELLIS. Exactly correct. The States more removed from crude oil and refineries are the States where the price would normally be higher because of the added cost of transportation. Now, then, if

these companies come up here with a uniform price and it must apply all over the United States, you know they are going to level that thing out to take care of themselves, which is going to deprive the citizen near a refinery of a lower price and the person further away is not going to be any better off than he was.

Mr. CURTIN. I understand, of course, that you are opposed to this legislation in toto, but, in the event that the legislation was enacted, do you think that it should have a provision therein that the trade name owner could fix different prices in different sections?

Mr. ELLIS. There should be something in there about it. If you do not it is going to end up in the courts, and since this is designed I think really to help small businessmen rather than to stabilize quality—I think that is just a vehicle they are riding it through on—for the small businessmen that do not have the money to go to the Supreme Court to find out the answers to these things, this leaves them at the mercy of the legal department of a large manufacturer. These things should be in this bill. It is nice to come up with these beautiful panaceas for small business, but we better find out whether this patient has a cancer, and if so an aspirin is not going to cure it. We are going to have to resort to other remedies. I might add this. I am not exactly a neophyte when it comes to the representation of small business and knowing something about their problems. I was staff director of the House Small Business Committee. I sat in that committee staff and listened to the complaints, the bellyaches, the gripes, the worries, the concerns of practically every type of small business in this country for almost 2 years. My principal representation is small business. I work at small business. I have investments in small business. I am small business from the heels up, and I will fight anybody big in this country—I do not care who it is, be it Congressmen or big business—that attempts to invade the province of a small businessman, but I learned long ago that sometimes when a group af small businessmen are hurting and hurting badly, somebody comes in with "this is the panacea. This is the cure-all. If we can get this legislation passed this is the salvation of the small businessman." Yet when you go to plumbing the potentials of that legislation as related to the various groups of small businessmen you will often find that that is no cure at all. It at best, if anything, is a little temporary sedative and they are worse off in the end than they were before they started.

I will give you an example. You have S. 11 and H.R. 11 that have been before this Congress for the last 5 or 6 years. They have unsuccessfully tried to pass those bills in the Senate. S. 11 floated through the House one year.

Mr. HEMPHILL. Is that the banking bill?

Mr. ELLIS. No, that is the one that would revise the Robinson-Patman Act in such a way as to try to change the law to make it conform to the opinion that the FTC had in the old *Standard of Indiana* case which the Supreme Court said was wrong. So now they are trying to cure that. I might point out in the *Standard of Indiana* case it only took 12 years to get the answer to that case. I have four amicus curiae briefs in it myself, and it is supposed to help small business.

Look at the testimony on S. 11 and H.R. 11. Small business by the gross marched in and they used the same old statistics they ply you with. "Thousands upon thousands of small businessmen are going

down the drain every year. S. 11 is the panacea for all our ailments." They come in here now. It is no longer S. 11 or H.R. 11 that cures the ailments. It is quality stabilization and fair trade prices. Take your same committee on the cease-and-desist bill. Some of them came in on that and they used the same old statistics of how many small businessmen are going out of business, "so if we pass this cease-and-desist-order bill this is going to be the salvation of small business."

There are a hundred bills before this Congress now that are purported by their proponents to be the salvation of small business. I think I can tell you in a few words the salvation of small business, but I do not know whether this Congress has guts enough to pass the laws to do it. That is pretty rough talk.

Mr. MACK. I think I want to interrupt you. You are speaking to a congressional committee and you are inferring that we do not have the courage of our convictions, if I understood you correctly, and I think that that statement is completely out of order.

Mr. ELLIS. Mr. Chairman, I apologize, but I would like to correct the record. I did not say that this subcommittee or any member thereof did not have the courage of their convictions.

Mr. MACK. If the gentleman has a proposal he wants to make that will solve the problems of small business, we are happy to receive your testimony. We are here for that purpose. But I think it is inappropriate to come in and say, and I quote your statement, "The Congress does not have guts enough to pass the bill."

Mr. ELLIS. I said I doubted that. I did not say as to this bill.

Mr. MACK. I might say to the gentleman that he is not very well acquainted with the members of this subcommittee if he is talking about us.

Mr. ELLIS. I am not talking about this subcommittee. Had I had reference to this subcommittee I would not have made the remark. I apologize, Mr. Chairman, if I have offended either the subcommittee, yourself, or any member thereof. I believe had you heard all of my prior remarks you would have realized that——

Mr. MACK. I did not hear the rest of your remarks. I was forced to make a telephone call a few minutes ago, but if you had been making statements of that nature previously I am sorry I was not presiding at the time.

Mr. ELLIS. I had not been making statements of that nature previously

Mr. MACK. I think it is completely uncalled for.

Mr. ELLIS. I apologize to the committee.

Mr. CURTIN. That is all, Mr. Chairman.

Mr. MACK. I want the gentleman to tell us how to solve the problems of small business. He has made a statement that he knows, and we are here for that purpose and we want to be eminently fair and give you all the time that is necessary, because that is the purpose of the hearings.

Mr. ELLIS. I think those problems can be solved, never completely to the satisfaction of every small businessman, but to the satisfaction——

Mr. MACK. It was very simple to infer that the Congress did not have the courage to do it. Certainly as the chairman of this com-

mittee, with certain responsibilities here, I am interested in your simple solution to the problems of small business.

Mr. ELLIS. The solution to the problems of small business in my judgment are as follows: No. 1. An increased and rapid enforcement of the antitrust laws and so-called fair trade laws that we now have.

Mr. MACK. Is the Congress responsible for that area? Is that what the gentleman is here referring to, that the Congress did not have courage enough? I prefer to use the word "courage" than the word you used. I think they both have the same meaning.

Mr. ELLIS. Is that field Congress must provide the money for those enforcement agencies to have enough people to enforce these laws. The FTC, for example, and the Department of Justice, for example, are backlogged now with investigations that by the time they get through with them and have the personnel to finish those investigations, there will be small businessmen economically dead and gone.

Mr. MACK. If you will permit me to interrupt, the Congress has been very fair in its apropriations with regard to the Federal Trade Commission and the Department of Justice, and I speak with some authority in regard to the Federal Trade Commission, and I do not know that we did not have courage enough or would not have courage enough to give them more if necessary.

Mr. ELLIS. Mr. Chairman, all I can point out is the backlog of the situation. When it comes to the filing of a complaint with the FTC. Today, in most instances I would have to advise my people to let us see if we cannot work out some other means rather than going to FTC because by the time FTC personnel have the time to get around to finalizing it, we are dead and buried. That is one area.

The second area is in the field of the Small Business Administration. While the present director of that organization has made some valuable and helpful changes and improvements, I think there are many improvements that that organization could make by way of giving practical help to small businessmen. Actually what I had reference to, Mr. Chairman, in the proposition of guts had more to do with political, or courage if you prefer that word, aspects rather than the legislative functions of the Congress. You as Congressmen are importuned by small businessmen almost everyday by letter, in person, or otherwise. Many of these small businessmen in my judgment have not done enough by way of helping themselves, and I think that if more Congressmen would say, after listening out each particular complaint, and they do not all fall within the invalid category, there are many valid ones, that if many of them or the representatives of their organizations were asked, "What have you done to help yourselves?" then after listening to that, I think many Congressmen would find that small businessmen and small business groups, and that is all I represent, if they would do more to help themselves there would be less of the necessity for bothering this Congress about help. I think that if more Congressmen would be willing to say that to a lot of these small business groups that come in, and I do not say on every issue—I do not say that—after weighing the facts and making a determination, for example, "Mr. Small Businessman, I get the impression that what you want is legislation which in effect will subsidize your inefficiency and the Federal Government is not as yet ready to subsidize the small businessman's in-

efficiency." If more of them were told that, there would be more of them that would go back and do something about it.

The people I represent have this same problem. There are many who want this or that type of legislation and you have to sit down and show them where getting that legislation, which they think would be a help, would in effect be an ultimate noose around their necks. So what have we done? In every State that we have an organization we established 10 years ago what we call management institutes and through the medium of these management institutes, jobbers are coming in. They are learning how to be businessmen, not just crossroads merchants that merely take orders to sell off the shelf. They are learning how to obtain equity capital. They are learning how to compete in what in effect is a newer and a revolutionized era of merchandising in this country.

So I think if in those areas more were done and small business, instead of always looking to the Federal Government to pull its chestnuts out of fire, would do more to help itself, there would be less pressure on the Congress, and I think if you Congressmen would say to many of these, and I know they have come possibly to each of you with complaints that you did not think were completely valid, "First, go home and do what you can to help yourself, and if that is not enough, then come back," they would be more prone to do it. That is the area that I have reference to, Mr. Chairman.

Mr. MACK. That completes your plan for solving the problem of the small business?

Mr. ELLIS. No, that does not complete it. There are many other things.

Mr. MACK. You may have all the time you want today to support your legislative program for solving the problems of the small businessman.

Mr. ELLIS. I am not recommending any legislative program.

Mr. MACK. I understood that you had indicated it was a very simple problem within the power of the Congress if the Congress had courage enough to do it.

Mr. ELLIS. No. What I thought I cleared up was the proposition of Congress having guts or courage—use the term if you will—to tell small businessmen, "First what have you done to help yourself before you seek our aid by way of legislation?" That is what I am talking about, not that Congress does not have the guts to pass legislation. I am not advocating legislation.

Mr. MACK. I would say that there are other segments of our society other than small business that perhaps would be more eligible or more entitled to the lecture than the small business community. I would say in my experience of 14 years in the House that small businessmen individually or collectively through any type of association have not abused the privilege of petitioning the Congress. If they have, even in your opinion they have, then they have done so without much success, because we have very few laws with regard to their problems or with regard to attempts to solve their problem, and I certainly could not subscribe to your statement to the effect that they are abusing this privilege.

Mr. ELLIS. I did not hear the last.

Mr. MACK. I said I could not subscribe to the statement you made which indicated that they had abused this privilege.

Mr. ELLIS. Well, I would not belabor the point, Mr. Chairman.

Mr. DINGELL. Mr. Chairman, I note that the hour is late and we have other witnesses here.

Mr. MACK. That is all I have. Any other questions?

Mr. HEMPHILL. I might make an observation that some of this legislation to try to help small business has helped some mighty big lawyers; such appears to me, and I get pretty tired of people coming here taking off on the Congress of the United States because for my part the political arena is an arena in which considerable courage has to be taken at all times, and to see people come before a committee of Congress and be disrespectful certainly does not help the Nation improve governmental relations. For my part I am pretty proud to be here and I will match my integrity against anybody in that capacity or my guts.

Thank you.

Mr. ELLIS. I thought I had made my apologies to this committee. If I have offended anyone, I regret it very much.

Mr. MACK. Thank you for your statement. I am very sorry I was not able to be here for your complete statement.

Mr. ELLIS. Yes, Mr. Chairman.

Mr. MACK. Our next witness is Mr. Charles F. Fort, the president of Food Town Ethical Pharmacies, Inc.

Mr. Fort, welcome back to our committee again. You have testified here on previous occasions, I think, on legislation and we are very happy to have you with us.

STATEMENT OF CHARLES F. FORT, PRESIDENT, FOOD TOWN ETHICAL PHARMACIES, INC., BATON ROUGE, LA.

Mr. FORT. Thank you, Mr. Chairman. In fact, this is the 11th year that I have appeared before you at every opportunity.

My name is Charles F. Fort. I am president of Food Town Ethical Pharmacies, Inc., Baton Rouge, La., a business which is engaged in the sale of drugs, small appliances, gasoline, photographic supplies, cosmetics, almost every field in the retail field except soft goods.

I would like to point out first that I admire the motives of the authors of the bills and, of course, with your bill, Mr. Chairman, No. 637, and the other bills and resolutions involved here I certainly am of the opinion that the Members of Congress want to help small business. I really feel that as a small businessman I have been through it from the very beginning and I have some recommendations for legislation which I am not at all hesitant to provide at this hearing.

I represent only my company and my customers, and my first recommendation would be that a tax revision is necessary for small business, and when we talk about small business let us talk about people who do $200 a day or in that neighborhood, because, as you know, the small business loans and small business definitions now take care of businesses up to $3 million in sales a year, which is more than $10,000 a day. The average drugstore in the United States does approximately $200 a day and that is about $73,000 a year.

Mr. HEMPHILL. How much is the margin of profit on that $200?

Mr. FORT. Under the manufacturer's price-fixing scale it is called 33⅓ percent, which is 50 percent above cost, but actually some of these small businessmen need more than 33⅓ percent to operate, if they provide services such as charge accounts and delivery, and things of that kind.

Mr. HEMPHILL. With a fountain that does not make money and other services?

Mr. FORT. That is right.

Mr. HEMPHILL. Thank you.

Mr. FORT. When we talk about small businessmen I would like to have it defined as a business which does in the neighborhood of $200 or $300 a day, which would include many service stations, many drugstores, many small food stores, and we are talking about doing less than $100,000 a year, and that really is small business and those are the men that are crying today and those are competitors of mine who could not with all the ingenuity in the world compete with me at my stage of development. It is an impossibility to say that small business can compete under our system now in which the bigger you are, the better you can buy, and the better the consumer can buy, and that is the way it should be, because that gives us volume production and volume sales, but the little man cannot compete in that area at all. He cannot buy it right. He cannot get the right cost. He cannot get as much co-op. It is impossible, so while we are talking about it let us talk about the time when I was doing $200 a day.

By the way, we operate a service station and I am confronted with the same problem. I would like to answer the question by one member of the committee. If you turn to the bill, the bill reads, "in the retail of goods identified by such brand name or trademark." So anything with a name under this bill, the price can be fixed for the distributor, the broker, the wholesaler, and the retailer, according to our interpretation of the legislation.

Mr. HEMPHILL. Let me interrupt you again. Is it your interpretation that price fixing is always price fixing too high instead of too low?

Mr. FORT. No, sometimes it is too low. I say in this statement that the manufacturer is not capable of fixing the right retail price, because the variation between retailing varies from 36 to 12 percent. A 36-percent cost of operation in retailing may include charge accounts, delivery, high rent, and other things which that businessman believes is good for his business. If a manufacturer comes in and sets 33⅓ percent above cost, the man at the 36-percent cost of operation level is losing money. My point is that the legislation from a practical standpoint, with no reflection on the designers of the legislation, would not permit a small businessman to get as much money as he should get in some cases.

The first point is that low retail prices on famous brands and trademarks stimulate the growth of small business. A small businessman can put a blackboard out on the corner and he can take a famous brand and quote a price and he has done some advertising without any cost almost no cost at all. I am speaking from experience because in the beginning at $200 or $300 a day there is not much advertising budget for any small businessman. Price fixing when it is legalized breeds conspiracies because everyone in that horizontal plane of com-

petition begins to feel that it is permissible to fix those prices. The highest professional standards are possible. That is one thing I would like to point out in my testimony because we are a country discount house, and "discount house" of course is a term which has some bad reputation, but it is possible for a discount house to operate on the highest professional standards and also maintain a lower price than even some of the bigger competitors.

Mr. MACK. I would like to interrupt you to have the country discount house defined, because I am not acquainted with that term. Does that mean that Baton Rouge, La., is a country town?

Mr. FORT. I would have to admit that, yes, sir. We have only about 185,000 people and I have drugstores in towns of 12,000, Mr. Mack.

Mr. MACK. Since I have already interrupted you, you may proceed for about 5 minutes, or we can adjourn at this point.

Mr. FORT. At this point would be fine.

Mr. MACK. I think it would be well because you have not actually gotten into your statement.

Mr. FORT. Yes, sir. Thank you very much.

Mr. MACK. We can include your entire statement in the record if you like, and you can summarize your statement if you desire.

Mr. FORT. I would like to do that.

Thank you.

(The statement referred to follows:)

STATEMENT OF CHARLES FRANK FORT, PRESIDENT, FOOD TOWN ETHICAL PHARMACIES, INC., BATON ROUGE, LA.

My name is Charles Frank Fort. I am president of Food Town Ethical Pharmacies, Inc., Post Office Box 2911, Baton Rouge, La. Since my resignation as a special agent of the FBI, I have been active in business management for 17 years.

Low retail prices on famous brands and trademarks stimulated rapid growth of small independent

In Baton Rouge, La., on October 26, 1955, the first Food Town Ethical Pharmacy was opened. It was truly a small business. Opening inventory and the first month's advertising exceeded capitalization. Now there are 12 units, with total retail sales of $6 million a year, a volume produced by approximately 8 turnovers, and up to $1,000 in sales per square foot annually.

Anti-price-fixing policy

Price fixing was being enforced in Louisiana when we opened. Our belief that it was unjust and unconstitutional motivated a pledge and a policy dedicated to 10 to 33⅓ percent (and later 50 percent) reduction in price fixing fair trade prices, which were traditionally 50 percent above wholesale cost, and 65 percent over manufacturer's selling price. We have never charged our customers price fixed fair trade prices, except for a brief time when we operated under Federal court injunction governing Abbott Laboratories' fair trade prices. On June 29, 1956, in the *Schwegmann* case, the Louisiana Supreme Court declared the nonsigner clause unconstitutional.

Price fixing breeds illegal acts and conspiracies

After operating for 8 months under price fixing by manufacturers, and for 6 years since it was declared unconstitutional, we can compare from experience.

As a small business, we experienced the damaging effects of price fixing by manufacturers, who, under brokers', distributors', wholesalers', and retailers' pressure, were forced to persecute the mass retailer whose low overhead permits low prices.

During the time we operated under the price-fixing laws (but refused to comply) we were given the conspiracy "treatment."

Retail competitors paid $50 each to create a $3,000 to $4,000 fund, to be used to "put us out of business" by use of libelous newspaper advertisements and other schemes. Our experience proves that price fixing encourages illegal con-

spiracies and agreements on a horizontal plane between competitors, especially when the power to fix prices is delegated to manufacturers.

Retail competitors exerted pressure to manufacturers to obtain Federal court injunctions, or terminate our direct-buying arrangements. Competitors threatened and intimidated our employees and induced official agencies to harass us with unreasonable and technical investigations.

This technique is employed in many trade areas, under price-fixing laws, because "fixing prices by any method" becomes commonplace between competitors on the same level of distribution.

Our antitrust complaint to the U.S. Department of Justice resulted in a U.S. grand jury investigation. This corrected most of these abuses, except by manufacturers who employ their right to refuse to sell direct for the purpose of maintaining high retail prices.

Highest professional standards; lowest prices possible

The price fixers' conspiracy to put us out of business was motivated simply by our refusal to agree with them (our competitors) on fixed prices dictated by manufacturers.

Our policy compels the highest professional standard in the mass distribution of nationally advertised products and preparations. We do not use loss leader or bait advertising. Our employees are compensated above the averages in our trade area.

Food Town Ethical Pharmacy policy also demands strict compliance with Federal and State laws applicable to its business. However, we have never complied with price-fixing laws.

Federal and State laws already prohibit deplorable conditions described in Quality Stabilization Act

In my opinion, the Quality Stabilization Act will not solve the deplorable conditions in the business community as described in the resolution. An increase in enforcement appropriations to enable strict enforcement of the Federal Trade Commission and related acts would be more desirable.

Practices listed in the resolution for which there is already legal remedy:

(*a*) Predatory interests and action is characterized by plundering and robbing * * * illegal now.

(*b*) Unfair or deceptive acts or practices * * * illegal now.

(*c*) Disable and destroy competition * * * illegal now.

(*d*) Create a monopoly of retail distribution * * * illegal now.

(*e*) Misrepresentation as to size, capacity, quality, condition, model, or age of goods * * * illegal now.

The aforementioned illegal practices now being permitted for lack of enforcement funds and personnel has created a situation in which the small businessman needs assistance. He does not need to be subjected to manufacturers with Federal dictatorial powers * * * to censor advertising, to fix prices and to retain ownership in merchandise which has been paid for.

Enforcement is needed, not another law. The Quality Stabilization Act will not correct a business climate which, according to the resolution:

(1) Destroys unfairly the value of the brand to the owners, small resellers, and the public.

(2) Reduces the volume of products moving in commerce.

(3) Adversely affects the demand for goods.

(4) Reduces manufacturers' incentive to maintain and increase the value of his goods to the public, with relation to price.

(5) Impairs the producers' ability to maintain and increase opportunities for employment, or pay rates for labor in his factory.

(6) Cause substitutions of inferior labor and materials in the fields of foods and drugs, and beverages, endangering public health.

(7) Depresses marketing of identified products and quality thereof tends to deteriorate.

(8) And in other fields endangers public safety.

If the violations of existing laws listed above (*a* through *e*) were prosecuted, there would be no need for the Quality Stabilization Act, except to empower manufacturers to fix prices, censor advertising, and retain ownership in another man's property.

This is undesirable, and against the best interests of small businessmen.

Majority of manufacturers in the United States are opposed to their fixing of prices for brokers, distributors, wholesalers, and retailers

When price-fixing fair trade was enforcible in 45 States, only 10 percent of the Nation's retail sales volume was price fixed. By volume, 90 percent of brokers, distributors, wholesalers and retailers determined there own prices, as dictated by economic necessity.

The trade news in national publications indicates that only a small percentage of the Nation's brokers, distributors, wholesalers, and retailers desire the price-fixing quality stabilization bill.

Many manufacturers dread the possibility of being forced by distributive pressure to enforce the Quality Stabilization Act. Experience has proven its enforcement will cost millions of dollars above any sums received through civil action in Federal district courts.

Fixing of distributive prices by manufacturers is not necessary for protection of trademarks; free, competitive pricing—not price fixing—creates greater volume

Brands and trademarks are not damaged by competitive prices. The merchandising history of this country proves this fact.

The following listed famous names, brands, and trademarks and the distributors, brokers, wholesalers, and retailers who sold them have not engaged in price fixing.

What price-fixed brand is held in higher esteem than these? What price-fixed trademarks sell in greater volume?

Libby's	Del Monte	Firestone
Carnation	Hormel	Quaker
Kellogg	Lipton	Heinz
Chrysler	Kraft	Armour
Borden's	Campbell's	Swift
Ford	General Motors	Goodrich

And many, many others.

The aforementioned trademarks (never price-fixed) are honored, bought and sold in great quantity, by small resellers

The contention in the quality stabilization bill that competitive pricing destroys value of the brand to small resellers is proven incorrect by the success of the manufacturers and distributors who make and sell the famous brands listed here.

The aforementioned famous brands refute other allegations in the quality stabilization bill that manufacturers' price fixing is desirable

1. Value of these brands has increased every year to the owners.
2. Value of these brands has increased to the small reseller, as they add prestige to his operation as demand merchandise.
3. Value of these brands has increased annually in the eyes of the consumer, as proven by greater volume of sales, and a greater demand for the goods.
4. These manufacturers have not lost incentive to maintain and increase the value of their goods.
5. These manufacturers have not lost their ability to maintain and increase opportunities for employment.
6. These manufacturers have not substituted inferior labor and materials to endanger public health or safety.
7. Marketing of these identified products has not been depressed, and the quality has not been allowed to deteriorate.

Quality stabilization bill would change ownership and property rights under capitalism

To buy and possess goods without owning them is a strange situation under the democratic and capitalistic system. In my opinion, it is more like socialism without State control, a socialistic procedure, in which the Federal Government seeks to pass ownership of property, and enforcement of the law, to a selected economic group without even the permission of the majority of the group selected. To add to the strange-sounding procedure, the selected economic group will be empowered by the U.S. district courts. There would be no supervision by Government.

As a businessman who buys and sells goods, I am vigorously opposed to the quality stabilization bill, and recommend that democratic and capitalistic measures be employed to aid the small businesses of America.

Adoption, and extended use of the quality stabilization bill might mean that brokers, distributors, wholesalers and retailers could not own goods for purposes other than price fixing.

The purpose of the quality stabilization bill is to empower manufacturers to fix broker, distributor, wholesale and retail prices

The first paragraph of the joint resolution defines some of its purposes:

1. To amend the Federal Trade Commission Act.

2. To promote quality. There is no need for the Congress to assume the responsibility of promoting quality. Our economic system has been the greatest producer of quality, as demanded by consumers and competition.

3. To define and restrain certain "unfair" methods of distribution (three "unfair" methods defined):

(*a*) Bait merchandising practices are unfair.

(*b*) It will be unfair for anyone (broker, distributor, wholesaler or retailer) to sell "owners" goods above or below currently established resale prices.

(*c*) It will be unfair to publish misrepresentation concerning "owners" goods, with intent to deceive purchasers.

Advertising and merchandising techniques are designed to induce, to create a desire, to lure, to entice. State and Federal laws now in force stipulate that these techniques must be conducted truthfully and without fraud. Enforcement of the Federal Trade Commission and related acts is necessary to aid small businesses. These laws should be enforced by appropriation of sufficient funds, if necessary.

What is bait advertising? The quality stabilization bill empowers the manufacturers of the United States to dictate whether advertising induces, creates a desire, lures, entices or baits. Webster's New World Dictionary defines "bait" as anything used as a lure or enticement; to lure; to tempt.

Every legitimate and ethical broker, distributor, wholesaler, and retailer in the United States legally designs his merchandising to result in creating the synonyms of to bait * * * to lure * * * to tempt * * * and to entice customers * * * to create a desire to buy.

The quality stabilization bill empowers a manufacturer to cut off the supply of branded merchandise, sue in Federal court for damages and injunctive relief, and recover cost of suit plus reasonable attorney's fees * * * if he arbitrarily rules that the broker, distributor, wholesaler, or retailer lured, tempted, enticed in merchandising practices.

Infractions of this proposed Federal law (as defined and enforced by the manufacturers) might include trading stamps, free prizes, lower prices, longer store hours, colder air conditioning, or any other temptation or enticement * * * now considered legal under State and Federal laws.

The business community does need a law to empower private individuals to dictate and limit freedom of speech, as now legally used in merchandising.

Manufacturers cannot fix a fair price, even with a minimum and a maximum; manufacturers' dictated prices for brokers, distributors, wholesalers and retailers cannot be lower or higher to sufficient decree

The quality stabilization bill empowers the manufacturer to fix currently established resale prices for brokers, distributors, wholesalers, and retailers.

In our distributive system, the cost of doing business varies greatly from about 10 percent up to 36 percent. In the retail field alone, the cost of doing business varies substantially also.

This variation makes it impossible for the manufacturer to fix a "fair" price. An example could be made of a retailer whose cost of doing business is 15 percent and one whose cost is 35 percent:

Manufacturer fixes retail price at	$10.00
Manufacturer fixes wholesale prices at	6.00
Retailer's gross	4.00
Net for 35 percent cost-retailer	.50
Net for 15 percent cost-retailer	2.50

In this practical example, the price-fixing manufacturer damaged the legitimate drugstore or department store by "allowing" them only a 50 cent net

profit on a $10 sale of the "owners" product, while the legitimate discount house made $2.50 on the same $10 sale. The manufacturer's fixed price was too low and too high.

The strength and surplus of the discount operator continue as he applies his 500 percent greater net profit to advertising and merchandising techniques legally to produce the store traffic from which he can make the $10 price-fixed sales.

The discounter could afford to give the bait away.

Even with a minimum and a maximum fixed price, the manufacturer cannot compensate for the 500-percent differential above, which accrued to the benefit of the big legitimade discount house.

The following approximate costs of operational information further illustrates the impracticability of fixing the fair price:

Cost of operation

	Percent
Department stores	36
Drugstores	28
Food Town Ethical Pharmacies, Inc.	17
Big discount houses	12

Brokers, distributors and wholesalers also experience a wide variation in cost of doing business. Manufacturers' fixed prices would not be "fair" to all.

It seems obvious that the quality stabilization bill will hurt the legitimate drugstore, department store, jewelry store, appliance store, and others while it benefits the big legitimate discount houses.

Cost of enforcing the quality stabilization bill will increase prices to consumer

Prior to February 1958 when General Electric abandoned price-fixing fair trade, the company processed 3,000 alleged price-fixing violations in 5 years, at a cost of $1 million.

Other manufacturing price fixers spent comparable sums.

Enforcement of price fixing is a cost which the consumer must pay.

In September 1955, Westinghouse Electric Corp., abandoned price-fixing fair trade as "unworkable."

The quality stabilization bill will cost consumers millions

If this bill is passed, many prices in 26 States and in the District of Columbia (now free of price fixing) will be increased from 20 percent to 30 percent or more. The estimated cost of the quality stabilization bill per family ranges from $100 to $250 a year, or more. A conservative estimate for the 24 States which are now free of price-fixing laws is $2.5 million to $6 million.

Big discount and mail-order houses were assisted by price fixing

This type of retailing becomes a threat to small local businessmen because many small businessmen maintain their high fair trade prices, while catalogs from the discount houses were being delivered by mail in their hometown. Our company has proven that the local man can compete with the catalogs if he tries; but he cannot do it if fettered by price fixing; he cannot compete if it is against Federal law to reduce prices on trademarked brands.

The traditional 50 percent above cost retail markup under price-fixing fair trade gave the discount houses a great margin to play with, especially since their operating cost is only about 12 percent.

Price fixing by manufacturers definitely harmful to small business

Low overhead and low retail prices on good products are the greatest weapons available to the small businessman with limited capital. Price fixing robs him of these weapons by forcing him to charge fixed high prices. The little man cannot provide the most expensive buildings, leases, and equipment; he cannot spend thousands of dollars for advertising. But he can compete effectively by operating on a small profit, fast turnover, and low retail price system. Price fixing denies the small businessman this powerful advantage.

Vitamin mineral preparations sales are important to the small drugstore, vitamins are one of the biggest volume items. House-to-house salesmen sell about $88 million worth a year. Mail-order and discount houses also take their toll by selling their low price private brands. As a result, drugstores sell only about 80 percent of all vitamins sold today * * * 20 percent loss in volume, principally in the small business community.

Price fixing is unnecessary for small business

Alaska, Texas, Missouri, Vermont, and the District of Columbia never passed fair trade statutes.

Small businesses in these States, and in the District of Columbia are as healthy as any in the Nation, and they do as great a proportionate share of the retail business as do small businesses in the price-fixing fair trade States. Both the consumer and small businesses benefited in these States, where competition retained its American characteristics, while 45 other State legislatures were bowing to the pressure of the 10-percent minority of manufacturers, distributors, wholesalers, and retailers who wanted high prices fixed by law.

In these States, over a period of years since 1938, small businesses have proven that they can succeed without price-fixing fair trade.

The big drug chains damage the small retailer with big newspaper advertisements. These advertisements entice the consumer to buy 100 vitamin capsules, and get another 100 for 1 cent. These vitamins are the chain's private brand, but are also national brands as a result of extensive nationwide advertising.

Next the small businessman may see in his morning paper a full-page advertisement by a mail-order house in New York, offering a 30-day supply of vitamins free.

It may be entitled "He Didn't Even Kiss Me Good Night."

About this time, the small businessman feels like he has had the kiss of death from the:

1. House-to-house man (not price fixed).
2. Big national chains (not price fixed).
3. Mail-order house (not price fixed).
4. The big discount house (not price fixed).

What can the small man do?

1. Make his own brand vitamins? Impossible.

2. Have a vitamin manufacturer put up vitamin capsules in bottles, using the small man's label? Impractical.

The manufacturer must have a very large order. Printing plates and labels must be bought. Even if the small businessman followed this expensive and prohibitive plan, who would believe that Jones Drug Store vitamins were as good as those made by the big operators?

A small businessman cannot buy private brands and promote them on sales of $200 a day * * * the national sales average per day for drugstores.

3. The only way he can compete is to lower prices on the best national brands of vitamins, such as those made by Lilly, Squibb, Parke-Davis, Abbott, Upjohn, Lederle, and others.

In my opinion from practical experience, the quality stabilization bill would rob the small man of his best competitive weapon:

Low prices on nationally advertised brands.

*Low costs and rapid turnover * * * good profit without cheating or fixing prices by Federal law * * * businessman's best weapon*

Inasmuch as price-fixing advocates insinuated our operations were substandard during previous testimony before committees, we consider it advisable to discuss the above-board, money-making system which we employ. Proponents of price fixing said it could not be done without cheating the consumer in some way. We do not try, and we could not succeed in fooling our customers; we need all of them, all of the time.

Unit turnover profit comparison

Fair trade in cost-of-sales comparison:	
Investment-inventory	$100.00
One turnover sale price (price fixed 50 percent over cost—33⅓ percent on sale)	150.00
One 2 percent cash discount	2.00
Total sale (unit gross $52)	150.00
Operating cost of sale (or 25 percent; arbitrary average for comparison purposes)	37.50
Mass distribution in same cost-of-sales period:	
Investment-inventory	100.00
10 turnover sale price (5 percent over cost)	105.00
Total sales volume (10 unit gross $50)	1,050.00
2 percent cash discount 10 times (discount gross)	20.00
Total gross on 10 turnovers	70.00
Operating cost of sale (or 3.6 percent)	37.50

In the above example, mass distribution's rapid turnover produced a reduction in operating cost from 25 to 3.6 percent while increasing gross profit by 34 percent. Five percent markup over cost produced more profit than 50 percent markup over cost.

Obviously, this ideal comparison is based on a fixed dollar-and-cents cost of operation, demanding that fixed overhead produce 10 times as many sales from the same inventory. As a practical matter, this is impossible. However, maximum efficiency in reducing costs bring the mass retailer closer and closer to this dollar-making Utopia.

Large-volume sales, and large inventory will not perform this feat; turnover and productive operating costs are the effective factors.

Price fixing prevents the small businessman from using this technique, which is his most effective competitive weapon.

Price fixing establishes higher retail prices, as manufacturers compete to give higher profits to each level of distribution

When the power to fix retail prices is delegated to manufacturers, price increases are inevitable. The result is for the retailer, distributor, and the wholesaler to encourage and coerce manufacturers to fix a price high enough so that all levels of distribution enjoy a big profit. This fact defeats the alleged protective provision that price-fixed fair trade items must be in competition.

For this valuable favor the retailers, distributors, and wholesalers give manufacturers their good will and their business. Then different manufacturers begin to compete for the good will and business from those in their system of distribution by offering higher fixed fair-trade prices, and more profits for all. There develops a type of competition to determine which manufacturer can offer the highest profits under fair-trade prices as high as the traffic will bear. The winner gets the most business and good will.

This process results in the practical fixing of prices on a horizontal basis between competitors; actual price competition is eliminated.

*Consumer unprotected as lack of competition at broker, distributor, wholesale and retail levels obscures right price of product * * * especially since 50 to 60 percent or more of the price is in distribution*

Under this system, the consumer is lost in the confusion of the same high prices everywhere. Even though the prices are too high, she cannot compare; she assumes they must be right, because they are the same everywhere.

This condition permits the manufacturers using "administered prices," to go higher with their price schedules, giving each level of distribution higher profits to secure good will at greater cost to the consumer.

Any price-fixing legislation will result immediately in substantial increases in the cost of distribution.

If enforced at Food Town Ethical Pharmacies, the quality stabilization bill would mean retail price increases of from 19 percent to 50 percent immediately.

The quality stabilization bill relieved worse than the nonsigner clause

Congress, in the McGuire Act of 1952, exempted the nonsigner clause, after the U.S. Supreme Court in the *Schwegmann* case in 1951, said price-fixing schemes were unconstitutional unless agreed upon by the parties. The quality stabilization bill makes nonsigners of all affected brokers, distributors, wholesalers and retailers.

To date, 17 States have declared the nonsigner clause unconstitutional: Arkansas, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, New Mexico, Ohio, Oklahoma, Oregon, South Carolina, Utah, Washington and West Virginia.

Four States have declared their price-fixing fair trade laws unconstitutional in their entirety: Montana, Ohio, Utah and Wyoming.

Four States and the District of Columbia never passed a price-fixing law: Alaska, Missouri, Texas and Vermont.

A total of 26 States and the District of Columbia have repudiated price-fixing laws by:

(1) Refusing to pass one.
(2) Repealing the law.
(3) Declaring it unconstitutional in its entirety.
(4) Declaring nonsigner clause unconstitutional.

The quality stabilization bill empowers manufacturers to fix wholesale and retail prices against the decisions of State supreme courts, and the wishes of the people in 26 States.

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NIRA preferable to delegation of price-fixing power to manufacturers

Small businessmen and consumers would benefit more by Federal bureaucratic price fixing similar to NIRA.

(*a*) Consumer pressure could be exerted through representative government eventually to the appropriate bureau.

(*b*) This process would slowly result in a more just, equitable price than the prices fixed by manufacturers, who are under pressure from all levels of distribution to guarantee high profits through price-fixing fair trade.

Antitrust acts suspended to permit horizontal price fixing and censorship by manufacturers

The quality stabilization bill suspends our antitrust acts to permit manufacturers, brokers, distributors, wholesalers and retailers to fix the same price between competitors and also to censor merchandising practices. There is no prohibition against managed or administered identical prices which have and will result in the whole industry on the same product from other sources.

Broker, distributor, wholesale and retail prices on the same product, when goods usable for the same general purpose are available to the public from other sources, will be fixed by competing manufacturers.

Identical administered price will result on the same product from other sources and from all sources. Past record of price fixing indicates this result

The record under price-fixing fair trade also proves that different manufacturers of the same product administer the same price.

Senator Kefauver's Senate Subcommittee on Antitrust and Monopoly defines the "administered price" phenomenon as an identical wholesale and retail price on the same product by different manufacturers, who have followed the leading manufacturers' price in all distributive levels (they fall in line) to prevent future price competition, especially from the leading or most powerful manufacture.

This actual technique destroys the alleged protection of free and open competition; for example, from a few thousands of "administered prices" which existed under price-fixing fair trade:

Manufacturer	Wholesale fair trade fixed	Retail fair trade fixed	List
Lilly	$30.60	$45.90	----------
Lederle	30.60	45.90	----------
Parke-Davis	30.60	45.90	$51.00
(And others.)			

STEAM AND DRY IRONS

	Wholesale	Quantity wholesale	Retail
General Electric	$12.57	$12.12	$17.95
Sunbeam	12.57	12.12	17.95
Westinghouse	12.21	11.67	17.95
(And others.)			

Purely administered or "managed" identical prices are not now illegal, provided there is no agreement between competitors. The above examples are not intended to infer conspiracy or agreement.

The fact is, they do exist in large numbers. The quality stabilization bill would fix these prices legally on a national scale. There would be no free and open competition on products of the same general class produced by others; nor would there be goods usable for the same general purpose available from other sources.

There is insufficient public protection in paragraph eight, the quality stabilization bill

"When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark (price-fixed by manufacturer) * * * ."

As a practical matter and by court decisions, this alleged public protection has proven useless in many retail areas. The phrase "same general purpose" is too broad.

By nature, a doctor's prescription is a monopoly when he feels compelled to prescribe a medication by trademark. Because only about 1 percent of pharmaceuticals manufactured in this country are inspected by the United States or any agency, doctors usually rely on the reputation of a trusted trademark when they write prescriptions.

The pharmacist legally cannot dispense a prescription except by using the patented, trademarked and price-fixed pharmaceutical prescribed; he cannot and should not use something "usable for the same general purpose" manufactured by someone else; he cannot use the same pharmaceutical by its generic name.

When the patient receives the prescription from the physician, that prescription becomes a monopoly; the consumer protection alleged in "the same general purpose * * *" provision does not exist. The quality stabilization bill permits the manufacturer to fix the wholesale and retail prices of monopolies in the prescription field. This is a dangerous suspension of the antitrust acts.

As a result of this:

(A) The consumer must pay the fixed high price on the patented price-fixed pharmaceutical. There is no free and open competition.

(B) The consumer must pay as much as several hundred percent more because of price-fixing.

(C) The retailer (the pharmacist) must dispense the patented, trademarked, price-fixed prescription. There is no free and open competition on any patented product. The quality stabilization bill will result in fixed prices on monopolies; there is no public protection from a practical standpoint.

*A prescription for a patented drug is a monopoly * * * protected by patent law from competition, making price fixing illegal otherwise*

The Quality Stabilization Act will permit manufacturers to fix wholesale and retail prices on patented prescriptions, even though the patent guarantees there can be no "free and open competition from products of the same general class, nor goods usable for the same general purpose available from other sources."

Practical experience proves that drug manufacturers and others have fixed wholesale and retail prices on monopolies since the beginning of legal price fixing, 30 years ago in California.

Every year, drug manufacturers produce approximately 400 new drugs, a testimonial to the competence and ingenuity of American drug manufacturers.

Price-fixing laws, like the Quality Stabilization Act, state that the wholesale and retail price cannot be fixed by the manufacturer, unless there are goods usable for the same general purpose available to the public from other sources.

Some patented drugs have been price fixed in violation of this protective provision against monopoly.

The courts have permitted manufacturers to enforce wholesale and retail price maintenance on some patented monopolies, according to the Harvard Law Review, in reference to the *Doubleday* case and the *Glen Raven Knitting Mills* case. Only one time in the history of legal price fixing has a court denied a manufacturer the right to fix a price on a patented monopoly under the State price-fixing laws: *Eastman Kodak Co.* v. *FTC*, 158 F. 2d 592 (2d Cir. 1946) cert. denied, 330 U.S. 828 (1947) (color film and magazine film).

Federal Trade Commission cannot prevent natural monopoly of a patented product

The following excerpt from FTC correspondence reflects that the "goods usable for the same general purpose * * *" phrase will not prevent fixed price monopolies:

"While CIBA has a natural monopoly in the sale and distribution of its particular patented products or those standard products for which it has its own registered trademark, it would appear that CIBA is in open competition with numerous other manufacturers of pharmaceuticals, which perform the same functions and produce the same results as those sold by CIBA. For instance, Serpasil, which you mention, is merely CIBA's registered trademark for reserpin U.S.P. There are, of course, numerous reserpin products of other manufacturers." (Not on a recipe.—Editor.)

This quotation is not intended to reflect unfavorably on CIBA or the FTC, but is to illustrate a situation produced by the 45 States which have legalized price fixing at one time or another.

U.S. physicians numbering 158,000 and millions of consumers could be victims of the prescription pharmaceutical monopoly

Because the Federal Government inspects only 1 percent of all drugs and pharmaceuticals manufactured, in most instances a physician must prescribe a patented or trademarked or price-fixed product; usually he cannot risk the health of his patient by prescribing the generic product of an unknown manufacturer. In this way the doctor is the victim of the manufacturer's price fixing.

The physicians' dependence on trade names is most accurately described in a wise statement attributed to Mr. Jack Cooper, director of the Pharmacy Research and Development Division of CIBA:

"It is the physician who bears the prime responsibility for the welfare of the patient, and upon him falls the responsibility of selecting not only the drug, but the manufacturer of the selected drug.

"If the physician is confident that no significant differences exist between the same drug as manufactured by different suppliers, nothing prevents him from prescribing by means of a generic name. On the other hand, if he is certain of the quality only as prepared by a particular manufacturer, it is his privilege * * * matching his responsibility * * * to prescribe by trademark."

The present attacks in Congress and elsewhere on patented, copyrighted, and trademarked merchandise is not the fault of our patent system.

It was caused by the price-fixing laws of the States which in effect have permitted manufacturers, under pressure from wholesalers and retailers, to fix wholesale and retail prices on monopolies and trademarks.

American consumers are fortunate in having the products of the world's greatest pharmaceutical manufacturers. This statement is not intended to analyze drug manufacturers' prices, nor to judge those prices without all the facts. In 1961, manufacturers spent about $227 million for research on pharmaceuticals for humans, and $5.8 million for veterinary pharmaceuticals.

In my opinion, pharmaceutical manufacturers have a right to spend 14 percent of sales for advertising and promotion, and 8 percent of sales for research as recent hearings reflected * * * or any percentage they desire, provided they are not permitted or forced to fix wholesale and retail prices, or otherwise violate our antitrust philosophy.

It is most undesirable to empower any manufacturers to fix wholesale and retail prices as specified in this act.

American consumers spent $1,800 million for prescriptions in 1958; $2,058 million in 1959; and $2,059 million in 1960.

The number of prescriptions has increased 300 percent since 1940, with the average retail price now $3.08. It is one of America's best buys, even if it is priced too high under legalized price fixing in many States.

The Quality Stabilization Act would permit prescription price fixing by manufacturers in 50 States for wholesalers and retailers whose cost of operation varies from 12 to 36 percent * * * at a time when costs vary even more because of the fact that 92 percent of prescriptions are dispensed as manufatcured, and only 8 percent are compounded (according to a New Jersey survey).

This reference to cost is not intended to reflect unfavorably on the role of professional pharmacists. Whether pharmaceuticals are dispensed as manufactured, or compounded, a pharmacist performs in a capacity of tremendous responsibility and trust, which demands the most exacting professional ability.

This act would, but should not, empower manufacturers to fix the pharmacist's price, and his professional fee.

Conviction of Northern California Pharmaceutical Association stems from horizontal agreements under State's price-fixing law

On June 22, 1961, after a jury's verdict of "guilty," Judge Louis E. Goodman fined the association $40,000, and also fined the author of a pricing chart $1,000 for "conspiring to restrain trade by adopting, printing, officially distributing, and urging the association's 1,500 members to use a prescription pricing schedule." The U.S. Government charged that 4 years' use of the chart raised prescription prices $12 million over what consumers paid prior to 1957.

The author of the prescription pricing schedule was quoted as saying "I thought I was acting legally."

Price fixing was born in California, and is still in force. For all practical purposes, apparently horizontal price fixing between competitors has been the accepted modus operandi for many years.

Under the provisions of this price-fixing act, the prescription pricing process described above probably would be legal, provided manufacturers fixed the retail prices of their prescription pharmaceuticals.

The quality stabilization act could promote socialized medicine or medicine by Government control

By edict dated in the year 1240, German Emperor Frederick II provided for supervision of pharmaceutical practice * * * including development of lists of governmentally established prices which still regulate the price of drugs in many European countries, according to Dr. George B. Griffenhagen, president, American Institute of the History of Pharmacy.

Since that time other governments have established medicine price controls.

In France, drug prices are closely controlled by the Government and profit margins are set by law. Extra markups on new products are permitted for a period of 2 years.

In Italy, drug prices are under Government control to the extreme extent that the Government may reduce or increase the established price of a drug.

In May of 1960 Dictator Nasser of Egypt nationalized the drug business except for retailers. Egyptian retailers dropped drug prices immediately to prevent nationalization of the retail drug business in Egypt.

Today, England's medicine is socialized to a great degree, and pharmacy in England has its price-fixing fair trade law, entitled "Restrictive Trade Practices Act," passed in 1956. This act permits the price fixers to fix prescription prices. The British Government then pays its socialized share of the prescription fixed price, and the patient pays his share. The Government's share is about 85 percent of the fixed price; the patient pays approximately 15 percent.

Since an estimated two-thirds of all prescriptions in England were developed by U.S. companies and produced in England by subsidiaries or by British companies under license, the following has implications relating to this act:

In England, socialized and price fixed

Number of prescriptions	million	230
Dollar value	do	$191
Average price-fixed selling price	cents	83
Cost to patient	do	14
Paid by government	do	69

In the United States

Number of prescriptions	million	740
Dollar value	do	$2,220
Average selling price (approximate)		$3.08

The Qaulity Stabilization Act would increase prescription prices in my company's stores 50 percent to several hundred percent. Prescription prices will increase nationally * * * especially in the 26 States now without price-fixing laws.

Consider the overtaxed consumer, now struggling with a 45-cent dollar. When prescription prices go up again, he may decide taxes can't go any higher, even under socialized medicine; he may decide he wants the 14-cent prescription. instead of the better one for $3.08. He may remember reading about the $23.63 price for 1,000 tablets to the U.S. Government, compared to the $170 price for the same 1,000 tablets to U.S. drugstores.

Simulated prescriptions, to illustrate there is no protection "when goods usable for the same general purpose are available to the public from other sources"

The following eight simulated prescriptions are shown to illustrate the absence of availability "from other sources" in relation to the trademarked monopolies. Four are trademarked; four are generic. Each reflects the price-fixed fair trade price, and the Food Town Pharmacy price. The generic is not price fixed fair traded. Note that prices vary in some instances more than 1,000 percent. These comparisons do not infer a recommendation of generics, as we do not dispense them, except on physicians' specific instructions.

(The simulated prescriptions may be found in the files of the subcommittee.)

Mr. MACK. Thank you.

The committee will stand in recess until 2:30 this afternoon.

(Whereupon, at 12:20 p.m., the hearing was recessed, to reconvene at 2:30 p.m., the same day.)

AFTERNOON SESSION

Mr. MACK. The committee will come to order.

When we adjourned this morning we were hearing testimony from Mr. Charles Fort.

Mr. Fort, we would be glad to have you continue.

STATEMENT OF CHARLES F. FORT, PRESIDENT, FOOD TOWN ETHICAL PHARMACIES, INC., BATON ROUGE, LA.—Resumed

Mr. FORT. Thank you, Mr. Chairman.

One point I would like to clear up is that one of the persons in the room thought that I was a proponent of the bill. I am in favor of the men who wrote it. I am against the legislation. I wanted to make that clear for the record.

Mr. MACK. We will give you a fair opportunity to clarify your position.

Mr. FORT. Thank you.

Mr. MACK. If I cannot agree with you completely I would find it difficult to go on record as opposing at least half your views.

Mr. FORT. Thank you.

In our opinion Federal and State laws already prohibit the deplorable conditions described in the Quality Stabilization Act, as a practical matter. The resolution lists predatory interest, unfair and deceptive acts to disable and destroy competition, misrepresentation as to size and so forth. These are all illegal practices now and it is our opinion that another law is not needed to correct them—only enforcement. Probably with the proper enforcement procedure the application of those laws would solve the problem. We feel the manufactures should not be empowered to censor advertising and to fix prices and to retain ownership in merchandise which has been paid for.

We feel that the quality stabilization bill will not correct a business climate which according to the resolution, and also according to my opinion, needs correction.

Destroying unfairly the value of the brand to owners, small resellers and the public. In my opinion the bill will not prevent that; that free competition will not reduce the volume of products moving in commerce; will not affect the demand for goods; will not reduce manufacturers' incentive to maintain and increase the value of goods; will not impair producers' ability to maintain and increase opportunities for employment; will not cause substitutions of inferior labor and materials. Present conditions do not depress the market, and we do not believe that in other fields it will endanger the public safety.

Briefly, we recommend the enforcement of existing statutes as far as they apply to our business in a practical way because we do try to observe those Federal laws now, the antitrust and the laws which create a fair competitive situation in the market.

The majority of manufacturers in the United States are opposed to fixing of prices for brokers, distributors, wholesalers, and retailers.

Many of the manufacturers' representatives have indicated that they would prefer not to have to enforce a price for these distributive levels and it has been more or less proven that when fair trade or price fixing by manufacturers was enforceable in 45 States only 10 percent of the Nation's retail sales volume was price fixed. Therefore, by volume, 90 percent of brokers, distributors, wholesalers, and retailers determined their own prices as indicated by economic necessity. Fixing of distributive prices by manufacturers is not necessary for protection of trademarks. Free competitive pricing, not price fixing, creates greater volume.

In that paragraph we mention Libby, Carnation, Kellogg, Del Monte and many other famous brands which have never been price fixed by the manufacturer in the distributive system.

The aforementioned famous brands refute other allegations in the quality stabilization bill that manufacturers price fixing is desirable. It is our opinion that these brands compete in esteem with any brands in the marketplace and they have never been protected by any price maintenance.

The Quality Stabilization Act would change ownership and property rights under capitalism. To buy and possess goods without owning them is a strange situation under the democratic and capitalistic system and in my opinion it is a procedure which would set a precedent in which the Federal Government passes ownership of property and enforcement of the law to a selected economic group; that is, for example, if we buy products from a manufacturer we can't claim complete ownership of those products because the manufacturer can force us to sell it no lower than the prices fixed, to sell the merchandise back to him, or to sell it out at the fixed price or to sell it at any price we want to if he refuses to buy it back. We feel this would set a precedent involving the value of a corporation.

For example, if we have $100,000 worth of inventory in nationally advertised brands, there would be a question as to whether we actually owned it completely since we might have to dispose of it on demand of the manufacturer.

The purpose of the quality stabilization bill is to empower manufacturers to fix broker, distributor, wholesale and retail prices. The Quality Stabilization Act amends the Federal Trade Commission Act. One of the purposes is to promote quality. We feel like a competitive market will do that; to define and restrain certain unfair methods of distribution, and we list three unfair methods: bait merchandising practices are unfair; it would be unfair for anyone, broker, distributor, wholesaler, retailer to sell owners' goods above or below currently established resale prices; it would be unfair to publish misrepresentation of owners goods with intent to deceive purchasers.

Advertising and merchandising techniques are designed to create a desire, to lure, to entice. State and Federal laws now in force stipulate that these techniques must be conducted truthfully and without fraud. Enforcement of the Federal Trade Commission and related acts is necessary to aid small businesses. These laws should be enforced by providing sufficient funds and personnel if necessary. This is a point that I am very much interested in because the Quality Stabilization Act gives censorship rights to manufacturers over our merchandising and advertsing. What is bait advertisting?

The quality stabilization bill empowers the manufacturers to dictate whether advertising practices create a desire, lures, entices or baits.

"Websters' New World Dictionary" defines "bait" as anything used as a lure or enticement; to lure; to tempt.

Every legitimate and ethical broker, distributor, wholesaler and retailer in the United States legally designs his merchandising to result in creating the symptoms of to bait, to lure, to tempt, to entice customers, to create a desire to buy. The quality stabilization bill empowers the manufacturer to cut off the supply of branded merchandise, sue in Federal Court for damages and injunctive relief, and recover cost of suit plus reasonable attorney fees if he arbitrarily rules that the broker, distributor, wholesaler or retailer lured, tempted, enticed in merchandising.

The manufacturer would have the censorship right to determine whether our advertising empowered him to take the branded merchandise away from us and then to take us into the U.S. district court.

We feel this is an excessive power granted to the manufacturer which in practical application would produce a situation in which a manufacturer's representative would come to us and say, "That ad you ran last week violates the Quality Stabilization Act and if you don't correct that advertising, which baits and lures customers, we are going to take the merchandise away from you and take you into the U.S. district court."

The business community does not need a law to empower private individuals to dictate and limit freedom of speech as now legally used in merchandising practices.

Manufacturers cannot fix a fair price, even with a minimum and a maximum. This bill, unless it has been changed in the last few days, does not permit minimum or maximum. It is a fixed price. Manufacturers' dictated prices for brokers, distributors, wholesalers and retailers cannot be lower or higher to a sufficient degree. Even if there was a variation in the bill, it would be impossible for him to fix a correct price.

I would like to use this example to show the variation in the price structure, because it has been traditional that the manufacturer would allow the retailer 33⅓ percent on selling price or 50 percent above cost.

In this example, the manufacturer might fix the retail price at $10. The manufacturer fixes the wholesale price at $6. The retailers gross $4 on that transaction.

Now, the net for the 35-percent cost of Operation Retailer is 50 cents on that $10 sale. The net for the 15-percent cost of Operation Retailer is $2.50. In this practical example the price-fixing manufacturer damaged the small businessman, drugstore, department store, by allowing them only 50 cents net profit on a $10 sale while a legitimate discount house made $2.50 on the same $10 sale. The manufacturer's fixed price was too low and it was also too high.

The strength and purpose of the discount operator continues to increase as he applies his 500 percent greater net profit; as he applies that to advertising and merchandising techniques legally—and he did do it legally—to produce the store traffic from which he can make the $10 price-fixed sale so that this big operator can take this big profit

if somebody demands a nationally advertised brand—take that $2.50 he made and grow stronger with that while the other smaller operator made only 50 cents net and has very little to accrue to surplus or to advertising and promotion. The discounter could afford to give the bait away. Even with a minimum and a maximum fixed price the manufacturer cannot compensate for the 500-percent differential above. It is an absolute impossibility to prevent the advantage which accrued to the benefit of the big operator. It is well known that the approximate cost of doing business at retail varies from 36 percent to 12 percent. It costs some retailers 36 cents out of every dollar to do business. It costs some retailers 12 cents out of every dollar to do business. It is impossible, then, for the manufacturer to fix a fair price.

Cost of enforcing the Quality Stabilization Act will increase the price to the consumer. Prior to February 1958 when General Electric abandoned price-fixing fair trade the company proposed 3,000 alleged price-fixing violations in 5 years at a cost of a million dollars. Other manufacturing price fixers spent comparable sums. Enforcement of price fixing is a cost which the consumer must pay.

In September of 1955 Westinghouse Electric Corp. abandoned price-fixing fair trade as unworkable.

The Quality Stabilization Act will cost consumers millions. If this bill is passed many prices in at least half the States of the Nation will be increased and those in the District of Columbia will be increased from 20 to 30 percent or more. The estimated cost, and this is conservative, of the Quality Stabilization Act per family ranges from $100 to $250 or even more per year. I think $100 a family is conservative.

So that would be $100 a family and 50 million families approximately. That is $5 billion a year added cost to the American consumer. We subtract half of those suffering under fair trade now, leaving a net cost if this bill is passed, of $2.5 billion cost to the consumers of the United States.

The big discount and mail order houses were assisted by price fixing. The record shows that the big chains and the discount houses actually used the price-fixing schedules of the well intentioned manufacturers to show a comparison to the public between that fixed price and the price that the discount house or the mail order houses were selling the merchandise for. Price fixing by manufacturers definitely is harmful to small business and in this category I speak from practical experience. The low overhead and the low retail prices on good products are the greatest weapons available to small businessmen with limited capital. If a man has limited capital there is only one way he can promote and advertise because he doesn't have the money to do it. He can give the consumer a good price on a nationally advertised brand so that the consumer knows, "If I go in this little store with its little building on the corner here, I am going to get merchandise just as good as I can get in the big store, and I will get it at a lower price." In our opinion, price fixing by a manufacturer robs the little man of his best weapon to start as a small businessman.

I use some examples of vitamin merchandising which, since it is a part of the record, I will skip over. It is well known that four

States have never had fair trade and the statistics indicate that small business is doing good in those four States.

To summarize here: the mail order houses, the national chains, the house-to-house man and the big discount house are not bound, their hands are not tied by the Quality Stabilization Act and we feel that the reason that they are given an advantage under this act is that they are big enough to provide brands and facilities which a small man cannot compete with.

As an illustration of what the small man could do as far as the vitamin competition is concerned, I would like to point just briefly to the back of the statement as an illustration of what happens in this field and it happens in all the areas of small business. I use Walgreen as an example and I have respect for Walgreen and I don't insinuate that they are doing anything wrong. I only hope that someday I can do it as well.

I show a Walgreen 1-cent sale. I am using vitamins as a comparison, vitamins of a private label advertised nationally by Walgreen and the label shows that this merchandise is as good as the price-fixed merchandise. Walgreen sells one for a lower price than the price-fixed merchandise and then gives the consumer another one for 1 cent.

The same procedure is used by other chains. The house-to-house and the mail operators sell vitamins. You look at the label and see the same contents and they sell to you by mail or give you 30 days' supply free and use a type advertising which indicates that vitamins are worth a lot more than they are.

I want to show you the Food Town ethical pharmacy advertisement which is the small business involved in this exchange. The results were very good.

Mr. MACK. What page is that?

Mr. FORT. The last one in the statement.

When this happened to us, 1 cent for an extra hundred, we could not buy these brands or go to these manufacturers and have them make a million capsules for us in that formula, not even in our volume. The only way for us to fight back as a small independent was to give the people the best that is made and the best that is made by reputation, the nationally advertised brands. So we picked those nationally advertised brands and gave them the best buy we could give them which is still higher than the same formula made by the big operators. This is just a practical example of how a small businessman can do it if he is free to do it. He is not forced to, but it gives him an opportunity to do so.

We feel that the Quality Stabilization Act would tie his hands so that this method would be impossible. That is what we mean by a rapid turnover and a comparison of quality which gives a small man who doesn't have a reputation an opportunity to compete with the big operators.

For the use of the committee, and I am sure it is well known to each of you, I presented here a unit turnover chart on page 14 to show the principles involved in turnover which a small man can do and I would like to make it clear right here for the record that the small men who come to Congress for help cannot just go back home and apply their strength and ingenuity and solve all their problems. They definitely

need some help from some source to compete under our economic system which is based on volume purchases and volume distribution.

Notice here the increase in volume. It is not the percentage mark-up that counts but the number of turnovers so that we have decreased the cost of doing business from 25 percent to 3.6 in this theoretical comparison which is possible if it were possible to keep the cost of doing business at a stationary percentage and it is almost theoretically possible because we were able to do this in the beginning of our operation. We didn't make slave-drivers of our people, because they are paid above the average in our market, but we gave them a chance to be productive to the extent that we could reduce the overhead by several hundred percent and in that way make money on more volume.

I want to point out that the fact that we have done this dosn't mean that the small retailer in the United States can do it now unless he has a situation in which this would fit and he is capitalized to an extent that he could do it. He wouldn't be able, in many instances, to do this where he has already got a system operating against him like this one.

I was able to do this principally because I went into a vacuum in which the prices were fixed on nationally advertised brands. Price-fixing establishes higher retail prices as manufacturers compete to give higher profits to each level of distribution. This is a lesson which I have learned from practical experience: That the manufacturer comes to you, as the buyer, and says, "This brand which is competitive only gives you 33⅓ on selling and we are going to give you 40 percent. The goodwill which is very valuable and necessary to the manufacturer's success works in reverse to the good of the consumer because if the manufacturer can give the wholesaler 20 percent instead of 15 and give the distributor 8 instead of 5 and give the retailer 40 percent instead of 33⅓, then the retailer is going to push the brand that gives him the best profit. It is only natural.

Then the manufacturers have to figure out how they are going to compete with each other to give the distributive system the best markup which automatically increases their volume. So it works in reverse against the lower price for the consumer. The consumer is unprotected as lack of competition at broker, distributor, wholesale and retail levels obscures the right price of the product, especially since 50 to 60 percent or more of the price is in distribution.

On a great majority of the merchandise we sell in our stores, actually 50 percent of the cost to the consumer is in distribution. If our retail prices were higher there would be a higher percentage naturally. Under this system the consumer is lost in the confusion of the same high price everywhere but the point is that so much of the cost is in distribution and if we allow a system to operate which rewards manufacturers with goodwill who give more profit in the distributive system, then we are bound to increase the consumer's price.

The Quality Stabilization Act is believed worse than the nonsigner clause. The McGuire Act permitted one signer and one manufacturer to make a contract in a State but the Quality Stabilization Act makes nonsigners of all affected brokers, distributors, wholesalers, and retailers and the man who makes it only has to have a name for it and it is enforcible under the Quality Stabilization Act.

This is a review of the States which have had fair trade and those States which have declared it unconstitutional with which the committee is familiar and it is part of the record. I will skip over that.

Now, I am not being facetious but I would prefer, as a businessman, for the Federal Government to control the prices in distribution than to have manufacturers control that price because in my opinion the consumer would have eventually a voice in the price. As it stands, under this act, as a matter of human nature, the manufacturers are going to be forced to fix a good profit in the fixed price for each distributive level. If the antitrust acts are suspended to permit horizontal price fixing by manufacturers, in my opinion the proper application of the act will permit censorship of advertising and promotion, as well as horizontal price fixing.

The identical price will result on the same product from other sources and from all sources. Past record of price fixing indicates this result. I would anticipate that this act permits manufacturers to fix competitive prices on each distributive level and then we end up with what is called an administered price. This little table in my printed statement is an example of what happened under the fair trade laws which exist now. It permitted the manufacturer to fix wholesale and retail prices and the result—and these famous manufacturers, certainly there is no reflection on them—but the automatic result is when this is permissible then the fixed price falls into line with that of the leader. The leader is in a position to threaten those below him and he is also anxious to make as much profit as he can. Then he is also anxious to keep those below him in the distributive system happy. If the others don't make as much profit available, then, for example, Lederle wouldn't be held in as high esteem as Lilly so that we end up in this case with the $30.60 antibiotics and the retail or fair trade price of $41.90 on each of the leaders. What happens is that in the market the leaders and brands finally arrive at about the same prices on the same product.

There is insufficient public protection in the Quality Stabilization Act. When goods usable for the same general purpose are available to the public from sources other than the owner of such brand name trademark, it is permissible for him to fix these distributive prices. "When goods usable for the same general purpose." No reflection on the language except that the interpretation of it on a practical level because when you say, for the same general purpose, in the field of medicine it was very complicated. I am not going to read every bit of this but I want to summarize it in this way. When a doctor writes a prescription, it is a monopoly. There is no competitive product and there is absolutely nothing available from the same general source after that prescription is written and it becomes a thing in itself. When that doctor's prescription comes into the retailer, there is nothing else available of the same general type from other sources so that actually in the cases which I will show you here in the next few pages of my printed statement that becomes a monopoly to the extent that there is no other source and there is no competition on that particular product.

The prescription for a patented drug is a monopoly, protected by patent law from competition, making price fixing illegal otherwise. Even on a patented product there can be no competition. The courts

have held that a patented product cannot be price fixed because there is no competition but there has only been one case in history in which we have found that the courts have used this for the protection of the public and that was a case involving Kodak. So that, monopolies under this act would be price-fixed.

The Federal Trade Commission cannot prevent natural monopoly of a patented product.

To summarize, the Federal Trade Commission has advised that even though the product is patented, the manufacturer can fix the price. Now, 158,000 U.S. physicians and millions of consumers could be victims of the prescription pharmaceutical monopoly. The physician must prescribe what he believes is good and unless he knows the other manufacturer, he must perscribe a patented or trademark item so that he is more or less bound to prescribe by trademark.

American consumers spent $1.8 million for prescriptions in 1958 and $2.059 billion in 1960. The number of prescriptions has increased 300 percent since 1940 with the average retail price of $3.08.

The Northern California Pharmaceutical Association was prosecuted for fixing the prices in the State on prescriptions. The man who wrote the schedule said this, and I think it indicates what a price-fixing statute will do.

He said, "I thought I was acting legally," when he was writing a schedule to price-fix all the prescriptions in the State of California. The Quality Stabilization Act could promote socialized medicine, or medicine by Government control. As far as the medical profession or the pharmaceutical profession is concerned, history proves that the governments which have fixed the price of medicine have been struck with control and price fixing in that field. I have some simulated prescriptions on page 28. I am not going over them in detail but I would like to use them to illustrate my points.

First, you will see the public does not know. Therefore, there is no protection in the phrase "when goods usable for the same purpose are available to the public from other sources."

On the top half of the page there are two prescriptions. On the lift-hand side is serpasil 0.25 milligram by Ciba. That is a patented product and owned by Ciba. The fixed price is $7.50. Our price is $5.14.

On the right-hand side of the page is reserpine 0.25 which would be sold by us for $1.06. The problem I want to illustrate here is that the nationally advertised brand, the trademark brand would be fixed on all distributive levels. This reserpine on the opposite side would probably not be price fixed. It would be the same general merchandise from another source, but would not actually be available because most doctors would not write just reserpine because he does not know the reputation of the manufacturers involved. If he wrote reserpine he might get medication for his patient from 100 different sources, none of which has been inspected by the Federal Government or by the State governments so that this reserpine 0.25 might not be anything—in fact, it might even be harmful to the patient. Both the doctor and the pharmacist in this case are bound. If he is going to do what is right for the consumer as a practical matter he would have to prescribe serpasil and you can see the variation in the price.

There are a number of examples which are identical. That is the patented item and the from-another-source item would not serve as a practical matter to protect the public under section 8.

I have hurriedly summarized my statement and I just want to reiterate that we are honest and sincere in our opinion that this act is bad for the consumer and it is bad for small business and we would like to ask the committee to vote on it unfavorably.

In closing, Mr. Chairman, I would like just briefly to mention what I think from my experience would be a good thing for Congress to do for these small businessmen who really need some help. I think that it is absolutely wrong to say that a man's ingenuity and strength in his particular market situation will be his savior because that is absolutely not true. I would like to recommend this, and of course I know it is not the right place to do it and probably no one in Washington wants to hear it, but I think a small business which does under 100,000 a year or whatever bracket is considered wise, should have the first $5,000 or $10,000 profit tax free. For example, when he fills out his income tax and shows a net profit here, then he has a dependent, his small business. He would take that from his income and pay taxes on the balance so that we would not be subsidizing him, actually, but giving him an advantage under the tax setup so that he could compete with people who buy better than he can by buying in greater quantity. Actually you are not passing that cost to the consumer if that could be done under the present tax structure.

Mr. MACK. Gross sales $100,000?

Mr. FORT. Yes, sir.

Mr. MACK. The first $10,000 would be tax credit or tax free?

Mr. FORT. I would say tax free. That little man would work like a dog. He sees the first $10,000 on which he does not have to pay taxes.

Mr. MACK. Does he have to invest that in the business?

Mr. FORT. I would say let him determine that.

Mr. MACK. I would say there would be several small business concerns that would be in favor of that.

Mr. FORT. I don't think it is unreasonable. As a matter of national policy we give people millions of dollars and don't get a thing from them. When a pharmacist comes out of pharmacy school he has spent 5 years getting a degree. We say he knows his business. He has a degree. He has a place to rent. He comes in and says, "I have got this business ready to go." You say, "We are going to change the requisites of small business loans, so you can borrow money. The small business loan procedure is worth nothing to these small businessmen and it is no reflection on Congress but the fact is that a man doing $200 a day or under $100,000 can't get a small business loan in most of the cases because he has to have a 3-year record of success and he has to have some assets and, if he were doing that, he would not need a small business loan.

I would say for the men who are not making any profit and there are plenty of small businessmen only paying themselves a small salary and not showing any net profit, the tax benefit won't help those small men but it would help them to say, "You are a pharmacist," or you are a photographer or, you are qualified in your business and you are a small businessman and you do under $100,000 or $200,000. We are going to loan you this money. We are going to violate the

bankers' ideal of good collateral. We are going to say small business needs this help and we feel that this is the American way to do it.

We are going to loan you $25,000 on $30,000 for 20 years. We have been doing that on homes. We will start that man out in business without the debt. Most small businessmen, even though they make a profit, never catch up or take so long that they cannot meet the competitive situation. You start a good man off in business who has graduated in pharmacy and if he has the right setup and right attitude he would give those big men a real run for their money.

Mr. MACK. Most of his profits normally go back into inventory.

Mr. FORT. True.

Mr. MACK. And into an account.

Mr. FORT. Bad debts. That is true.

Mr. MACK. I don't know that it is real income. Instead of net income you might call it take-home pay. Take-home pay is substantially reduced.

Mr. FORT. And I think that is a democratic process. We are not socialistic. If we give the reduction allowances for dependents, I don't think it is anything wrong at all and I think it would do a lot to stimulate the business in this country because these men are not going to be satisfied just to make that first $10,000. They are going to have plenty of incentive. They might form several companies before it is over.

Mr. MACK. I want to take this opportunity to commend you on your suggestion. I don't know that I would be in a position to wholeheartedly endorse it at this point but at least you have made a constructive suggestion here and some attention should be paid to the small businessman, quite frankly. He is in a very large segment of our society. This is a community that has been totally neglected.

Mr. FORT. If I may say one thing in parting, I am sincere about this. I would much rather have the responsibility in your hands and your colleagues' hands than to turn it over to the manufacturers in this country, many of whom are going to make a private brand and sell it to me in quantity while they let the small retailer struggle with the trademark on which the price is fixed. I thank you for your time.

Mr. MACK. You have a very good statement.

Mr. Dingell.

Mr. DINGELL. I want to commend you for a very interesting statement. I was told that you would be an informed, interesting, vigorous witness.

Mr. FORT. Thank you.

Mr. DINGELL. I want to cover three or four things if I may.

We are told in this committee how discounters are engaging in in-and-out sales practice and bait merchandise. Do you, in your firm, engage in any of those practices, bait advertisements, loss leaders?

Mr. FORT. No, there are several kinds of discounters. We are really not a discounter because our prices are based on a cost of doing business and we call that an ethical arrangement. But in answer to your question, we and those who do business like us don't use any loss leaders. We only match those who do. For example, if Walgreen runs a product below cost in our market we cut that out of the paper and paste that on the cash register and sell it for 3 days even though we lose money on it. But we never use loss leaders. We don't sell

any junk. We don't use bait advertising. Not that we are so holy because we will do anything to get business that is legal. Our point is that the public is smarter than most people know. Many of them lose money because the housewife will buy only the products that are baited. We are there to stay. We have been there since 1955. We started with sales of around $200 a day. We are doing almost $20,000 a day now but the reason I think we are doing it is that we feature nationally advertised brands at the best price we can pass on every day and we don't try to fool the public. I don't believe they can be fooled over a period of time.

I wouldn't want to say that I endorse all discount operations because I don't endorse anything that involves fraud and misleading advertising. Even though baiting may not be illegal, and under the old American system of let the buyer beware it has been legal for many, many years, I don't believe you can build a business on it and that is the reason we don't do it.

Mr. DINGELL. You were a complainant in an antitrust suit, am I correct?

Mr. FORT. That is true.

Mr. DINGELL. I believe you alluded to this in your prepared statement, am I correct?

Mr. FORT. Yes.

Mr. DINGELL. Briefly, what was the reason that you complained to the Department of Justice in that matter?

Mr. FORT. When we organized in 1955 and started our business, at that time Louisiana was a fair trade State. We didn't observe any of the fair trade prices because we didn't believe that it was constitutional, so we didn't abide by it.

As a result of that, our retail competitors created an organization to put us out of business and they met in a hotel room and actually collected from each member to create a fund to put us out of business.

As a former special agent of the FBI, I took immediate action to get the Department of Justice to investigate the case and bring it before the Federal grand jury. These men were of the opinion that because vitamins sold at $7.50 a hundred, they had a right to do anything to enforce it and they actually collected money.

The Federal grand jury didn't indict anybody and I think for the reasons that they were reputable, good citizens in every other way. The point is that they thought they had a right to force that price on us regardless of whether it was illegal or legal and it was certainly a violation of the Sherman Antitrust Act.

Mr. DINGELL. I notice that page 6 of the bill, line 14 includes exemptions from the antitrust laws for exercise of rights under the bill and it further permits a manufacturer who chooses to manufacture, wholesale, and retail, in competition with his other independent retailers, to fix prices. I wonder if you see any danger in these two sections.

Mr. FORT. Of course. The great danger is that the manufacturer has great power under that situation because he is being permitted to compete with the people he supplies. For example, say a manufacturer is supplying a wholesaler and he is also in the position of wholesaler. He can take punitive action against his wholesalers because he is making the profit of the manufacturer before the goods passed to the

distributors or wholesale level. So that he is in a powerful position against the other members in the distributive system.

I am 100 percent for the philosophy of the antitrust laws and the Clayton Act and the Robinson-Patman Act. I think that philosophy guarantees fair play in the market although it is not being fully enforced probably because it would be a tremendous cost. I would say, knowing the *Parke Davis* decision, that it will not be permitted, allowing a manufacturer to compete when he is making a profit in advance of that distribution.

Mr. DINGELL. Let's take the situation where I walk in with a prescription. Let's say dexedrine sulphate. If I walked in with a prescription of that kind, would I in a sense have a free choice in the marketplace and would there be other substances in free, open competition with that substance? Would I have the opportunity to select from other brands?

Mr. FORT. In the first place you would have no chance to deviate from the way the prescription is written. That would be fundamental. In the second place the manufacturers have proven that they will enforce a prescription fair trade or fixed price before they will the front merchandise. I know that we were brought into U.S. district court based on a reduction of the fixed price after the manufacturers' label had been removed and we had put our label on it. We sold it with our name on it but the courts have upheld the right of the manufacturer to price fix that merchandise because it didn't make any difference even though the label wasn't available to the consumer.

In my opinion the fact that the bill specifically said, identified by brand name or trademark, then serpasil or any other brand name like dexedrine will be available for price fixing and the consumer then will have no choice from another source.

Mr. DINGELL. Do you read this bill as authorizing price fixing under those circumstances, even where you take the manufacturer's label off and mark it under your own label?

Mr. FORT. Absolutely. I had a case in Federal Court in which the judge ruled in favor of the manufacturer after I had taken his label off and used my own.

Mr. DINGELL. Let me go into a couple of other things about this bill. I am interested in this bill from the standpoint of the pharmaceuticals. I wonder if we are not vesting in the hands of a relatively small number of manufactures the power to fix prices over a vast amount of, a very high percentage of the goods of like quality which are for sale in the marketplace.

Let's take some of the pharmaceuticals which are manufactured. Can you give us an idea of how many of these pharmaceuticals are manufactured by one or two or three of the pharmaceutical manufacturers of the country?

Mr. FORT. As I want to make clear for the record, I am not a pharmacist and I have 20 pharmacists whom I let work in the freedom of their profession so that I am not too familiar with the pharmaceuticals, but I have this suggestion. Antibiotics are one of the best examples. The antibiotic market was controlled by approximately, without actually studying it, four or five manufacturers, who controlled, I would say, approximately 90 percent of the antibiotic business.

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Mr. DINGELL. So that we vest in four manufactures under this bill the power to fix prices of almost all of many different classes of commodities.

Mr. FORT. My statement shows here, which is an actual fact, that those antibiotics are fixed at the same wholesale and the same retail price. While I list only three manufacturers here, it reflects what happens as a natural result and it certainly doesn't mean they are doing anything illegal. They don't have to meet and conspire but they end up with $36 by the hundred wholesale and $45 retail and that is the only thing available to the consumer in I would say more than 90 percent of the cases because the doctor—and he is right—will not prescribe something from another source that has not been examined and certified as to strength.

They are right in saying, "We must prescribe 90 percent of the branded tradmark pharmaceuticals." I have written Senator Kefauver about the attempt being made to ask doctors to prescribe a generic pharmaceutical. No one can guarantee that the patient is getting that medicine so that I think it is really harmful to say to a welfare group in a State, "All you old people have to take these generics." We don't know what is in them. It meets the U.S.P. standards but nobody has inspected it to see if it actually meets the standards and with all respect to those who have the authority to do it, I would say that no better place to spend tax money could be found than to inspect and verify every medicine that is available to the public and I think it is a shame that the record shows right now that since 1913 or thereabouts, the medicine that animals take in this country has been verified and inspected by the Federal Government but the people of this country can take anything and there is no verification at all.

Only about 1 percent of the pharmaceuticals manufactured for human comsumption is inspected.

Mr. DINGELL. That is true in case of human and animal food.

Can you cite some cases where a large portion of the pharmaceutical market is controlled by one or a small number of people?

Mr. FORT. A good example is insulin. Insulin is an absolute necessity for a diabetic. I have great respect for Eli Lilly and because they have convinced the doctors and the nurses that the best insulin in the world is Eli Lilly's, I would say that 95 percent of the insulin sold in this country is sold by Eli Lilly, if the proportion in my market is the same all over the country. From the information that I have been able to ascertain Lilly has most of the market.

A few others make it, but for practical purposes, there is not anything else available.

Mr. DINGELL. For all intents and purposes if this bill passes we would vest in one company, Eli Lilly, a very fine company, the power to fix prices of something like 90 or 95 percent of the insulin?

Mr. FORT. That is right. I even wrote to the University in Canada to try to get a better price on insulin. Canadian sources and other sources are not available to the merchants in this country. I wouldn't want to buy a foreign product to compete with labor and businesses in this country but at that time I was having trouble on the price of insulin because both the retail and wholesale prices were fixed. It was so well enforced that even discount wholesalers from Boston, New York, Chicago, where we would buy some of the branded merchan-

dise, if it was dated and we could see it was fresh, would send you anything else but Lilly's insulin because if they violated their franchise they would lose it and it is one of the most valuable franchises a drug wholesaler can have.

Mr. MACK. You buy through brokers or wholesalers, is that correct?

Mr. FORT. Yes, distributors or wholesalers, sometimes brokers. You cannot buy insulin direct from Eli Lilly. Their distributive policy is strictly through wholesalers and I am not complaining about that policy.

Mr. MACK. Since they do have a monopoly in this field, as you have indicated, what keeps them from charging these wholesalers an unreasonable price?

Mr. FORT. I am really not qualified to say on that. I am not trying to avoid the question, Mr. Mack. If what I have been told is true, the price of producing insulin is low.

Mr. MACK. Of course, this testimony has pointed out some of the drug manufacturers who are making 117 percent profit.

Mr. FORT. Now, you notice I never did say anybody was making too much money.

Mr. MACK. Excuse me. I stand corrected. $1,700.

Mr. FORT. Mr. Mack, you notice that I respect the American system. I have never said that anybody is making too much money or that anybody's price is too high. That is their right under our system to get as much as they can for their merchandise under the free enterprise system.

Mr. MACK. There is no law that would keep them from charging 1700 percent. I concluded that the inference is that the situation would get worse if we passed this bill.

Mr. FORT. I would really have a tougher time but I am not saying I am right. I have never said that other small drug stores are too high. They have a right to charge it and they should be paid for it and I think in many cases that 33⅓ percent on retail is not enough to permit a man to say in business and if he gives enough service to the consumer he ought to be paid for it.

Mr. DINGELL. Let me get on to the business of undue economic emoluments being vested by this bill in a small group of people. I am not as knowledgeable in the drug field as you are. Can you list me any other examples, for example, specific pharmaceuticals. Just, for example, Butisol sodium or a specific, some of the specifics, antiarthritic substances.

Mr. FORT. If you will look at these simulated prescriptions here the purpose there is to show that these manufacturers have a 100 percent monopoly. It is not 90 or 95. These people make 100 percent of this product as far as the consumer is concerned. There is no competition. They are patented products and no other company can make it.

Mr. DINGELL. You say a patented product. When you say a patented product, no body else can make a patented product?

Mr. FORT. No, sir.

Mr. DINGELL. If this bill passes we will vest in a manufacturer of a patented product the power to fix prices on a commodity of which he manufactures 100 percent of the market supply, is that correct?

Mr. FORT. Correct. That is correct as far as that product is concerned. Now, let's look at dexedrine sulphate. You take it as a consumer. Your doctor 95 percent of the time will not write dextro-amphetamine sulphate. That is on page 31, as an illustration. He will write the 100 percent monopoly dexedrine sulphate 5 mg. because he knows when Smith Kline & French says it is in this, it is there. If he wrote that dextro-amphetamine sulphate you might shop with that prescription and find anything. You might get somebody making it in their front room in Texas or New Jersey. The doctor is going to write dexedrine sulphate and they have a patent.

Mr. DINGELL. We vest in the hands of SKF the power to fix the price of 100 percent of this particular commodity sold in commerce today.

Mr. FORT. In every level of distribution.

Mr. DINGELL. Would you be able to submit to this committee a list of some examples of this kind? I think this is particularly helpful. This is the point I have never heard discussed in the committee, the fact that we are going to vest in the hands of very small numbers of people the pricing of an enormous amount of particular commodities in the marketplace.

Mr. FORT. There would be thousands and thousands of them and that is why I believe that the committee doesn't intend to do that, because what actually is happening is a violation of all our antitrust philosophy. When you let a patented product be price fixed, there is no competition. It has always been the theory that there should be something available in free and open competition.

Mr. DINGELL. This is why, then, the exemption from the antitrust laws provided in section 14 is so bad, am I correct?

Mr. FORT. In my personal opinion that is how I feel about it. I feel like it would be bad for the small businessman as well as the consumer.

Mr. MACK. Would you yield to me?

Mr. DINGELL. I yield.

Mr. MACK. I hesitate to interrupt my good friend and colleague here but I did want to make note of the fact that it wouldn't be possible for a manufacturer to stabilize prices unless there were goods usable for the same general purpose available.

Mr. FORT. Yes, sir.

Mr. MACK. Now, if you are talking about a company that produces 100 percent of a commodity or 100 percent of the goods in that area, I don't think it would come under the provisions of the bill.

Mr. FORT. The courts have held, strangely, that it can be price fixed even though the manufacturer makes 100 percent of it. That is why I wrote to the Federal Trade Commission. I said CIBA cannot fix the price on this product because it is patented. The Federal Trade Commission quoted court cases and said that even though that is patented and CIBA makes 100 percent of it, CIBA can fix the price on it.

I was of the same opinion you were, that if CIBA had it patented and it wasn't available from any other source that CIBA could not fix the price on it, but the Federal Trade Commission told me they can and the courts have upheld it. In fact, they told me that there

is only one exception in the whole history of the country and that was Kodak's color film.

I was just as surprised as anybody could possibly be that CIBA could fix that price and it was patented and you could not call the doctor and I wouldn't even let my pharmacist do it and say, "Would you let us prescribe this chemical in another chemical formula because Serpasil is patented and cannot be made by anybody else."

The same chemical formula can be made but it doesn't exist as far as that prescription is concerned.

Mr. MACK. You are referring to the practices under the State fair trade law?

Mr. FORT. Yes, sir, at the time when the manufacturer was able to fix it.

Mr. MACK. Have you anything further?

Mr. DINGELL. I want to commend you for an excellent statement and thank you for your help to the committee and you will submit to us other examples with approximate markets of those?

Mr. FORT. I would estimate that there are 75,000 of them.

Mr. DINGELL. I just want some good examples, not all 75,000.

Mr. FORT. I will submit some good examples.

(The following requested information was subsequently received for the record:)

FOOD TOWN ETHICAL PHARMACIES, INC.,
Baton Rouge, La., June 29, 1962.

Congressman JOHN D. DINGELL,
The Congress,
Washington, D.C.

DEAR SIR: Reference is made to your request that I submit a list of patented prescription drugs to the House Subcommittee on Commerce and Finance. This list reflects a small part of more than an estimated 50,000 in this status.

In my opinion and for all practical purposes there are no other "goods usable for the same general purpose available to the public from other sources." These are patented pharmaceuticals, available only on doctor's prescription, each of which is a monopoly, now price fixed in the fair trade States notwithstanding the philosphy that distributive prices cannot be fixed on a patented product.

Thank you for your interest in this undesirable effect of the quality stabilization bill, which I believe would damage both small businessmen and consumers.

Please accept and convey to Congressman Mack and other members of the subcommittee my sincere appreciation for making my appearance there most pleasant.

Sincerely yours,

CHARLES F. FORT.

Company	Pharmaceutical	Quantity	Fair trade price maximum usually higher	Our price	Difference
Roche	Marplan	100	$11.00	$7.45	$3.55
Upjohn	Medrol 4 mg	30	8.48	5.82	2.66
Lederle	Pathibamate 400 mg	100	13.01	8.86	4.15
Schering	Meticorten 5 mg	100	26.15	15.69	10.46
CIBA	Esidrix 25 mg	100	6.63	5.09	1.24
Geigy	Preludin 25 mg	100	7.50	5.56	1.94
Riker	Rauwiloid 2 mg	60	6.00	4.44	1.56
CIBA	Singoserp	100	7.50	5.29	2.21
Do	Ser-ap-es	100	9.00	6.73	2.27
Squibb	Rautrax	100	11.50	8.42	3.08
McNeil	Twiston 4 mg	100	3.15		
Pfizer	Vistaril 25 mg	100	10.46	8.48	1.86
Geigy	Tandearil	100	11.50	8.16	3.34
Do	Tofranil 25 mg	100	12.50	8.74	3.76
Merrell	Tenuate 25 mg	100	7.25	4.29	2.96

Company	Pharmaceutical	Quantity	Fair trade price maximum usually higher	Our price	Difference
Roche	Madribon	30	$4.90	$3.18	$1.72
Warner-Chilcott	Peritrate 20 mg	100	6.25	3.46	2.79
Lederle	Diamox	25	3.24	2.13	1.11
CIBA	Serpasil 0.25 mg	100	7.50	5.14	2.36
Lederle	Aristogesic	100	4.88	3.88	1.00
Warner-Chilcott	Acetycol	100	5.33	3.74	1.59
Lederle	Aristocort 4 mg	30	8.48	5.95	2.53
Schering	Celestone 0.6 mg	30	7.43	5.56	1.87
Merrell	Bendectin	100	11.67	8.39	3.28
Warner-Chilcott	Choledyl 200 mg	100	6.00	4.44	1.56
Sharp & Dohme	Decagesic	100	8.10	6.73	1.37
Upjohn	Orinase	50	6.25	4.99	1.26
Abbott	Enduron 5 mg	100	9.00	6.47	2.53
Roche	Gantrisin	100	4.90	3.74	1.16
Do	Librium 10 mg	50	5.84	4.09	1.75
Sharp & Dohme	Hydrodiuril 50 mg	100	9.00	6.47	2.53
Do	Hydropres 50 mg	100	12.90	9.59	3.31
CIBA	Ismelin 10 mg	100	7.33	5.56	1.77
Warner-Chilcott	Nardil	100	8.00	6.34	1.66
National	Orenzyme	48	12.38	8.86	3.52
Warner-Chilcott	Mandelamine 0.5 gm	100	5.85	4.29	1.56
Schering	Chlor-Trimeton 8 mg	100	5.03	3.74	1.29
Ayerst	Premarin 1.25 mg	100	8.75	6.99	1.76
Lilly	Co-Pyronil	100	4.60	3.18	1.42
Roche	Azo-Gantrisin	100	6.89	4.86	2.03
Winthrop	Trancopal 200 mg	100	13.33	8.74	4.59
Warner-Chilcott	Transentine-Phenob	100	4.67	3.46	1.21
CIBA	Pyribenzamine 50 mg	100	4.67	3.59	1.08
Do	Ritalin 10 mg	100	5.67	4.02	1.65
White	Permatil	50	6.00	4.58	1.42
Warner-Chilcott	Peritrate 10 mg	100	4.17	2.34	1.83
Squibb	Raudixin 50 mg	100	5.00	3.59	1.41
Smith, Kline & French	Thorazine 50 mg	50	5.81	3.88	1.93
Do	Stelazine 2 mg	50	6.29	4.09	2.20
Endo	Coumadin 5 mg	100	7.20	5.14	2.06
Wyeth	Sparine 50 mg	50	6.24	4.86	1.38
Merck, Sharpe & Dohme	Decadron .75 mg	100	24.16	15.59	8.57
McNeil	Grifulvin 250 mg	100	16.64	9.59	7.05
U.S. Vitamin	D.B.I. 25 mg	100	5.75	4.72	1.03
Merck, Sharpe & Dohme	Diuril 500 mg	100	9.00	6.47	2.53
Winthrop	Theominal R.S	100	8.00	5.56	2.44
Do	Milibis 500 mg	25	4.33	3.04	1.29
Schieffelin	Danilone 50 mg	100	5.00	3.74	1.26
Squibb	Stilbetin 5 mg	100	3.80	1.78	2.02
Abbott	Enduronyl	100	13.19	8.95	4.24
Burroughs-Wellcome	Emprazil	100	5.95	4.16	1.79
Merck, Sharpe & Dohme	Benemid 0.5 mg	100	9.00	7.19	1.81
Do	Colbenemid	100	10.35	8.48	1.87
Schering	Celestone 0.6 mg	30	7.76	5.46	2.30
Winthrop	Aralen 250 mg	100	11.16	5.56	5.60
Wyeth	Ansolysen 40 mg	100	5.00	3.74	1.26
Burroughs-Wellcome	Antepar 500 mg	100	4.75	3.32	1.43
Winthrop	Winstrol 2 mg	100	7.50	5.21	2.29
CIBA	Serpasil-Apresoline No. 1	100	6.67	4.97	1.70
Lederle	Kynex 500 mg	100	13.23	8.39	4.84
Roche	Librax	50	5.33	3.95	1.38
Eaton	Furadantin 50 mg	100	24.17	15.09	9.08
Roche	Tigan 100 mg	100	9.17	6.59	2.58
McNeil	Natisol	100	6.24	4.72	1.52
Searle	Enovid	20	7.00	5.29	1.71
Upjohn	Provera 100 mg	25	10.00	7.45	2.55

Mr. MACK. Joseph L. Nellis, vice president and general counsel of the National Association of Consumer Organizations, Inc.

STATEMENT OF JOSEPH L. NELLIS, VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF CONSUMER ORGANIZATIONS, INC.

Mr. NELLIS. Mr. Chairman.

Mr. MACK. We are glad to have you with us.

Mr. NELLIS. Thank you, sir.

Mr. MACK. I raised certain questions concerning the National Oil Jobbers Council and I presume that you have also answered those questions in the statement.

Mr. NELLIS. Yes, sir.

Mr. Chairman, with your permission I would like to file this statement for the record and testify briefly and give the chairman and Mr. Dingell an opportunity to question me if you should desire to do so.

Mr. MACK. Without objection, your entire statement will appear in the record.

(Mr. Nellis' prepared statement follows:)

Mr. NELLIS. Thank you, sir.

May I say this: This last bit of conversation with the previous witness was of great interest to me and I would like to make a comment about it.

Mr. Chairman, I have had the privilege of trying more than a small number of fair trade cases in the courts, both in the Federal and State courts, and accordingly I have had some very practical experience from the point of view of evidence regarding the points that you and Mr. Dingell raised a little while ago with Mr. Fort.

I would like to refer to the language of the quality stabilization bill in paragraph 8, and I will quote the particular language I refer to:

> When usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark * * *.

That particular language is identical to the existing language in most of the State fair trade laws which says that you cannot fair trade a product unless it is in free and open competition with other products of the same general class; and I want to fortify what the previous witness said.

Despite testimony and evidence in court under oath, no judge that I have ever appeared before has refused to allow a manufacturer to maintain a fixed fair trade price on a commodity (*a*) because it was patented, or (*b*) because the manufacturer of that commodity happened to have a market monopoly. In other words, the phrase "free and open competition" never hindered the courts in interpreting the fair trade law to prevent the use of fair trading in the case of monopolies or patented products. So that we have a situation where a doctor prescribes a particular drug and the monopoly begins. It can be fair traded and therefore there can be no free and open competition.

Mr. MACK. Does it exist today or would it again, do you think, after this bill was enacted?

Mr. NELLIS. Mr. Chairman, it exists in almost every State where there are remaining fair trade laws and I predict that, if the quality stabilization bill passes, it will exist everywhere.

Mr. MACK. Does it exist in some areas where you do not have fair trade laws?

Mr. NELLIS. No, sir. I don't believe so because if you have a situation where a non-fair-trade State is involved you will undoubtedly take your prescription to a retailer of the kind I represent, or the kind that Mr. Fort is, where you have confidence that your prescription will be accurately filled but you will not be required to pay the monopolistic price.

Mr. MACK. What type do you represent?

Mr. NELLIS. Mr. Mack, I will be very brief. It is covered in my statement. I represent 58 department stores, all of whom——

Mr. MACK. Department stores?

Mr. NELLIS. Yes, sir; all of whom have drug departments, all of whom have prescription departments. We are in the discount business and I know that discounters have taken a terrible beating in these so-called fair trade hearings but I want to say to you, Mr. Chairman, that we operate on a very sincere basis in the sense that we do not use any of the predatory practices to which this stabilization bill refers. Our prices, whether on commodities that are fair traded or not, are based upon our cost. They are not based upon comparatives or upon bait or loss leaders.

Now, these department stores are unique, Mr. Chairman, in that they are not open to the public. They are open only to certain segments of the public; namely, government employees, Federal, county, city and State, members of the Armed Forces, retired civil servants, schoolteachers and the like, and these customers pay a nominal membership fee very much like a PX or co-op system, although I don't want to mislead the Chair. This is strictly private enterprise. They pay a nominal price for the privilege of shopping in the store. They must identify themselves in order to secure the membership card as belonging to the classification that I have stated.

Now, this trade association I represent started in 1957.

Mr. MACK. Let us clarify that because I was completely confused. I thought you represented consumer groups and in reality you represent the department stores sales group and retailing groups.

Mr. NELLIS. May I explain that, Mr. Chairman?

Mr. MACK. Rather than a consumer. You might say you are an association of discount houses.

Mr. NELLIS. Yes, that is true, but we have almost 5 million consumer members who have paid a fee to stores in their particular locality for the privilege of shopping in our stores where they secure the finest brand merchandise available at the lowest possible price.

Mr. MACK. Do not misunderstand. I was only trying to clarify. You represent the people to whom the fee was paid and not the people who are paying the fee?

Mr. NELLIS. Yes, sir, that is correct.

Mr. MACK. I just wanted the record to be clear.

Mr. NELLIS. I admit that there may be some confusion in the use of the words "consumer organizations" but we regard ourselves as a consumer organization because we do not cater to the general public and it is a particular segment of the consuming public that is eligible for membership in the various stores that this association represents.

The question of the small businessman has always been one which has interested me. At one time I was special counsel to the House Small Business Committee and I recall the problems, many of which have multiplied since I held that position.

We have in our stores some 48 departments. It is a very large operation.

Mr. MACK. You represent 58 different stores?

Mr. NELLIS. Yes, sir; and they are in some 32 States including Puerto Rico, and we are going into some areas of Europe as well.

Mr. MACK. Are these 58 stores owned by the same group, or owned by 58 different groups?

Mr. NELLIS. Not 58. There happen to be 18 separate ownership entities but they are widely dispersed and widely spread out throughout the United States. I was about to say that we have some 48 departments in each of these stores. Every one of these departments, with two exceptions, are leased. Now the leases are made for the most part with small businessmen so that the man who owns the drug department in one of our stores can be classified as a "small businessman." These small businessmen operate in our store under a lease agreement with us. We have demonstrated by the use of mass merchandising techniques the ability of the small businessman to get along on a much smaller proportion of profit than he would be able to get along with if he were operating a corner drugstore, let us say, in Springfield, Ill. We recognize that the man who operates the corner drugstore in Springfield, Ill.—where, incidentally I took my bar exams, Mr. Chairman, and I have a fond memory for the capital of my home State—the corner drugstore in Springfield, Ill., as Mr. Fort so forcefully pointed out, needs a substantial margin of profit because his volume is not in any way comparable to ours. He cannot purchase merchandise on any basis comparable to the way we purchase it because of volume. He gives services which we do not give in the form of delivery, credit, and various other personal services which people in that community are accustomed to and which they deserve to have and should pay for; but I submit to you, Mr. Chairman, that the way to solve this problem is not to put that Springfield druggist's umbrella margin of profit on us.

Mr. MACK. I was going to say that you are a very young-appearing man but the record is going to reflect that it has been some time since you have been to Springfield.

Mr. NELLIS. Oh, yes, sir; it has been some time. Probably a year since I visited Springfield.

Mr. MACK. The gentleman has not selected a good example, I might say, because the Thrifty Drugstores operate in Springfield.

Mr. NELLIS. So do Walgreens, I believe.

Mr. MACK. On quite a large basis. Yes, Walgreens operate there and they are of substantial size now and they have taken over quite a few of the independent drugstores in the city, as well as in Alton, Ill., and I believe in the St. Louis market.

Mr. NELLIS. Mr. Chairman, I know that the chains have gone into the smaller cities but by the same token, I am quite certain that I would be correct in my assumption that there remains in most every community smaller independent drugstores and other small businessmen who have survived the crush of chain competition. If Springfield is an exception I am not aware of it. I assume there are independent druggists there. The only point I am making is that these people deserve to remain in business but they do not deserve the opportunity to remain in business based upon a "shotgun" approach as it were, which is what this bill is, with a margin of profit provided for them by manufacturers which we as large-volume operators do not need and do not want because we want to be able to pass on to our consumers the fruits of our efficiency. We do not think the Federal Government wants to be in the position of saying to efficient op-

erators who do not need that wide margin of profit, "Now you cannot carry brand name goods unless you charge the same price as the independent 2 or 3 miles away," who does not in any way operate the way we do, nor can he.

Now, Mr. Chairman, we have had a remarkable phenomenon in the retailing business and I have some familiarity with it because I happened to be one of the organizers of these large retail chains. In the last 5 years the association which I represent has grown from 5 stores to 58 stores, from a volume of a little less than $5 million to a volume this year of $800 million, and that is based upon the success of the small businessmen who are concessionnaires in our stores.

In other words, we have demonstrated that under the extreme pressures of today's competition at the retail level we can still take small business and make what I think everybody would agree to have been a phenomenal success out of it. We did this in the free marketplace. However, it is true that in some States where fair trade laws still obtain we cannot offer our customers merchandise at a much lower price because of the existence of these fair trade laws. I will give you one example which may interest you, Mr. Chairman.

In one case we were selling a very popular one-a-day multiple vitamin. The fair trade price of that commodity was $3.11. We sold it every day in the week, no specials, no sales, no bait, no loss leader, just sold it at $1.69. They took us to court and forced us to raise the price of that commodity to $3.11. At $1.69, Mr. Chairman, we were making a very fair, a reasonable and acceptable profit under our particular method of doing business. Our customers were satisfied with it because this was a product they knew. We say to this committee it would be a travesty not only to the consumer but to the small businessman who can afford to sell that commodity at a much lower price to force him into the position where the manufacturers, having been delegated this vast and complicated authority by the Congress, could say to us "By golly, you have no right to exist on a 21 percent margin. Henceforth, you are going to exist on an 80 percent margin."

We think that there is something fundamentally unfair about a law which would crystalize the absence of price competition. It is price competition that made our business grow to the point where it is today and I believe the essence of retailing in this country ever since it began has been ability of the merchant down the street to outsmart you or for you to outsmart him in terms of offering the consumer a bargain. The consumers of this country, and I am very familiar with a good number of them and am one myself, are great bargain hunters. There is no such thing as a workable law which will preclude the consumer from hunting for bargains because, if this law passes and the product that I was referring to a little while ago is sold everywhere in the United States for $3.11, there will be ways and means found by that consumer to secure that product at a lower price. He will do it either by forcing the retailer to adopt a trading stamp policy which he does not have now or a giveaway of some kind or a merchandise giveaway. There will be tricks and there will be litigation which will make the 30 or so trade cases in which I have been involved look like child's play.

Mr. MACK. That would be in effect pressure to keep the manufacturer at a reasonable level.

Mr. NELLIS. To some extent, but to a greater extent not, Mr. Chairman, because you have in the pharmaceutical field, as was so ably pointed out by the previous witness, a series of circumstances which I think no one ever intended.

Mr. MACK. If the manufacturer had set his price too high his competitors would be delighted, would they not?

Mr. NELLIS. Assuming he had competitors they would be delighted except that may I say to you Mr. Chairman that you don't need the patent monopoly to set the price. The proof is there in the steel industry. Administered pricing goes on every single day in consumer goods and I don't say that all manufacturers engage in it but there are price leaders in every single branch of consumer manufacture in this country.

Mr. MACK. I am in complete agreement with the witness on that. It has existed to my knowledge for at least 20 years and this legislation would not affect that one iota.

As a matter of fact, in my opinion it would improve the situation.

Mr. NELLIS. Mr. Chairman, if I may, I would like to point out why not. This legislation would harden into law and give a manufacturer who was formerly a price leader by virtue of his position in the marketplace a Federal mandate under which he could control the price of every comparable similar commodity simply by coming out with his price list, and I have seen evidence of this day in and day out in court.

Mr. MACK. This might give you additional authority or evidence with regard to prosecuting under our antitrust laws if that were the case.

Mr. NELLIS. Mr. Mack, I don't think so for this reason: This is an exemption from our antitrust laws and I don't believe we could ever make out a treble damage action if this bill were to become law. If a manufacturer under this bill decided not to sell us one of his branded commodities; if he decided that we had violated this law and therefore withdrew the supply of his commodity from our stores, we could never prove that he did it with the collusion of our competitors and therefore every treble damage action—and we have tried quite a few and won a number—would be removed from the realm of possibility because you could never prove that this was done by reason of collusion with your competitors.

Mr. MACK. The situation is so bad today that I would be of the opinion that it would be worth a try to see what would happen.

Mr. NELLIS. I am sorry, Mr. Chairman. I did not hear.

Mr. MACK. The situation is so bad today that I would think that it would be worth a try to see how it would work under this proposal.

Mr. NELLIS. Mr. Mack, the only way I can answer that is that, having studied all of the fair trade proposals for a number of years, having been in the business that I represent for a number of years, having tried fair trade cases in the State and Federal courts for a number of years, my judgment, my opinion is that this bill would compound every existing inequity in the business of buying and selling merchandise, and I will be specific. I believe that any manufacturer who has the absolute right under color of law to fix a price or to withdraw his merchandise from the channels of distribution has a right which is completely contrary to every single element of free competitive enterprise that I know anything about.

Mr. MACK. Several years ago we had a witness here from Standard of New Jersey at the time that the gasoline prices had been increased. We pursued the problem to see if this was in any way related to the law of supply and demand. He admitted that it was not, that at that time it was based on cost and they established the price, the higher price at various times when they had the greatest surplus of gasoline in the country that we have ever had. We had that same situation existing in the aluminum industry years ago when the stocks were so high that they were all screaming trying to sell to the Government stockpile and some of them made a success of that, at the very time they increased the price of aluminum. I don't think the situation could get any worse than it is today if this bill were adopted.

Mr. NELLIS. Mr. Mack, I am sure that there are some instances where price leaders, so called, can do practically what they want to do with the market irrespective of supply and demand and irrespective in some cases even of the antitrust laws; but I think you will agree that when we talk about furniture, drugs, housewares, soft goods, automotive accessories, sporting goods, that there is not the prospect that that merchandise at the retail level will not respond to the normal competitive situation involving the laws of supply and demand as well as involving advertising.

My point is that if the price leader in a gas war does something, obviously the others who are in that business must more or less fall in line; but the competition that now exists I submit will be inapplicable, if this bill passes, in consumer goods.

Now I would like to make mention of one other thing and that is, there has been a lot of talk about these fair trade bills not increasing consumer prices. I would like to submit on the basis of my own personal experience that that is not the fact, and I do not have to cite the Justice Department survey or the Federal Trade Commission's statement before other committees. The cost of merchandise in our stores in Maryland, merchandise that is fair traded under the Maryland law where we are obliged to observe the law under court rulings is in some cases approximately 30 to 40 percent higher than the cost of the same merchandise, the identical brand, the same size, in the District of Columbia.

The District of Columbia has no fair trade law, as we all know. Accordingly, we are placed in the position where consumers who shop in our Maryland stores for this fair traded merchandise must pay a higher price and we must secure a higher margin of profit even though we don't want it. We submit to the committee that that is not only an anomalous position for us to be in but it is completely contrary to every economic precept of free enterprise. If we want to sell at a lower price we should be permitted to do so.

In conclusion, I just want to say that attached to my statement, Mr. Chairman, is an appendix showing the number of stores, where they operate, the consumer members that we have and our estimated gross volume. You will observe that I am not talking about a small retail enterprise. It is a large enterprise and the "proof of the pudding is in the eating." We could never have grown this size in a bare 5 years unless consumers accepted us and accepted what we were attempting to say. Our statement to them was that we would "give you the lowest daily price that we could possibly give" and we have given them that.

Mr. MACK. You passed the bar in Springfield, did you not?

Mr. NELLIS. Yes, sir; I did.

Mr. MACK. So that you will have nothing against it.

I notice that you do not represent anyone in Illinois and thought you may be discriminating against Illinois.

Mr. NELLIS. We plan to open a store in Illinois in the next 6 months. However, we have stores in St. Louis and Kansas City, which is not far from the district you represent. We have one coming up in Mr. Dingell's city of Detroit.

Mr. MACK. Do you have one in Indianapolis?

Mr. NELLIS. Yes, sir.

Mr. MACK. Actually that is a little closer to my district than the one in Kansas City.

Mr. NELLIS. Yes, that is true, sir; closer than St. Louis.

Mr. MACK. Mr. Dingell.

Mr. DINGELL. Mr. Chairman, I am pleased to welcome Mr. Nellis to the committee. He is an old friend.

Mr. MACK. Before you start, could I ask, this question? Your firms are discount houses. Do they discount?

Mr. NELLIS. No, sir. I thought I made a statement on that. We do not discount from any manufacturer's suggested retail price.

Mr. MACK. You do not understand my question. I want to know if you discount, if you offer discounts below the prices that you sell at in your discount to a certain select group of people such as members of the medical profession.

Mr. NELLIS. No, sir. Our structure on price is a one-price structure. We mark up our goods in accordance with a formula margin of profit which is considerably lower than conventional department stores for many reasons. Our stores are not downtown. We don't have any elevators. We don't furnish it with fancy fixtures. The real estate we put them on is much less expensive than the downtown real estate.

In any event, all of these factors produce a cost of doing business and we mark our prices at a level above that cost of doing business and do not discount from some fictitious real price, whether it is put out by the manufacturer or whether it is a fair trade listed price.

Mr. MACK. Yes, but you do not have discount drugs? You do not represent discount drugstores, do you?

Mr. NELLIS. No, sir.

Mr. MACK. And you do not have a drug counter as part of your——

Mr. NELLIS. Oh, yes. Everyone of our stores has a complete prescription and drug and sundry department.

Mr. MACK. However, you do not discount to the members of the medical profession?

Mr. NELLIS. No, sir. They are not eligible to buy in our stores unless they are members of the Public Health Service, you see. The general public cannot enter our store, Mr. Chairman. You must be a member, and to be a member you have to be eligible, and to be eligible you must be either a government employee, or a member of the Armed Forces, or in that category.

Mr. MACK. Are the people pretty disappointed when they get to your front door and you won't let them in?

Mr. NELLIS. Yes, sir. Friends of mine will say, "Oh, heck, we can get in," and I will say "All right, I'll bet you a dollar you can't,"

and they go to the front door and they can't show a membership card and they cannot get in.

Mr. MACK. Thank you very much.

Mr. NELLIS. Thank you, sir.

Mr. MACK. I am sorry to interrupt you.

Mr. DINGELL. That is quite all right. You indicated that if this bill goes through the possibility of winning treble damage antitrust suits by yourself on behalf of your clients would be impossible?

Mr. NELLIS. Practically impossible, yes, sir.

Mr. DINGELL. Would you tell us why?

Mr. NELLIS. Yes, sir, I can; by reason of the manner in which the courts have interpreted existing fair trade laws and this, may I submit, is nothing more or less than a fair trade law. We would find it impossible or practically impossible to prove on any given occasion that a manufacturer has refused to let us have his line because some of our manufacturers' other customers; namely, our competitors, had induced him to do so. He could always hide behind any of the provisions of this bill which would give him the right to refuse to deal with us for a reason that I maintain would be fictitious. Therefore, we would find it practically impossible to prove the quality of collusion, which the courts have described as absolutely necessary to prove in a treble-damage action. I hope I have made my answer clear to you, Mr. Dingell.

Mr. DINGELL. Would the language of page 6, line 22, subsection (12), beginning "No exercise of any right or remedy provided in paragraphs (7) to (13) inclusive of this subsection shall be construed to be a violation of the Antitrust Acts" have any bearing on this?

Mr. NELLIS. Yes, sir. My starting point is that paragraph (14), but there is something additional, and I refer again to the language of paragraph (8) which purports to set up a standard that does not exist, because there are many, many commodities, in the pharmaceutical field particularly, which cannot be substituted for not only on prescriptions but because of the demand of consumers for the advertised products. May I say in that connection the monopoly created by advertising is a monopoly of a different kind than the one created by the doctor when he writes the prescription. Nevertheless, when the consumer comes into the store and wants Bayer's aspirin, Mr. Dingell, rarely will he be switched to something else. He wants Bayer's aspirin.

Mr. DINGELL. You indicated that the exemption from the antitrust laws would have a bearing on this. Can you amplify that for us?

Mr. NELLIS. Yes. If a manufacturer refused to deal with one of our stores under existing law, without the passage of this bill, if we can prove that that refusal to deal was the result of collusion between the manufacturer and our competitors, we may have a valid cause of action under existing antitrust laws, and if we can prove our case we can get three times the damages sustained, but under this language if a manufacturer refused to sell and sets up as a defense for that refusal his right under this bill to deny access to his merchandise, because of some alleged predatory pricing practice, then we can never prove under the antitrust laws that we have been damaged, and, therefore, we cannot get damages in a court of law.

Mr. DINGELL. Do you view this section as in any way repealing any of the provisions of the Robinson-Patman Act, or justifying any action in defiance of the sections of that statute as presently construed?

Mr. NELLIS. May I say this, Mr. Dingell. I believe that this bill is redundant. I think that has been pointed out to you by your eminent colleague, the Chairman of the Judiciary Committee, Mr. Celler. Where it refers to bait practices and misleading advertising it is completely redundant because all of that is already contrary to law under the Federal Trade Commission Act, as amended, section 5, and also contrary to law under most State unfair competitive practices acts, so my first answer to you is that that paragraph referring to these practices is completely redundant and unnecessary. This bill would promote bad faith and discrimination in pricing.

Mr. DINGELL. Thank you very much for your testimony.

Mr. MACK. Thank you very much.

Mr. NELLIS. Thank you, Mr. Chairman.

(Mr. Nellis' statement follows:)

STATEMENT OF JOSEPH L. NELLIS, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF CONSUMER ORGANIZATIONS, INC.

My name is Joseph L. Nellis. I am a practicing attorney in the District of Columbia with offices at 1411 K Street, N.W., and I am also Executive Vice President and General Counsel of NACO.

I appreciate this opportunity to appear in opposition to the pending quality stabilization bills on behalf of National Association of Consumer Organizations, Inc., a voluntary nonprofit trade association representing 58 closed-door membership department stores in 30 States and Puerto Rico.

Attached to this statement is an appendix setting forth the number and identity of member organizations, the States in which they are doing business, the total number of consumer members of NACO stores and some information about the gross volume of the membership department store industry. For the present purposes I wish to review briefly the status of our segment of the so-called discount store industry to illustrate what free competition in the retail field can accomplish in a few short years.

NACO began its existence as a trade association with four members doing an approximate gross volume of $5 million in 1957. Today its 58 existing member stores will gross approximately $800 million for the year 1962. In 1957 the consumer-members of NACO stores were approximately 250,000, all located in the State of California. Today there are almost 4½ million customers, that is, consumer members of NACO stores. One member chain, GEM, International, Inc., with 18 currently operating stores alone has over a million customer consumer-members. Our member stores are located in 30 states and one of our members is presently engaged in building stores in England, France, and Germany. There are scheduled to be opened NACO member stores in the continental United States, Puerto Rico, and abroad some 27 new stores in addition to the 58 presently operating. By conservative estimate the year 1963 will show an approximate gross volume of a $1¼ billion for the closed-door department store industry.

NACO stores are distinguished by the fact that the general public is not free to shop in the store. Membership, a prerequisite to shopping and for which a nominal charge is made, is restricted in general to Government employees, such as employees of the Federal, State, county and city governments, active or retired members of the Armed Forces and of the Civil Service and other certain categories such as employees of quasi-public organizations and charitable, educational, and hospital institutions.

Our member stores which have had an admittedly phenomenal growth over the past 6 years do not, contrary to some opinion, discount from "fair trade" or "suggested list" prices. Our stores operate on the principle that a low margin or markup on cost should and does establish the retail price. By reason of economies effected in distribution and the volume sale of merchandise, plus the elimination of many retail merchandising frills, our member stores are well satisfied with a comparatively lower margin of profit than conventional retail stores must have in order to stay in business. Our markups on cost of merchandise is the same, in the same category of goods, whether the goods are "fair traded" or not. These markups we have found to be completely satisfactory to us and they enable

us to offer the consumer fine quality merchandise at prices which are generally lower than those prevailing in conventional retail department stores.

Our member stores offer credit, delivery, and other services which are charged for and those customers who desire extra services above the cash or credit price in the store are ready and willing to pay for them. We do not mark our merchandise with an umbrella markup sufficient to cover the cost of the most expensive type of retailing. It is important for me to emphasize that our member stores do not sell only "fair traded" goods. While the number of items that are "fair traded" in those States where we still encounter State "fair trade" laws are heavily concentrated in the drug and pharmaceutical field, cosmetic, and certain housewares and automotive accessory items, the vast bulk of our merchandise is not presently "fair traded" even in those States where fair trade is still permitted to be enforced by State law. Yet so-called fair traded merchandise is important to us and to our consumer-members because it is so heavily concentrated in drugs, sundries and prescription items.

Discounting in the last 10 years has been termed "a revolution in retailing." The core, the substance of this "revolution" is that a competent retailer who understands the economics of mass merchandising no longer needs a high "fair trade" markup to do business at a profit. He can do business at a fair profit to himself and at the same time pass some of the economies resulting from an efficient operation on to the consumer in the form of lower prices. Similarly, the fact that our member stores tend to locate on real estate less expensive than that of conventional department stores; the fact that our member stores build structures which are substantially less costly than the multistoried, elevator buildings used by conventional department stores; the fact that the interior of our stores, while pleasant and conducive to shopping, are not lavishly furnished; the fact that our departments are largely self-service, thus providing economies in the cost of labor and the processing of merchandise—all of these factors contribute to the reasons why there can be and actually are substantial savings passed on to the consumer in our stores every day of the year.

While I have taken pains to relate what is essentially a retail success story, I want to emphasize that our type of store, that is the membership department store, is but a small part of the overall discount industry. While there are no reliable figures that I can point to with certainty, I can say that the Department of Commerce estimates gross sales at retail by discount stores to have been in the neighborhood of $25 billion in 1961. The growth of this retail industry serves to call attention to the fact that people are shopping for bargains and are relying upon price competition between retailers as a source of these bargains. I respectfully point out that any governmental body, including the Congress of the United States, which underestimates the extent to which bargains are being shopped for by our American consumer is making a substantial mistake. I predict that if the so-called quality stabilization bill passes, under which a manufacturer will have the right to dictate resale prices to retailers and thus control costs to the consumer by arbitrary direction rather than by the traditional mehods of price competition, persons responsible for its passage will have to face the organized wrath of consumers at some point or other.

I have been attending hearings on various proposed fair trade bills in this distinguished branch of Congress, as well as the other, for a number of years. Whether it is a "fair trade" bill with the pernicious nonsigner provision or a "quality stabilization" bill with an equally pernicious administered price provision, the cry of the proponents is always the same. They say, "save us from loss leader merchandise; save us from bait advertising and other misrepresentations by predatory price cutters." I believe I am in a good position to refute these arguments once and for all because NACO member stores do not use bait advertising, they do not employ loss leader selling; they do not misrepresent the quality, price, or the terms and conditions under which the retail merchandise is sold. The simple reason is that since we do not admit the general public to our stores we do not advertise in the mass communication media except for occasional institutional advertising. Our advertising is directed to our members and prospective members by mail in the form of a monthly or bimonthly publication. Our member stores do not use comparative pricing except where it can be demonstrated by documentary evidence that the comparative price is sound and has a basis in fact. Accordingly, we deny that there is any reason for the proponents of Federal price fixing to say that a bill such as House Joint Resolution 636 is necessary or desirable to halt "bait" and "loss leader" practices at least, insofar as our stores are concerned.

Mass merchandising rests on the fundamental concept that the consumer, who is also a member of the store participating in benefits other than lower prices, must be treated fairly in all respects, including advertising of quality, price, and terms of credit, plus an unconditional guarantee of satisfaction. Such a guarantee which does not depend exclusively upon the guarantees made by manufacturers is, to our mind, the hallmark of honest retailing.

In his appearance before the Senate Special Subcommittee on Quality Stabilization of the Committee on Commerce, the Honorable Emanuel Celler, chairman of the Committee on the Judiciary of this body, stated in part on May 24, 1962:

"Senate Joint Resolution 159 would give the owner of a distinguishing brand or mark a property right therein as well as in the public good will associated therewith. This 'property right' would be protected even after the transfer of the goods to which the brand relates. Those who have purchased the goods for resale under the manufacturer's brand or name, if there are 'goods usable for the same general purpose' from other sources, may have that right revoked:

(*a*) for employing the goods in furtherance of bait merchandising practices;

(*b*) for advertising, offering for sale, or selling such goods at prices other than such currently established resale prices;

(*c*) publishing misrepresentation concerning such goods."

These practices are already contrary to law under the Federal Trade Commission Act and many States have on their books prohibitions against sales below cost, against "unfair sales" where the purpose is to injure competition, and in some States there are even constitutional prohibitions against combinations between persons or firms to reduce prices for the purpose of injurying competitors. In general, it was this very constitutional provision which led the Court of Appeals of the State of Virginia in the *Benrus Watch* case in 1958 to declare that State's Fair Trade Act unconstitutional. The point is that the bill before this subcommittee which purports to deal with bait advertising, loss leader selling and other such price representations and deceptions is in itself questionable since the practices referred to in Chairman Celler's statement quoted above are already prohibited by both Federal and State law. Certainly, "corrective" legislation need not encompass what is already illegal.

The only net result that is a certainty if these bills should pass and become law is that the consumer will be required to pay higher prices in our member stores for many commodities on which we are content to charge and receive a price substantially lower than that which the manufacturer would and in some States actually does dictate. For proof of this statement I represent to this committee that for over 2 years I have tried a substantial number of fair trade cases in the Federal and State courts in which proof was adduced that the "fair trade" price of many pharmaceuticals were from 40 to 100 percent higher than the actual prices charged in one of our member stores. In one specific case a popular vitamin of the one-a-day variety bore a "fair trade" price of $3.11 per hundred against an actual daily selling price of $1.69 in our stores. It is this kind of evidence produced in the courts that leads me to ask: "How can any proponents claim, as they do, that this bill would not lead to higher consumer prices?" It is a plain fact proven over and over again by the Justice Department survey, by the survey made in 1945 by the Federal Trade Commission, by Department of Commerce statistics, and by actual experience in court that "fair trade" or "quality stabilization" produces higher prices to the consumer—prices not based on competition but solely on arbitrary price declarations of the manufacturers of "fair traded" products.

We do not understand and cannot make out the alleged public necessity for Federal legislation which would eliminate price competition. If small businessmen can make out a case that they need relief it seems to us that such relief could be afforded by Congress in the form of tax amendments and credit assistance. The type of legislation here proposed is analogous to the use of a shotgun to kill mosquitoes. If it can be demonstrated, and I think it can, that certain areas of retail small business need legislative assistance, surely the way to afford that assistance is not by a sweeping exemption of price competition from our antitrust policies nor by the abandonment of our traditional concept of the free marketplace, but rather by a searching analysis of the specific problems faced by small business which can be remedied by Federal and State action.

Discount houses have taken a terrible beating during the years of the hearings in Congress on "fair trade" bills. Most of this anti-discount-house propaganda is composed of sweeping generalization rather than specific instances where

predatory price cutting, designed for the purpose of injuring competition, or misleading and deceptive practices have been shown and proven. It is as unfair to brand all mass merchants as predatory price cutters as it is unfair to brand all retail druggists as subsidy seekers. It is unfair to brand the entire medical profession as opposed to proper hospital care for the aged to be paid for out of social security just because the professional society which represents less than a majority of all practicing physicians takes that point of view. It is unfair to blame the vast majority of discount houses for fly-by-night practices just because a few unscrupulous operators arrogating to themselves the name "discount house" mislead or deceive.

On the whole, the particular segment of the mass merchandising industry I represent has had singularly few problems raised by consumer or competitor complaints. We are proud of this record only because it demonstrates that for the overwhelming majority of consumers we represent an opportunity to purchase bargains and pay lower prices. If this opportunity is to be taken away from our customers, let it be taken away by the normal process of free and open competition rather than by legislative fiat.

This bill if passed would do unimaginable harm to our consumers, to our economy, and to our business community. It is not designed for the public interest but for the special interest of a few who would profit and benefit from its provisions. Surely this is not the type of legislation that in these difficult times should be seriously considered for approval.

APPENDIX A.—*National Association of Consumer Organizations member stores in operation and under construction*

	Number of stores operating	Stores under construction
Alabama: GES		1
Arizona: SAVE CO	1	
California:		
Allied Buying Corp. (SAGE)	1	
AGE, Inc	2	
Certi Bond	1	
GEM	1	1
MORE	6	
SAGE	1	
SAVE CO	1	
SEE	1	
SERV MART	1	
Union Stores (SAGE)	3	
Venox (SAGE)	1	
State total	19	1
Colorado: GEM	2	
Connecticut: GEM		1
Delaware: GEM		1
Florida: MET	1	1
Georgia: GEX	1	
Hawaii: GEM	2	1
Indiana: GOVCO	1	
Kansas: GEM	1	
Kentucky: GES	1	
Maryland: GEM	3	1
Massachusetts: GEM	2	1
Michigan: GEM		2
Minnesota: GEM	1	1
Missouri: GEM	3	
Nebraska: GEM	1	
New Jersey:		
GEX	1	
GEM		1
New York:		
GEX	1	1
GEM		1
State total	1	2
Ohio:		
FAME	4	4
GES	2	
State total	6	4
Oklahoma: GEX	1	
Pennsylvania: GEM		2
Puerto Rico: GEX		1
South Carolina: GEX		1
Tennessee:		
Dixie Mart	2	
GES		1
Texas:		
GOV X	1	
SAGE	3	
State total	4	
Virginia:		
GEM	1	2
GEX	1	1
State total	2	3
Washington: GOV MART	2	
Wisconsin: GEX		1
Total NACO member operating under construction	58	27

Total consumer of NACO stores, as at June 1, 1962 4,385,000
Gross volume of combined NACO membership, as at Dec. 31, 1961 ..... $500,000,000
Estimated gross volume 1962 ..... $800,000,000

Mr. MACK. Our next witness is Mrs. Sarah Newman, general secretary of the National Consumers' League.

STATEMENT OF MRS. SARAH NEWMAN, GENERAL SECRETARY, NATIONAL CONSUMERS LEAGUE; REPRESENTING MARYLAND CONSUMERS COUNCIL

Mrs. NEWMAN. With your permission, Mr. Chairman, I would also like the record to show that I am here representing the Maryland Consumers Council as well.

Mr. MACK. Do you state in your statement the type of organization that you represent?

Mrs. NEWMAN. Just in very general terms. I would be glad to submit some literature which would indicate exactly what the National Consumers League is. We are an old organization and have appeared on the Hill many, many times before other committees, but I would be glad to submit for the record information about our organization if you would like me to do so.

Mr. MACK. You have not included the number of members in your organization?

Mrs. NEWMAN. No, I have not.

Mr. MACK. The committee will be interested in that. I recall some theoretical consumer organizations which appeared here in the course of the fair trade hearings that seemed to represent only half a dozen people in St. Louis.

Mrs. NEWMAN. We have been in existence for more than 60 years and have quite a record in our history.

Mr. MACK. The committee would like to have that for the record.

Mrs. NEWMAN. I will be glad to send it in.

(The requested information was subsequently supplied for the record.)

NATIONAL CONSUMERS LEAGUE,
Washington, D.C., June 18, 1962.

HON. OREN HARRIS,
Chairman, Interstate and Foreign Commerce Committee,
House of Representatives,
Washington, D.C.

DEAR MR. HARRIS: At the request of the chairman of the Subcommittee on Commerce and Finance, I am submitting material to be placed in the record which will help to identify the National Consumers League. We have a membership of over 1,500 who reside throughout the United States.

Sincerely yours,

SARAH H. NEWMAN, *General Secretary.*

SOME FACTS ABOUT THE NATIONAL CONSUMERS LEAGUE

Since its founding in 1899, the National Consumers League has aroused consumer interest in and concern with the conditions under which goods are manufactured and distributed. It has used the three-point technique of making investigations, marshaling public opinion and seeking remedial legislation to promote public health, consumer protection, public welfare and fair labor standards.

The National Consumers League has been closely associated with the major social reforms of the past six decades. For example, it introduced the idea of minimum wage and maximum hours legislation to the United States and fought for its enactment. It was one of the foremost supporters of the pure food and drug law when that legislation was before Congress. It pioneered in the fight for legislation prohibiting child labor. And it was among the first supporters of social security legislation.

The league pioneered with a number of techniques and institutions which are now widely accepted in America. For example, it promoted the idea of the Children's Bureau in the Federal Government to protect child health and wel-

fare. It introduced the idea of a consumer label to indicate fair labor standards in production industries. It introduced "shop early" campaigns as a means of cutting down staggering Christmas season work hours and providing steadier employment for workers.

The list of National Consumers League officers, directors, and members, past and present, reads like a "who's who" of important Americans. They include Felix Frankfurter and the late Louis D. Brandeis, U.S. Supreme Court Justices; Arthur Goldberg, Secretary of Labor, and Frances Perkins, former Secretary of Labor; Ester Peterson, Director of the Women's Bureau, and Mary Anderson, former Director of the Women's Bureau; Mrs. Eleanor Roosevelt; Arthur Schlesinger, historian; Paul Douglas, U.S. Senator; the late Sumner Slichter, economist; J. Douglas Brown, dean of Princeton University.

Officers will be elected by the board of directors at the February 15 annual meeting. Present officers include: president, Dr. John Howland Lathrop, Berkeley, Calif.; vice presidents, Elizabeth Brandeis Raushenbush, Madison, Wis.; Mary Dewson, Penobscott, Maine; Mrs. Thomas Fleming, Pasadena, Calif.; Pauline Goldmark, Hartsdale, N.Y.; Alice Hamilton, M.D., Hadlyme, Conn.; John Haynes Holmes, New York, N.Y.; Alice W. Hunt, Providence, R.I.; Archbishop Robert E. Lucey, San Antonio, Tex.; Frances Perkins, New York, N.Y.; Josephine Roche, Washington, D.C.; Mrs. Franklin D. Roosevelt, Hyde Park, N.Y.; Bishop William Scarlett, Castine, Maine; and Robert Szold, New York, N.Y.; treasurer, Hyman Schroeder, New York, N.Y.; board chairman, Louise Stitt, Washington, D.C.; board vice chairmen, Walter Frank, New York, N.Y., and Eleanor Hadley, Northhampton, Mass.; general secretary, Vera Waltman Mayer.

POLICY STATEMENT OF NATIONAL CONSUMERS LEAGUE

Extension of remarks of Hon. Lee Metcalf, of Montana, in the Senate of the United States, Tuesday, March 14, 1961

Mr. METCALF. Mr. President, recently I had the honor of addressing the annual meeting of the National Consumers League. This organization is now beginning its 62d year of existence. Throughout its long history, it has made tremendous contributions to many of the major social reforms of the 20th century.

It was founded in 1899 in the belief that consumers have a responsibility to help improve the working and living conditions and standards of those who produce the goods we all consume. The league introduced the idea of minimum wage legislation to the United States in the early years of the century, gave valuable support to the great social insurance programs, and was an early supporter of the concept of pure food and drug legislation.

The list of National Consumers League officers, directors, and members of both the past and the present reads like a "who's who" of important Americans. They include Felix Frankfurter and the late Louis D. Brandeis, U.S. Supreme Court Justices; Arthur Goldberg, Secretary of Labor, and Frances Perkins, former Secretary of Labor; Esther Peterson, Director of the Women's Bureau, and Mary Anderson, former Director of the Women's Bureau; Mrs. Eleanor Roosevelt; Arthur Schlesinger, historian; Paul Douglas, U.S. Senator; the late Sumner Slichter, economist; Benjamin V. Cohen, New Deal adviser; J. Douglas Brown, dean of Princeton University; Mary Gibson Blanding, president of Vassar College.

Present officers include president, Dr. John Howland Lathrop, Berkeley, Calif.; vice presidents, Elizabeth Brandeis Raushenbush, Madison, Wis.; Mary Dewson, Penobscot, Maine; Mrs. Thomas Fleming, Pasadena, Calif.; Pauline Goldmark, Hartsdale, N.Y.; Alice Hamilton, M.D., Hadlyme, Conn.; John Haynes Holmes, New York, N.Y.; Alice W. Hunt, Providence, R.I.; Archbishop Robert E. Lucey, San Antonio, Tex.; Frances Perkins, New York, N.Y.; Josephine Roche, Washington, D.C.; Mrs. Franklin D. Roosevelt, Hyde Park, N.Y.; Bishop William Scarlett, Castine, Maine; and Robert Szold, New York, N.Y.; treasurer, Hyman Schroeder, New York, N.Y.; board chairman, John W. Edelman, Washington, D.C.; board vice chairmen, Walter Frank, New York, N.Y.; Eleanor Hadley, Northampton, Mass.; Mrs. R. Gordon Arneson, Arlington, Va.; general secretary, Vera Waltman Mayer, Washington, D.C.

The league's long history of service and idealism commands respect. Further, the modernity of the league's ideas and its sensitivity to the important so-

cial problems which confront us today is impressive. This is not an organization content to rest on the many laurels of its past achievements. Rather, this is an organizaton which is continually reaching out for solutions to problems both old and new.

For this reason, I believe the league's statement of policy, adopted last week, will be of interest to the Senate. I ask unanimous consent to have that statement printed in the Appendix of the Record.

(There being no objection, the statement was ordered to be printed in the Record, as follows:)

POLICY STATEMENT OF THE NATIONAL CONSUMERS LEAGUE

A wave of hope seems to be sweeping over our Nation. Although the problems we face are many and grave, the will to confront and solve them is shared by us all. We in the National Consumers League, along with our fellow citizens, face the year ahead with a sense of real expectation.

In the 62 years since the founding of the Consumers League, the nature of the problems we must cope with has changed but the object of the league remains the same—improvements in the working and living conditions of our countrymen. Today, as in 1899, our members believe that, as consumers, we have an active responsibility for the establishment of humane standards of employment and for the protection of the standard of living of our people. Because of these beliefs, the National Consumers League was responsible for introducing the concept of the legal minimum wage in the United States, gave significant support to the social insurance programs, and was among the early advocates of pure food and drug protection.

AREAS OF CONCERN TODAY

The sweatshops of yesterday have given way in many industries to varying degrees of industrial democracy. Yet problems remain—problems about which much must be done and about which we feel great concern. Even today the following conditions exist:

Food and fiber still are produced under conditions which often amounts to peonage. "Harvest of Shame" is an appropriate title for many of America's agricultural products.

Minimum wage and maximum hours protection is still denied to millions of wage earners who need it the most.

Thousands of our aged are still without the financial means of living in dignity and health in their declining years.

Unemployment, with its corroding and degenerating consequences, is chronic in some of our regions and recurs periodically in virtually all of them.

The consumer is still too often compelled to buy at his own risk in a marketplace which becomes increasingly more complex.

Legal and social prejudice still robs millions of Americans of their rights as citizens to equal participation in the political, economic, and social life of our country.

These are some of the problems which affect our social health, our national self-confidence and our leadership in a rapidly changing world. In the solution of these problems, the National Consumers League will continue to offer its full support and assistance.

NEW FRONTIER'S FIVE-POINT PROGRAM

Specifically, the Consumers League will support the legislation designed to carry out the already announced five-point program of the New Frontier—legislation we have long called for and have worked to secure. This five-point program would provide for:

1. increasing the minimum wage to $1.25 an hour and extending the Fair Labor Standards Act coverage to additional millions of Americans;
2. providing health insurance for the aged under social security;
3. enacting Federal aid to public education for school construction and teacher's salaries, leaving the choice to each State;
4. assisting chronically depressed areas;
5. instituting an omnibus program for housing construction, including especially slum clearance, urban renewal, and housing for the elderly.

FARM LABOR IMPROVEMENTS

The Consumers League would add a sixth point to the program outlined above. The league's goals include extensive improvements in the conditions of the 2 million and more farmworkers in the United States. Too many men, women, and children engaged in agricultural work in this country toil and live under shamefully depressed conditions. They are denied the protection of much of the reform legislation enacted during and following the 1930's.

Farmworkers currently earn an average of only $829 a year. They are employed an average of only 138 days a year. They suffer from so many privations it is difficult to decide which evil to attack first. The basic problem, however, is their deplorably low wages. Their miserable housing, poor health, illiteracy and the use of their children in the fields, all grow out of their great poverty.

A major cause of low wages in this occupation is an oversupply of labor due to the importation of foreign workers. Half a million Mexican farmworkers enter the country annually under the provisions of Public Law 78—originally an emergency war measure.

Therefore, the League's legislative priorities for improving the conditions of farmworkers are the reform of Public Law 78, the enactment of a Federal minimum wage for farmworkers, and the protection of their right to bargain collectively.

We will also request legislation (1) establishing employment guarantees for domestic farmworkers—a protection now accorded to foreign workers; (2) establishing employment referral centers in areas of employment to aid farmworkers and employers; and (3) controlling and regulating crew leaders to prevent their exploitation of the migrant workers whom they recruit. We also advocate education, health services, and the regulation of the employment of their children, and the removal of State and local residence requirements for eligibility to health and welfare funds.

CONSUMER PROTECTION AND INFLUENCE

The Consumers League is well aware that an individual's economic well-being is not completely assured by the payment of an adequate minimum wage or the protection of a comprehensive social security system. We know that his standard of living is materially affected by such other things as the purity of the food available for his consumption, the rates he is charged for credit extended him, and the efficacious or harmful qualities and price of the drugs he buys. Much is needed to protect the consumer's interests in such matters, which are largely beyond his individual control, irrespective of his economic status.

Therefore, the National Consumers League will encourage and support legislation that—

1. Provides protection for the consumer in the production and marketing of food and drugs.
2. Safeguards consumer interests through the regulatory agencies and executive departments which control the price and the furnishing of gas, electricity, transportation, communications, etc.
3. Requires the disclosure of the actual interest rates charged on installment purchases and loans.
4. Establishes a consumer department in the executive branch of the Federal Government to represent the interests of consumers, as the Department of Agriculture, Department of Commerce, and Department of Labor represent the interests of particular economic groups.
5. Initiates committees in Congress to study and consider legislation to deal with the problems of consumers as other committees now act on other economic problems.

PROTECTION AGAINST THE DANGERS OF RADIATION

Closely allied to consumer problems is the rapid rate at which radiation is increasing throughout the world and the serious and insidious dangers which accompany it. Uncontrolled radiation kills, maims, and endangers, whether it comes from nuclear warheads or peacetime industrial pursuits. There are no easy means of avoiding the dangers of radiation. But solutions of the problems must be sought, found, and applied. The health of future generations, as well as that of our own, depends upon man's search for means of counteracting the evil

effects of radiation at the same time he develops the great potentials of atomic energy for man's advancement.

We will, therefore, continue to follow with care the course of atomic energy development, and support such measures as we believe should be taken to protect the health and life of men.

RECESSION PREVENTION

As a nation, we can ill afford the economic waste and human suffering caused by periodic unemployment and business recessions. The new administration has promised a constructive program for economic recovery and the expansion of national production. Parts of that program have long been on the Consumers League list of must legislation. Therefore, we shall continue to support a bill providing for the redevelopment of depressed areas, Federal standards for unemployment compensation laws, and the attainment of full employment.

CONCLUSION

The National Consumers League regards these proposals as a means of meeting desperate human problems facing America in an ever more complex world. America has the ability, the capacity, and the strength to meet these problems.

Mrs. NEWMAN. In the more than 60 years since the founding of the National Consumers League, our organization has devoted its efforts to the improvement of working and living conditions of Americans. As consumers, we believe that we have an active responsibility for the protection of our standard of living. Over the years we have given significant support to the legislative programs which have promoted the well-being of our society, starting with our efforts on behalf of women exploited in the sweatshops of the 1890's, going through our work toward the establishment of the Food and Drug Administration in the early 1900's, and on up to the present time, when we are actively engaged in attempts to improve conditions for migratory workers, and to efforts on behalf of that largest of unorganized groups in or economy—the consumer. I must say I was very pleased to hear real concern expressed by some of the members of your committee about the consumer because too often, since all of us are consumers, and there is no one organization or agency of the Government concerned with the welfare of the consumer, the point of view of the consumer is not really represented.

We know that consumers are vitally and deeply concerned, not only with the quality and safety of the products they purchase and use, but also with the cost of these products. The league is, therefore, strongly opposed to the provisions of House Joint Resolution 636 and H.R. 10335, since we believe that they would operate not only against the consumer but against the strength and vitality of our economic system.

Traditionally, Americans have reiterated the belief that only through adherence to the basic American principle of free competition has our economy been able to keep dynamic and vigorous. Competition throughout the distribution system is an important factor in the strengthening of that system and should not be prevented. It should be encouraged. Without price competition, the substance of true competition disappears. Adoption of these bills would result in elimination of competition at all levels of distribution and even of manufacture. It would, without legalizing horizontal agreements, in fact, produce the same results, since all distributors would be given authority to maintain fixed sale prices. It is totally inconsistent with our antimonopoly legislation and with our

concept of the importance of free competition in our economy, as the Federal Trade Commission testified. And the Attorney General's National Commission to study the antitrust laws in 1955 reported that, "any operative fair-trade system facilitates horizontal price-fixing efforts on the manufacturing and each succeeding distribution level." They further stated, "Federal price fixing exemption not only symbolizes a radical departure from national antitrust policy—but extends an invitation for further encroachment on the free-market philosophy that the antitrust laws subserve."

In the past, those agencies of the Federal Government which do have some concern with the protection of the consumer—and I refer to the Federal Trade Commission and the Department of Justice as well as other Federal agencies such as the Department of Agriculture and Department of Commerce—have opposed passage of fair trade legislation. And many individuals and organizations concerned with the well-being of consumers, and of our economy, as well as retailers who wish to be free to compete on their own terms, are also on record in opposition to such legislation. In fact, this kind of legislation is class legislation, aimed to provide some segment of our economy a degree of insulation from the wholesome corrective influence of free competition which is completely contrary to the public antitrust policy, and strikes at the heart of the free enterprise system.

The immediate results of passage of such legislation would undoubtedly be higher prices to consumers. All recorded enforcement activity has been specifically directed at requiring retailers to charge higher prices than they had been charging. I know of no record of any enforcement activity in fair trade cases where retailers were asked to charge lower prices than they had already been charging. Private monopolistic price fixing would be legalized, without the slightest restraint of any public regulatory body of abuses of such price maintenance. The minimum prices fixed under such legislation would be high enough for the most inefficient operators and for the full-service stores. Consumers would not be permitted the availability of reduction of prices due to a willingness to do without any services, fancy or otherwise. Consumers willing to pay cash, to forego delivery, and service on equipment, would still have to pay the fair trade price. This is unfair both to the consumer and to the merchant who would otherwise allow the purchaser a free choice of paying less for less service.

Various studies have been made over the years, during which this battle has gone on, showing the extent by which the bill for consumers is increased under fair trade. The estimates extend from a minimum of $1 billion annually to $10 billion, and I think some say even more. In the 1958 Senate hearing, the electric appliance trade was cited as stating that the retail prices of appliances no longer fair traded should be approximately 16 percent less than the former prices. The Department of Justice survey of 1956 showed that prices for Washington where we have no fair trade, averaged 32 percent below fair trade prices on 129 items priced. In 1958, an ad by Peoples Drug Stores in the Washington Star showed that its Maryland stores were forced to charge $100.22 for 1 each of a group of 17 items for which it charged only $71.43 in its District stores. In Washington these prices are

lower than outlets of the same chain have to charge in Maryland where they are fair traded, and the witness who preceded me gave you the estimate of what the additional cost is to the members buying in their Maryland stores than to the people who would buy in the District for fair-traded items. The existence of fair-trade legislation in Maryland thus caused consumers there to pay 40.5 percent more than we paid here in the District for the same items from the same store, refering to this group of items in the Washington Star. Many similar market-basket surveys have been made over the years—I have made some—illustrating the same point. They all show that where fair trade exists its inflexible arrangements completely negate the effects of free competition, that traditional yardstick for the protection of the public.

I have heard some people say at the hearing in the Senate, that we do not really have free competition, anyway. Well, regardless of whether we do in fact have, what some people would describe as free competition, I think that we still would want to do everything in our power to increase free competition rather than to make it difficult for free competition to exist.

Another objection to a Federal Price Fixing Act, which this would be (except in times of national emergency), and at such times you know it is the maximum prices that are set, whereas under this legislation the minimum prices would be set, is that it would force onto States which never have adopted fair-trade legislation, or that have repealed such legislation, a law, which it seems to us, should properly be left to each State and territory to decide upon for itself. This legislation, it seems to us, would be an encroachment on the rights of the individual States and contrary to our best interests.

As to the questionable arguments used by the proponents of this legislation describing it as a means of strengthening and protecting small business, many economists and experts have pointed out the true facts. As the editors of Fortune once pointed out, the "fair traders have never been able to prove that price competition has caused more merchant bankruptcies in non-fair-trade States than in those where prices are policed." Big business can, even under fair trade, through its own private house labels, sell merchandise, identical to fair-traded items, at prices much lower than the small business merchants. The wide margins on fair-trade items actually helps big business accumulate profits which makes them more able to put the squeeze on small business (1) by reducing their prices on non-fair-trade items, and (2) by giving them more money to spend on larger advertising campaigns than small business can afford.

Even if it were good for the national economy to support small business at the expense of the consumer—and I think this is questionable—this bill before you does not really give small business much protection. If the defenders of small business really wanted to enact legislation to protect that group, it could have included a provision to prevent manufacturers from supplying the large retailers with goods identical to the fair traded items, but under a private label, which is then sold at a lower cost. It is this merchandise which really hurts the small businessman whose volume is not big enough to enable him to carry a private brand. As Commissioner Dixon of the FTC pointed out—a study of the 10 largest chains showed that in the

frozen food field, 64 percent of such products sold by these stores was under packers labels.

This legislation if passed would be class legislation. It would result in giving to the owner of a trademark the right to control prices. I doubt that the Congress, when it enacted the trademark legislation, intended that the owner of a trademark be given the power to control prices. He is now protected by legislation against impairment of his monopoly of the trademark. This is all he is entitled to under the law.

The National Consumers League and the Maryland Consumers Council believe that House Joint Resolution 636 and H.R. 10335 would merely enable an organized minority to benefit legally at the expense of the unorganized purchasing public, without benefit to small business or to the economic well-being of the Nation as a whole, and we earnestly request this committee to oppose passage of this resolution.

The league appreciates the opportunity to present its views to the committee.

Mr. MACK. Thank you very much.

Mr. Dingell, do you have any questions?

Mr. DINGELL. No questions, Mr. Chairman. Thank you very much.

Mr. MACK. Thank you.

Mrs. NEWMAN. Thank you.

Mr. MACK. Mr. Thomas Rothwell?

STATEMENT OF THOMAS A. ROTHWELL, COUNSEL, O. M. SCOTT & SONS, MARYSVILLE, OHIO; ACCOMPANIED BY JOHN LEWIS, SECRETARY, QUALITY BRANDS ASSOCIATES

Mr. ROTHWELL. Mr. Chairman, I request permission for my associate and friend, Mr. John Lewis, secretary of the Quality Brands Associates, to sit beside me during my testimony to aid me with my faltering memory should this occur.

Mr. MACK. Mr. Rothwell, would you like to have your entire statement included at this point and summarize your statement, or would you like to read the statement?

Mr. ROTHWELL. No, Mr. Mack. I would like to submit my statement for the record and limit my oral testimony to a few extemporaneous remarks predicated largely on that which has been heard by this committee.

Mr. MACK. Without objection, the entire statement will be included in the record at this point.

(The statement referred to follows:)

STATEMENT OF THOMAS A. ROTHWELL

Mr. Chairman, my name is Thomas A. Rothwell. I am appearing here today in the capacity of special counsel to Quality Brands Associates, a national organization of manufacturers who are deeply concerned with the orderly marketing of their branded and trademarked products. I am counsel to the O. M. Scott & Sons. Co., Marysville, Ohio. I have represented many nationally known producers of trademarked commodities. I am a former trial attorney of the Antitrust Division of the U.S. Department of Justice.

My appearance before this committee today is for the purpose of stating the more salient features of the legal and economic background of the quality stabilization bill. It is also to offer a section-by-section analysis of the bill.

The businessman is again before you in Congress, Mr. Chairman, because he has been deprived, in effect, of all forums but Congress, before which to plead his case.

It is said that Congress is the only constitutional arbiter with respect to conflicting views of national economic policy.

The ominous situation, however, is that the Federal Trade Commission and the Department of Justice have assumed authority in determining what the national economic policy should be. Whether this assumption of authority is constitutional or unconstitutional is beside the point, unless Congress now acts firmly with respect to this quality stabilization bill. Otherwise it will surely be too late to "lock the barn door" for the damage will be irreparable.

Twice in the last 25 years Congress has given overwhelming approval in substance to the rights of resale price maintenance by enactment of the Miller-Tydings Act and the McGuire Act. Yet the Federal Trade Commission and the Department of Justice seem to ignore your congressional mandates in this area. They have harassed, undercut, hampered, and destroyed the legal posture of resale price maintenance as well as the possibilities of marketing products thereunder.

The Honorable Paul Rand Dixon, Chairman of the Federal Trade Commission, a man continuously in the employ of the Government since the completion of his schooling, addressed the Consumer Products Division of the National Electric Manufacturers Association less than 3 weeks ago on the subject "Current Pricing Problems in the Distribution of Electrical Appliances."

Mr. Dixon said: "Many manufacturers of consumer goods have seen fit to set up highly restrictive schemes of distribution, imposing numerous restraints on the way their customers conduct their businesses. They call this, quite euphemistically, the orderly marketing of goods.'"

Mr. Dixon then warmed up in his crusade for the abolition of property rights by declaring: "A manufacturer of a product, once he has sold it for a price satisfactory to himself, has no further right of control over it. For him to thereafter reach down to the level of his customers and prevent them from competing with each other as to price, is an unlawful restraint of trade."

This warning by Mr. Dixon to the brand name owners of America that he is making the law does serve one constructive purpose. It puts the issue of the quality stabilization bill into sharp focus for consideration by this Congress.

The central concept of the quality stabilization bill is that the brand name or trademark used to identify goods constitutes a separate property interest, severable from the goods themselves, and, like other property interests, entitled to be protected by law.

Mr. Dixon's theories to the contrary, this is not a new concept. In fact, a unanimous U.S. Supreme Court, in the *Old Dearborn* case (299 U.S. 183, 1936), explicitly recognized this concept, saying:

"We are here dealing not with a commodity alone, but with a commodity plus the brand or trademark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trademark stands. Appellants (the resellers) own the commodity; they do not own the mark or the goodwill that the mark symbolizes. And goodwill is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation."

Mr. Dixon also is surely aware that this principle was reiterated in the recent case of *G.E.M. Sundries Co.* v. *Johnson & Johnson, Inc.* (283 F. 2d 86 (9th Cir. 1960)), where the court said:

"Since the owner of the trademark has a continuing and protractable interest in the property of trademarked goods by another, he has a right, in the protection of his interest, to impose a condition upon the resale of that property (283 F. 2d at p. 92).

The controversy between those who have a stake in orderly marketing—because their money is invested therein—and the punitive economic theorists, such as Mr. Dixon, has now continued for more than a half century.

Until 1911 the general thrust of the law was that resale price maintenance contracts were valid and enforcible. There is not a scintilla of evidence to suggest that the Congress considered that resale price maintenance contracts were inimical to competition in 1890 when it enacted the Sherman Act.

However, in 1911 the Supreme Court in the famous *Dr. Miles Medical Co.* case (220 U.S. 373) ignored 21 years of peaceful coexistence between the Sherman Act and resale price maintenance, as well as more than a century of com-

mon law experience, and decided by a one-vote margin that the Congress meant to outlaw resale price maintenance contracts when it enacted the Sherman Act.

Since then, Federal administrative agency action and subsequent court decisions largely proceeded on the basis that the presumed prohibition of the Sherman Act against resale price maintenance was graven on stone, a fixed and unalterable point of reference in the economic firmament, despite overriding congressional commands reflected in the Clayton Act of 1914, the Miller-Tydings Act of 1937 and the McGuire Act of 1952.

The Department of Justice and the Federal Trade Commission have declared that the "oriental bazaar" way of doing business shall be the national economic policy. In complaint after complaint, indictment after indictment, and order after order, these agencies, oblivious as they are to the realities of the marketplace, have unilaterally determined that competition between one manufacturer's brand against all other manufacturers' brands is not enough. They insist that any effort by a manufacturer to obtain orderly marketing by limiting destructive self-competition as to a single brand is a violation of the antitrust laws.

Typical of the harassment by the Federal administrative agencies is the recent decision by the Federal Trade Commission involving the Sandura Co. Sandura distributed through exclusive dealerships. It had a policy of price maintenance at the retail level. In the language of the hearing examiner:

"The record contains a number of instances in which dealers who sold below the recommended minimum price were either disfranchised or were threatened with disfranchisement * * * in the opinion of the examiner it makes little difference, so far as the issues in this case are concerned, whether respondent permitted occasional or minor deviations from its recommended minimum prices, or required strict adherence to such prices."

Although Sandura cited the McGuire Act—enacted by you in 1952—as a defense to the charges made against the company, the hearing examiner somehow reached these novel conclusions:

(1) That it is unlawful to fair trade in nonsigner States, even though the States have a valid and existing Fair Trade Act as to contracting parties.

(2) That the device of terminating pricecutters as a method of enforcement is unlawful.

(3) That price-maintenance agreements and fair trade agreements are somehow different—the former being illegal, the latter being permissible.

The hearing examiner also found illegality in the territorial franchising of Sandura's distributors. The hearing examiner concluded by rejecting Sandura's proposed economic defense and justification as irrelevant. The decision means in effect that Sandura cannot, even when acting alone, engage in orderly marketing and price maintenance practices.

The Department of Justice and the Federal Trade Commision now seem to be moving toward the extreme position of "per se" illegality as to practices that have been sanctioned by numerous common law and congressional statutory precedents.

General Motors was recently indicted in California for conspiracy to keep Chevrolets out of discount channels. The position of the Department of Justice is that retailers are free to divert to discounters, and the producer, in effect, commits a crime if he tries to prevent this illicit traffic. Consider as well the plight of the franchised Chevrolet dealer in California. He can shut down his service facilities and go discount, or else he can become bankrupt by operating a free showroom for "brokers" and "referral services."

Orderly marketing in any sense is impossible if discounters have the right—enforcible by law—to purchase any trademarked product they choose to handle. Conversely, the Government seems to be saying that a manufacturer risks fine and imprisonment if he seeks to keep his products out of discount channels. If the Government's views are to prevail, no restriction on either the buyer or the seller will be countenanced. Price maintenance, quality distribution, and functional levels all are to go by the board.

It is a matter of common knowledge that the so-called discounter revolution is creating vast changes in our distribution pattern. Discounters now are well financed and well represented. Organized discounters have gone on record as predicting they will control, through 11 national chains, in excess of 80 percent of the Nation's retail business within the next 5 years.

The discounters have now learned how to utilize governmental pressures—through the Antitrust Division and the Federal Trade Commission—to tip the scales in their favor in order to win their economic battles against those who stand foursquare for orderly marketing.

Our Nation now finds itself in full-scale retreat from our ideals of "a government of laws; and not of men."

The quality stabilization bill is the last great hope for the American businessman—manufacturer and reseller—interested in sanity in the marketing of trademarked products.

The quality stabilization bill is a challenge to this Congress to halt and reverse the damage now being done to our free enterprise system.

The quality stabilization bill should be the answer of Congress to the central and basic question: May a trademark owner protect his property rights against a third party who seeks to exploit—to the point of destruction—that which he did not create?

One of the major questions that has been raised about the quality stabilization bill is in respect to its relationship to fair trade. Is this merely fair trade by another name? We submit that it is not: one facet of the quality stabilization bill deals in part with the same subject matter (resale price maintenance) as did fair trade, but in a wholly different manner.

The quality stabilization bill and fair trade have this much in common: they both oppose the prevalent Department of Justice-Federal Trade Commission view that price maintenance practices are illegal, conspirative, and indefensible per se. This is the major point of contact between fair trade and the quality stabilization bill. Both approaches say, in effect, that resale price maintenance practices are not inherently illegal.

Therefore, if one defines "fair trade" as expressing an attitude about the social or economic desirability of resale price maintenance, then it is possible to argue that the quality of stabilization bill is a fair trade bill. On the other hand, and more realistically, the quality stabilization bill proceeds on a wholly different basis than fair trade. It provides for brand name control—not price control. This is reflected in the broader coverage of the quality stabilization bill. Fair trade is limited in application to resale price maintenance. Quality stablization extends protecton against abuses of the brand name not only with respect to pricing, but also to harmful "bait and switch" tactics and to misrepresentations of the trademarked product.

The difference in approach, namely, the "brand control" of the quality stabilization bill contrasted with the "price control" of fair trade, is brought into sharp relief by focusing on the remedy of the typical Fair Trade Act as compared to the remedy provided by the quality stabilization bill. Under the fair trade approach the producer would go into court and ask that a discounter raise his prices. Under the quality stabilization bill the brand name owner asks the court to prevent the discounter from misusing his brand name.

Not only is the remedy graphically different, but the basic legal theory is wholly independent of fair trade. Fair trade is based on contract. Fair trade laws provide that the signature of one retailer to a contract binds all retailers in the State, whether or not they are parties to that conract. This of course has proven to be the Achilles heel of fair trade, as many State courts have found the so-called nonsigner clause repugnant to State constitutional requirements. Compare this to the basis of the remedy of the quality stabilization bill.

The quality stabilization bill is property-confirming legislation. It protects the property in the brand name by preventing its unauthorized use. It is submitted that the ownership of private property and the regulation of private property—in the sense that it can be controlled by its owner—constitutes the very basis of the free enterprise system. To own private property means in effect that one has certain rights to exclude others from the use and enjoyment thereof. Otherwise there is no such thing as private property.

The quality stabilization bill recognizes the property right that exists in a maker's reputation, his good name, his trademark. The quality stabilization bill provides in substance that the owner of the brand name—the reputation—can forbid the commercial use of that reputation to those who would abuse and destroy it.

Our best analogy comes from the law of real property. If you own a parcel of land, that ownership carries with it the right to exclude others as you will from the use of that property simply because it "belongs" to you. Now it may be in your interest to permit others to use your property, but if your ownership means anything, it means that you can deny the use of your property to those who would abuse it. This, in essence, is the quality stabilization bill.

The quality stabilization bill is not price-fixing legislation. It is brand name control legislation and it does not involve any public agency in the enforcement

of its rights. And, because of its form and its approach, the protection of property rights in trademarks, it neither overrules State supreme court decisions in this area nor does it override declared policy at the State level.

SECTION-BY-SECTION ANALYSIS

The quality stabilization bill takes the form of an amendment to the Federal Trade Commission Act. It is preceded by six "Whereas" clauses in which the economic realities of the 1960's are spelled out. These economic realities referred to in the "Whereas" clauses are amply supported by testimony submitted to this committee, as well as being part of the record in prior hearings by the Senate and House on such subjects as discount house competition. Although the "Whereas" clauses do not become part of the law, they do provide a background indicating the necessity for the legislation. The "Whereas" clauses are an important part of the legislative history of this measure and, taken together, constitute a complete justification for the legislative proposal that follows.

The first provision of the quality stabilization bill is subsection (7) because it follows subsection 5(a) (6) of the Federal Trade Commission Act, as amended. Subsection (7) is a recognition and congressional confirmation of the property rights that a brand name owner has in his trademark. Subsection (7) states in substance the same recognition of this property right as is contained in the *Old Dearborn* case, and other legislation heretofore enacted by Congress, notably section 526 of the Tariff Act of 1930.

Subsection 8.—This subsection of the quality stabilization bill is the action section. It provides that the brand name owner may limit the use of his brand by any reseller that engages in any of the following practices:

(*a*) Bait merchandising.
(*b*) Selling at other than the established price.
(*c*) Misrepresentation.

If any of these three acts are committed, the offending person's right to make further use of the brand name may be withdrawn by its owner. This is subsection 8 of the proposed legislation.

Subsection 9.—This subsection protects, in a due process sense, the rights of the reseller in the merchandise on hand after his right to use the brand name has been revoked. Such a seller may follow one of two courses under subsection 9. First, he may sell out his present stock of inventory providing he respects the rights contained in section 8. That is, he could sell the merchandise but he couldn't continue the practices such as bait merchandising, price deviation or misrepresentation that led to the revocation. The brand name may be used in the selling out of present inventory but it cannot be used in respect to additional inventory, acquired after the notice of revocation has been received.

The second route that a reseller whose rights to use the brand name have been revoked may follow, is to furnish the brand name owner with a list of his current inventory, together with the prices paid, and offer to sell the entire inventory to the brand name owner at that total price. If the brand name owner does not accept this offer within a 10-day period, then the reseller may sell out that inventory at his own price—using the brand name. If he does this, he must post notice that his right to make further use of the brand name, after the inventory has been depleted, has been revoked.

By providing these alternate routes to take care of the problem of current inventory when revocation notice is received, the investment of the reseller in the branded inventory is protected. There is no deprivation of property that may otherwise give rise to a due process question. In reality, the legislation is most evenhanded in conserving and protecting a reseller's investment in merchandise, even though he has violated the law in respect thereto.

Subsection 10.—This subsection is the remedy provision. In the event a reseller continues to use the brand name after his right to do so has been revoked under subsection 8 and his inventory problem has been resolved under subsection 9, then subsection 10 provides a legal remedy. The legal remedy takes the form of a civil action for damages, plus injunctive relief, and gives the Federal district courts jurisdiction, without reference to any minimum jurisdictional amount. The remedy section also provides that the brand name owner, whose right of revocation has been flouted, may recover the cost of suit together with a reasonable attorney's fee. Years of experience with discounters would seem to indicate that anything short of a provision with teeth will be insufficient to effect compliance with the law.

Subsection 11.—This subsection of the quality stabilization bill provides that the enforcement of rights by the brand name owner cannot be discriminatory. That is, the brand name owner cannot enforce against one reseller without also enforcing against others who, to his knowledge, are also violating the law.

This seems fair because the right of revocation (a deterrent of maximum effectiveness) may be exercised merely by mailing notice to the offending reseller. It does not place any undue burden on the brand name owner and yet insures that enforcement of the remedy will be nondiscriminatory.

Subsection 12.—The subsection appears as an acknowledgment that the remedy provided by the quality stabilization bill is not exclusive, when the question might otherwise involve trademark infringement or other aspects of unfair competition. In other words, Congress is not repealing any of the present laws relating to the protection of trademarks when it enacts the quality stabilization bill.

Subsection 13—This subsection is jurisdictional and expresses the intent of Congress to use the full sweep of its power over commercial transactions. The jurisdictional scope of this act will be identical to that of the Lanham Trademark Act. That is, the interstate commerce in the brand itself is sufficient to establish Federal jurisdiction over the local use of the brand for the reason that such local misuse inevitably affects interstate traffic in that brand. Subsection 13 also defines person to mean any form of business.

Subsection 14.—This subsection has several sections, as follows:

(1) It contains a directive from Congress to the antitrust enforcement agencies to the effect that the exercise of brand name control by the owner, as provided in the quality stabilization bill, shall not be construed by a hostile Government agency to be a violation of the antitrust laws. This provision is necessary to remove what might be a latent conflict between the rights granted under the quality stabilization bill and a future interpretation of the Sherman Act or the Federal Trade Commission Act.

(2) Subsection 14 further overrules the so-called McKesson-Robbins doctrine, in that the rights of a brand name owner to establish prices shall not be less if the owner engages in multiple distribution, even if he sells in competition with his resellers. Such would be the case if a brand name owner, manufacturing a trademarked commodity, also operated retail stores, at the same time selling to wholesalers and retailers. Since such a manufacturer, with a complex distribution system, has the same economic interest in his brand name as does a manufacturer with a simple distribution structure, he should have the same rights to protect himself from abuses to his trademark. There is a proviso, however, that the brand name owner, selling in competition with his resellers, must himself sell at the same price that he sets for that level of distribution. Obviously, it would be unethical to allow a brand name owner to put himself in a position whereby he could offer price advantages to certain customers, as compared to his resellers.

(3) The last provision of subsection 14 obviates the possible construction of this measure as a repealer of the Miller-Tydings Act, the McGuire Act, the Lanham Trademark Act, or any State law relating to price maintenance and the protection of trademarks. It is not the intent of Congress to repeal or modify any of this preexisting legislation and this proviso sets this out specifically.

This concludes my statement subject to any questions.

Mr. ROTHWELL. Mr. Chairman and members of the committee, I am deeply appreciative of the opportunity to appear here and I am especially appreciative of the courtesies and consideration shown to me by the chairman. I appear here in the capacity of special counsel for Quality Brands Associates, the proponents of this legislation. My present connection is as counsel to the O. M. Scott & Sons Co., Marysville, Ohio, producer of grass seed, fertilizer, and many other products for the care of lawns and gardens. In that capacity I am deeply involved on a day-to-day basis with this whole subject of orderly marketing, resale price maintenance, and permissive limitations on distribution.

My qualifications to speak I do not want to belabor. I am an attorney, of course, a member of the bars of Michigan, Illinois, and New York. I was formerly with the Antitrust Division of the Depart-

ment of Justice. For some years I served as counsel to the American Fair Trade Council operating from New York. At the moment I am special counsel to QBA, serving on an honorary basis, but nevertheless, trying to do my bit for the case.

I have been associated with Mr. Anderson, who has testified before this committee, for many years, president of the Quality Brands Associates, and have worked with the sponsors, drafters, and proponents of this legislative proposal. I feel, Mr. Chairman, that at this point a somewhat extemporaneous statement of what the measure comprises might be helpful for the purposes of clarification of the record. I have sat here and heard witnesses discuss this measure in terms of a fair trade proposal, in terms of price fixing, in terms of monopolization, and I suggest that witnesses who testify along these lines have obviously missed the major point of the proposal. This proposed legislation is in effect an attempt to compromise the competing views of those who believe in fair trade in its conventional form of strict resale price maintenance and those who believe in the right of the discount house to price their products that they have purchased at any price they choose. The concept, although not original, is original in legislative form. It is based upon the property right that a producer has in his branded and trademarked article as it moves through the channels of distribution.

As the Supreme Court has said in the *Old Dearborn* case, the purchase of a trademarked commodity is a complex transaction. The purchaser obtains the product itself and also the trademark. This legislation is predicated on the proposition that the trademark owner retains some degree of interest in the trademark as it moves along the channel of distribution. It is his reputation. It is his consumer franchise which is being exploited, and it is submitted that he has some measure of right to determine that the exploitation of this consumer franchise be in a manner not inimical to the interests of those people who created the values involved. This is not fair trade legislation. It is not fair trade legislation because no one can be required to raise, lower, or to sell at any particular price. The legislation takes the form of brand name control.

Mr. DINGELL. Just a minute. Fair trade fixes prices, does it not?

Mr. ROTHWELL. Well, Mr. Dingell——

Mr. DINGELL. Just a minute now. Fair trade fixes prices, does it not?

Mr. ROTHWELL. I do not know what you mean, Mr. Dingell.

Mr. DINGELL. Take the fair trade bill before this committee in the last Congress. You appeared. That proposal fixed prices, did it not?

Mr. ROTHWELL. Are you talking about H.R. 1253?

Mr. DINGELL. I am talking about the fair trade bill we had in this committee during the previous Congress. That bill fixed prices, did it not?

Mr. ROTHWELL. I am trying to understand what you mean by "fixed prices."

Mr. DINGELL. It gave the manufacturer the power to fix prices. Do you deny that that bill gave the manufacturer the power to fix prices, and do you deny that this bill gives the manufacturer the power to fix prices?

Mr. ROTHWELL. Mr. Dingell, please let me try to answer you.

Mr. DINGELL. This is a very simple question. Did the fair trade bill last time give the manufacturer the power to fix prices?

Mr. ROTHWELL. It is deceptive.

Mr. DINGELL. It is not deceptive. Tell me what is deceptive about the question. Does the fair trade bill give you the power to fix prices? You are a manufacturer. It does, does it not? Answer just "yes" or "no."

Mr. ROTHWELL. Would you let me answer the question?

Mr. DINGELL. If you can do it in a few words I would appreciate it. Fair trade gives the manufacturer power to fix prices, does it not?

Mr. ROTHWELL. If you mean by "price fixing"——

Mr. DINGELL. I said fair trade gives the manufacturer power to fix prices. That is a fairly simple statement. Do you deny that?

Mr. ROTHWELL. I neither admit nor deny. I am trying to give a complete answer.

Mr. DINGELL. Answer just "yes" or "no." Does it or does it not?

Mr. ROTHWELL. I submit that——

Mr. DINGELL. I do not think you are being responsive at all. I would like to have a responsive answer. Does fair trade give the manufacturer the power to fix prices?

Mr. ROTHWELL. Fair trade, Mr. Dingell, gives the manufacturer power to engage in resale price maintenance.

Mr. DINGELL. That is fixing prices, is it not?

Mr. ROTHWELL. Not in the antitrust law terms; no, Mr. Dingell.

Mr. DINGELL. I am not talking in antitrust law terms. I am just talking plain, ordinary commonsense.

Mr. ROTHWELL. You are talking words of art in an antitrust sense when you say fixing prices.

Mr. DINGELL. I did not say that. I said power to fix prices. I did not say collusive price fixing or anything of that sort. I simply said it gives the manufacturer the power to fix prices. In a sense, fair trade prices are fixed prices, are they not, and the manufacturer has the power to fix prices? I am not trying to dig you a pit, or trap you, or ensnare you, or anything. I just asked you a simple question and I think I am entitled to a simple answer, yes or no. Fair trade prices are fixed prices and the manufacturer fixes them; is that not a fact? The manufacturer fixes fair trade.

Mr. ROTHWELL. He sets the prices at which his product will be resold; yes, Mr. Dingell.

Mr. DINGELL. And the same thing obtains under this bill; is that not a fact?

Mr. ROTHWELL. No, Mr. Dingell.

Mr. DINGELL. Will you tell me, then, that under House Joint Resolution 627 the manufacturer will not have the power to fix prices?

Mr. ROTHWELL. Not in the same sense and context; that is correct.

Mr. DINGELL. Then if we strike all of the language dealing with fixed prices in this bill and the power of the manufacturer to establish resale prices, you will have no objection, I assume?

Mr. ROTHWELL. Yes, Mr. Dingell, I would have objection.

Mr. DINGELL. Just a minute. Is it not the power of the manufacturer here to fix prices, the whole guts of this bill and nothing more or less than the power to fix prices?

Mr. ROTHWELL. No, Mr. Dingell.

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Mr. DINGELL. That is the whole heart, liver, and lungs of the bill. You name me one other significant difference between this bill and the fair trade bill which you opposed during the previous session of Congress.

Mr. ROTHWELL. Mr. Dingell, may I answer?

Mr. DINGELL. Yes.

Mr. ROTHWELL. I did not propose that bill.

Mr. DINGELL. I said that you opposed during the past session.

Mr. ROTHWELL. I did not oppose or propose that measure, Mr. Dingell.

Mr. DINGELL. You mean to say that you and the Quality Brands Associates did not oppose the fair trade bill in the last session of Congress?

Mr. ROTHWELL. No, Mr. Dingell.

Mr. DINGELL. If I read it out of the hearings would you be surprised?

Mr. ROTHWELL. We endorsed the Boykin bill which was present for the committee's consideration before that session of Congress.

Mr. DINGELL. You did not endorse the fair trade bill the last session of Congress?

Mr. ROTHWELL. No. My testimony, Mr. Dingell, was limited to the Boykin bill.

Mr. DINGELL. But this bill and the fair trade bill both fix prices; do they not?

Mr. ROTHWELL. In the context of our prior discussion——

Mr. DINGELL. They establish prices. They fix prices. Let us say they establish prices. Established price is the same as a fixed price; is it not?

Mr. ROTHWELL. They give the manufacturer the right to establish resale prices without antitrust injury to himself.

Mr. DINGELL. All right. I was not getting into the question of antitrust. I was just saying they are fixed prices; are they not? There is no price competition where prices are fixed, is there?

Mr. ROTHWELL. Yes, Mr. Dingell, there often is——

Mr. DINGELL. Where is the price competition?

Mr. ROTHWELL. There is price competition.

Mr. DINGELL. Will there be any price competition on any of these commodities whose prices will be fixed under this bill?

Mr. ROTHWELL. All of them are subject to price competition.

Mr. DINGELL. There would not be any price competition at all.

Mr. ROTHWELL. All of them are subject to price competition from competing brands, you see.

Mr. DINGELL. I am reading testimony here from Mr. Thomas Rothwell during the last session:

We believe the Boykin bill to be fully valid and wholly constitutional. The Harris bill we feel is on much more dubious grounds.

Did you not oppose the Harris bill and did you doubt the constitutionality and also as being of questionable effectiveness during the previous session of Congress?

Mr. ROTHWELL. Mr. Dingell, in that testimony you are reading I was supporting the Boykin bill as the superior approach. I opposed nothing.

Mr. DINGELL. It does not sound like an endorsement of the Harris bill to me.

Mr. ROTHWELL. That is exactly what I have said.

Mr. DINGELL. Do you doubt the constitutionality?

Mr. ROTHWELL. That is exactly what I said. I neither endorsed it nor opposed it. My testimony before Congress was directed to the Boykin bill, which was the predecessor bill to the present Madden bill introduced also by Mr. Harris and Mr. Mack, which is presently the subject of committee consideration.

Mr. DINGELL. The simple fact of the matter is you are in here arguing in favor of fixed prices, prices which are fixed by the manufacturer, and if we were to take that out of this bill you would oppose it, would you not?

Mr. ROTHWELL. That is a proposition to which I would not subscribe, sir.

Mr. DINGELL. You want the manufacturer to have it and then you do not want the manufacturer to have it.

Mr. ROTHWELL. I want the manufacturer free to establish resale prices on trademarked commodities when they are in competition with others without running afoul of the antitrust laws.

Mr. DINGELL. Let's discuss this thing on your ground. You say that fixed prices or price fixing is a work of art, is that correct?

Mr. ROTHWELL. That is correct.

Mr. DINGELL. In the antitrust laws?

Mr. ROTHWELL. That is correct, Mr. Dingell.

Mr. DINGELL. That means that in violation of the antitrust law the manufacturer fixes prices, am I right?

Mr. ROTHWELL. That is correct.

Mr. DINGELL. And engages in questionable practicies, am I correct?

Mr. ROTHWELL. Illegal per se practicies.

Mr. DINGELL. Illegal, collusive price fixing, am I correct?

Mr. ROTHWELL. Price fixing, collusive price fixing, is unlawful conduct under the antitrust laws.

Mr. DINGELL. Under your bill here the person, the owner of the trademark here, establishes prices, is that right?

Mr. ROTHWELL. That is correct, Mr. Dingell.

Mr. DINGELL. And to do so he gets an exemption from the antitrust laws, does he not?

Mr. ROTHWELL. No. He needs statutory permission by Congress.

Mr. DINGELL. Yes, he gets the power to establish prices and he gets an exemption from the antitrust laws to do it under your bill. So, for all intents and purposes the language of fixed prices in the worst connotation is legalized by this bill, because he gets the power to fix prices and then he gets an exemption from the antitrust laws to do it so he can engage in the most callous kind of price fixing and he has an exemption under this bill. Do you deny that?

Mr. ROTHWELL. Yes, Mr. Dingell, I will deny that.

Mr. DINGELL. He is exempt from the antitrust laws, right, under section 14?

Mr. ROTHWELL. Section 14 says that the exercise of the rights granted by this measure shall not be considered to be a violation of the antitrust laws, correct?

Mr. DINGELL. And one of the rights that is enumerated is the power to fix prices, am I right; to establish a price?

Mr. ROTHWELL. Yes, Mr. Dingell; to establish a resale price, yes.

Mr. DINGELL. And when you establish that price you fix it, do you not?

Mr. ROTHWELL. No, Mr. Dingell.

Mr. DINGELL. What do you do when you establish a price, then?

Mr. ROTHWELL. I am sorry if I seem difficult, sir.

Mr. DINGELL. You do not seem difficult. You do not seem responsive. I think my questions are fairly simple. The simple fact of the matter is you have a bad bill here. It destroys the antitrust laws and eliminates price competition, gouges the consumer. It has a number of other bad features which I would be happy to enunciate to you, but the simple fact of the matter is this bill gives exemption from the antitrust laws to fix prices. You tell me why it does not and I will be happy to hear it.

Mr. ROTHWELL. Will you allow me to, sir?

Mr. DINGELL. Yes, I am asking you to.

Mr. ROTHWELL. The phrase you use, "fixing prices," a price-fixing act in an economic sense occurs every time there is a purchase or sale. If I sell my home, for example, to a purchaser, we arrive at a price. In an economic sense this is price fixing. However, in the antitrust sense, in the sense of the statute, if you will, price fixing connotes illegal conduct. It connotes collusive conduct and it connotes monopolization.

Mr. DINGELL. What that is is prices which are established with intent to control and dominate the market and to engage in other price practices which are violative of the antitrust law, am I correct?

Mr. ROTHWELL. I do not understand. Price fixing as used in an antitrust context is definitely forbidden.

Mr. DINGELL. Yes, I agree. It is establishing prices with intent to control and dominate the market, eliminate competition, and do certain other acts and actions which happen to be violative of the antitrust laws, is that correct?

Mr. ROTHWELL. That is right.

Mr. DINGELL. Just a minute. This bill establishes in the manufacturer the power to establish prices, does it not?

Mr. ROTHWELL. Yes.

Mr. DINGELL. And it then says that—

No exercise of any right or remedy provided in paragraphs (7) to (13) inclusive of this subsection shall be construed to be a violation of any of the Antitrust Acts.

Mr. ROTHWELL. Right. That is correct.

Mr. DINGELL. And the establishing of prices is one of the powers which is vested in the manufacturer, right?

Mr. ROTHWELL. That is correct.

Mr. DINGELL. This means that the minute that the prices are established the Department of Justice cannot go into the reasons why, manner in which, or anything else with regard to those prices which were established. Am I right?

Mr. ROTHWELL. That is the present law in many jurisdictions.

Mr. DINGELL. That is correct. So, therefore, this sanctifies and gives the imprimatur of law and the Congress and everything else for

illegal price fixing by the antitrust laws because of the exemption which is given down here in section 14.

Mr. ROTHWELL. To that I don't subscribe, sir.

Mr. DINGELL. Beg pardon?

Mr. ROTHWELL. With that conclusion I do not subscribe, sir.

Mr. DINGELL. Why? You are the expert on this subject. I am not.

Mr. ROTHWELL. I don't purport to be an expert. I don't purport to be an expert, Mr. Dingell, but the use of the phrase "price fixing" in an economic sense connotes——

Mr. DINGELL. We are in wholehearted agreement on this part. You tell me why it doesn't offer us that kind of——

Mr. ROTHWELL. Every time a sale is made there is a price fixing. If price fixing in the economic sense, the answer is affirmative. If you mean price fixing in the antitrust sense, the answer is negative.

Mr. DINGELL. I mean price fixing in the antitrust sense just so we have this clear on the record.

Mr. ROTHWELL. In that sense, then what this bill proposes is not price fixing in the antitrust sense.

Mr. DINGELL. Do you deny that this bill vests in the manufacturer the power to fix prices or to establish prices? Let's use your term, "to establish prices." Do you deny that the bill will vest in the manufacturer that power?

Mr. ROTHWELL. It vests in the manufacturer the power to engage in resale price maintenance, correct.

Mr. DINGELL. All right. We will take your term. Those in a sense are prices that establishes, is that correct?

Mr. ROTHWELL. That is correct.

Mr. DINGELL. And it gives him a complete license to do so. As a matter of fact, it gives him specific exemption from the antitrust laws, does it not?

Mr. ROTHWELL. Mr. Dingell——

Mr. DINGELL. Just a minute.

Tell me this: Is there any limitation on the power that this manufacturer has to fix prices under subsection (14) of your bill?

Mr. ROTHWELL. He can't engage in the practice if there are no substitute products available. That is one limitation.

Mr. DINGELL. That doesn't say that he cannot engage in collusion, does it?

Mr. ROTHWELL. Subsection (14) does not——

Mr. DINGELL. Where does subsection (14) say there shall be no collusion or where else?

Mr. ROTHWELL. Subsection (14) does not deal with the subject matter of collusion, Mr. Dingell.

Mr. DINGELL. Subsection (14) says:

No exercise of any right or remedy provided—

and remember the establishment of prices is a right or remedy—

in paragraphs (7) to (13) inclusive of this subsection shall be construed to be a violation of any of the Antitrust Acts.

Where is there a prohibition in that section or elsewhere in the bill against collusion, rascality, and any other sort of vicious act which would be a violation of the antitrust laws when the manufacturer establishes prices. You tell me.

Mr. ROTHWELL. But, Mr. Dingell, section 14 says the exercise of rights under this act. There is no provision under this act for the exercise of horizontal price collusion.

Mr. DINGELL. As a matter of fact, there is, isn't there?

Mr. ROTHWELL. No, there is not.

Mr. DINGELL. Apparently you haven't studied your own bill, because I would cite you the language which appears in line 25 on page 6 to line 4 on page 7. That is horizontal price fixing. It was so held. The Supreme Court so held in the *McKesson and Robbins* case. Am I right or wrong?

Mr. ROTHWELL. (Reading):

> * * * all such rights and remedies shall be available to any owner of a brand name or trademark who, in the resale of goods identified by such brand name or trademark, shall compete, at any level of distribution, with any reseller offering such goods.

Mr. DINGELL. That is right and that is horizontal price fixing and was so held in the *McKesson and Robbins* case and your bill gives exemption from that.

Mr. ROTHWELL. That is correct. Our bill would overturn the result of the *McKesson and Robbins* case.

Mr. DINGELL. Why are you doing that?

Mr. ROTHWELL. We are engaged in resale price maintenance, yes. However, we have a simple system of distribution. We sell to retailers only, so we don't have the McKesson & Robbins problem, but it is my position, as counsel of the QBA, sir, that the *McKesson and Robbins* doctrine is erroneous in that it fails to distinguish between competition between brands, which is what we mean by collusive price fixing, and price competition, with respect to the same brand.

Mr. DINGELL. You are a lawyer. You weren't sitting on the Supreme Court at that time, were you? You recognize when the Supreme Court speaks that is the law of the land?

Mr. ROTHWELL. I grant you that, of course.

Mr. DINGELL. But is there any reason why Scott or your organization should be compelled to repeal the antitrust laws of the United States in that regard?

Mr. ROTHWELL. We are not attempting to repeal the antitrust laws.

Mr. DINGELL. You seek to repeal the decision of the Court who interprets the laws, do you not?

Mr. ROTHWELL. You know as well as I do under our system of government, Congress is the arbiter of economic policy and I am appearing here as the representative of a group of people who are petitioning Congress to set an economic policy and there is nothing rascally about that, sir.

Mr. DINGELL. I am not saying anything about that at all. It is your right to appear here, but at the same time you should be prepared to justify your case. Why is this in this bill? It was not in the previous bill.

Mr. ROTHWELL. You mean this line 25 and over to the top of page 7?

Mr. DINGELL. Yes.

Mr. ROTHWELL. This language is in the bill to express the congressional intent to disprove the majority view in *McKesson and Robbins* and approve the view enunciated by Justice Harlan in *McKesson and Robbins*.

Mr. DINGELL. Did you put this language in the bill?

Mr. ROTHWELL. I don't know, frankly. This bill has been through about 60 drafts and there have been many people contributing.

Mr. DINGELL. You have been consulted in all of them.

Mr. ROTHWELL. I have been, yes.

Mr. DINGELL. As a matter of fact, you were in on the drafting of the bill and the redrafts, all of them, were you not?

Mr. ROTHWELL. Oh, yes.

Mr. DINGELL. So who put this language in this bill?

Mr. ROTHWELL. I frankly cannot recall.

Mr. DINGELL. You cannot?

Mr. ROTHWELL. I know it came into the bill.

Mr. DINGELL. Did McKesson & Robbins put it in?

Mr. ROTHWELL. No.

Mr. DINGELL. Did Esso put it in?

Mr. ROTHWELL. I don't believe so.

Mr. DINGELL. This repeals the ruling in the case of *Secatore* v. *Esso*, does it not?

Mr. ROTHWELL. Yes. We had an opinion, Mr. Dingell, if I may trace that out a little bit for you, prior to the introduction of the bill in the Senate by 10 Senators, Senator Humphrey and Senator Capehart and a number of others, 8 others. The bill was referred to the Senate legislative counsel, whose name at the moment I don't recall, but he is a former antitrust colleague, and he agreed that this language was not necessary because of the property rights concept of the bill and because of the difference in remedy between this bill and the Fair Trade Act.

Mr. DINGELL. Do you and he agree that this language was not necessary?

Mr. ROTHWELL. We agreed this language was not necessary, but it was recommended that it be put in there for clarification purposes.

Mr. DINGELL. So as a matter of fact, this language is altogether superfluous to the bill.

Mr. ROTHWELL. Not altogether superfluous. It makes clear what otherwise might be arguable.

Mr. DINGELL. But it is unnecessary. Do you endorse his opinion or not?

Mr. ROTHWELL. Yes, I do. I feel that it is better to have it in the bill so as to eliminate any questions about it.

Mr. DINGELL. But it is not necessary?

Mr. ROTHWELL. Not if you construe the bill the way he and I did. The same result would be achieved by an appropriate reading and giving the bill hospitable scope, as Justice Harlan says.

Mr. DINGELL. Of course, the courts have traditionally had the practice of construing congressional legislation fairly and hospitably, am I not correct? As a matter of fact, this is one of the acts in the statutory construction, is it not?

Mr. ROTHWELL. It is, sir.

Mr. DINGELL. So this bill is to be construed in friendly fashion by the courts, this language, you say?

Mr. ROTHWELL. No. Mr. Dingwell, you misstate what I say.

Mr. DINGELL. Tell me then. I understand this is what is in the record.

Mr. ROTHWELL. What I am saying is that the bill fairly construed would not need this language.

Mr. DINGELL. Are you telling me the courts are going to construe this in a hostile fashion?

Mr. ROTHWELL. If they act toward this the way they have acted toward other similar pieces of legislation, the construction will be narrow and restrictive, yes, sir; we expect that.

Mr. DINGELL. You are telling me that the courts are going to give this bill, then, a hostile construction.

Mr. ROTHWELL. Not hostile; narrow and limited.

Mr. DINGELL. Isn't narrow and limited possible?

Mr. ROTHWELL. I am borrowing language from Mr. Justice Harlan because he criticizes the *McKesson & Robbins* case.

Mr. DINGELL. This is rather novel for me to hear a witness come to a committee and tell me that the courts are going to give a piece of legislation a narrow construction. As a matter of fact, it is a principle of judicial interpretation of statutory language that courts always construe legislation to accomplish the purposes of Congress and the ends of Congress. Am I correct?

Mr. ROTHWELL. That is right.

Mr. DINGELL. So, obviously, we need have no fear that the courts are going to give this narrow or limited construction, do we?

Mr. ROTHWELL. Mr. Harlan——

Mr. DINGELL. Mr. Harlan was not construing this bill, was he?

Mr. ROTHWELL. Mr. Harlan was construing a Fair Trade Act in the *McKesson & Robbins* case and he in his dissent pointed out this very thing.

Mr. DINGELL. What did the majority say?

Mr. ROTHWELL. The majority said that——

Mr. DINGELL. As a matter of fact, the majority didn't say they were construing it narrowly, did they?

Mr. ROTHWELL. No, but after 25 years of fair trade experience in which manufacturers engaged in multiple complex distribution utilized fair trade, for the first time in the *McKesson and Robbins* case it was determined that this was not permitted by the fair trade statutes.

Mr. DINGELL. This was also the first time that this issue found its way to the Supreme Court, was it not?

Mr. ROTHWELL. It is the first time the question was briefed and argued before the Supreme Court. It had been before the Supreme Court in 1936.

Mr. DINGELL. This was not a sudden thing by the Supreme Court?

Mr. ROTHWELL. It had been before the Supreme Court in 1936 in the *Seagrams Distilleries* case.

Mr. DINGELL. It was not squarely before the Court in the *Seagrams* case.

Mr. ROTHWELL. No. It was before the Court.

Mr. DINGELL. But it was squarely before the Court in the *McKesson and Robbins* case?

Mr. ROTHWELL. It wasn't briefed and argued prior to 1956.

Mr. DINGELL. As a matter of fact, as a matter of statutory interpretation, the Supreme Court generally only considers those questions which are squarely before it, does it not?

Mr. ROTHWELL. That is right.

Mr. DINGELL. They rarely go off on a tangential issue.

Mr. ROTHWELL. That is correct.

Mr. DINGELL. So we would not be fair in saying that the Supreme Court had construed this statute narrowly or that this was a sudden departure from established law. This is just a question which had never previously been before the courts, so I keep coming back to the fact that this language is really not necessary to accomplish the purpose of the bill which gives this broad exemption from the antitrust laws.

Mr. ROTHWELL. We are talking about the *McKesson and Robbins* language, are we not?

Mr. DINGELL. I am just asking you if under the understanding of the *McKesson and Robbins* case that which you and I have arrived at, whether this language is necessary.

Mr. ROTHWELL. Better in the bill than not in the bill.

Mr. DINGELL. But not necessary. Let me ask you this: Isn't it possible in your mind that under certain circumstances not inconceivably the courts might have to sanction certain kinds of vicious practices which might otherwise be afoul of antitrust laws because of the language that is here?

Mr. ROTHWELL. No, Mr. Dingell, none of these practices would.

Mr. DINGELL. Would you deny that that is a definite possibility?

Mr. ROTHWELL. None of these practices, Mr. Dingell, are vicious.

Mr. DINGELL. I am not referring to the standard practices in the industry, which is with regard to price maintenance. I would say, would you deny to this committee that not inconceivably in the history of judicial interpretation of this statute that the courts might very well have to sanction vicious and unethical violations of the antitrust laws because of this language here?

Mr. ROTHWELL. I disagree with what you say wholeheartedly, sir. I think that there is nothing vicious or undesirable which is permitted by this legislation and I don't think there is anything in the legislation which would permit a court to sanction anything that was vicious or undesirable.

Mr. DINGELL. You will concede, won't you, that very probably acts which are otherwise violative of the antitrust laws at this moment, previous to the enactment of this legislation, will suddenly become lawful because of the language on page 6 at the bottom and the top of page 7?

Mr. ROTHWELL. That is a very excellent question and I would like to answer it. The acts permitted by this legislation are not violative of the antitrust laws today. They simply cannot be accomplished.

Mr. DINGELL. The *McKesson* decision is repealed.

Mr. ROTHWELL. Mr. Dingell, if I may, what is permitted by this legislation concerns the use of the trademark, conditions the use of the trademark, and denies the use of the trademark to those who do not comply with the conditions. This right does not exist today. Therefore, there is no question today about its antitrust significance, because nobody is doing this.

However, if Congress in its wisdom should enact this statute it should be crystal clear that the utilization of these rights and remedies granted by this bill do not give rise to any antitrust liability.

Mr. DINGELL. But the language in subsection (14) you still concede is not necessary to the bill?

Mr. ROTHWELL. This language starting on line 25 at the bottom of page 6, going over to line 4 at the top of page 7, was not in the original draft of the bill because——

Mr. DINGELL. You didn't regard it as necessary.

Mr. ROTHWELL. A number of us felt it was in there by implication in any event, because we were dealing not with the right of a producer in terms of interbrand competition, but of the right of a producer to protect his own property by having a remedy which impinged directly upon the use of that property and that, therefore, it would not give rise to any question under the *McKesson & Robbins* case. However, because there was some question raised, it was felt that it would be in the interest of legislative clarity to make it perfectly clear. As a proponent of this measure we are in effect saying that if a manufacturer engages in complex distribution, the remedies afforded by this bill should still be available to him because he is protecting the same property right.

Mr. DINGELL. Do any of the Quality Brand Associates members engage in this kind of distribution? You speak on behalf of the organization. I assume you would be able to tell us whether or not——

Mr. ROTHWELL. I am not too familiar with the members and their practices except as they have been clients of mine in the past.

Mr. DINGELL. Do you know of any of the members who engage in this complex method of distribution?

Mr. ROTHWELL. I would say that probably the majority of firms today, producing firms today, engage in complex distribution. My employer, the O. M. Scott & Sons Co. of Marysville, is somewhat unique in that we engage in a wholly simple method of distribution, sales to retailers only. Now, if the court should construe this measure, if enacted into law, to apply only to producers with a highly simplified distribution structure, it would not cover the ground that the proponents seek to have it cover.

Mr. DINGELL. Do you favor retailer suits in the framework of this bill?

Mr. ROTHWELL. No, I do not.

Mr. DINGELL. I assume you are speaking here on behalf of Quality Brands Associates.

Mr. ROTHWELL. I think so; yes, sir.

Mr. DINGELL. Do you favor having in this bill langauge which would permit minimum or stipulated resale prices?

Mr. ROTHWELL. Yes; I favor minimum or stipulated resale prices on the grounds that they are economic circumstances which require pricing flexibility.

Mr. DINGELL. You did not favor that last year, though, did you, or the last time this bill was up, because the quality brands bill has always provided for fixed prices, and not minimum or——

Mr. ROTHWELL. You are right, Mr. Dingell, and in a prior draft the stipulated price only appeared. In this draft stipulated or minimum appears, which I suppose establishes that one learns a little as he goes along.

Mr. DINGELL. According to the trade press, as I read it, there are amendments already drafted running around which would change this bill to conform with that practice too. Am I correct?

Mr. ROTHWELL. I worked with a group on a set of amendments which have been presented to the Senate committee.

Mr. DINGELL. They have already been approved, have they not? It is written in the trade press. I will read the article.

Mr. ROTHWELL. I worked with a group. We got a set of amendments together which were presented to Senator Monroney for his approval, the chairman of the committee in the Senate that heard this testimony with reference to this legislation. Whether or not they have been approved, or whether they are being reported in the trade press, or what the rumors are, I frankly don't know, sir.

Mr. DINGELL. The trade press says you folks are going to go to the price concept range. Is that correct? This is Drug Union Weekly. Then it says you are going to also drop the term "unfair or deceptive acts or practices."

Mr. ROTHWELL. Would you like me to talk to that one?

Mr. DINGELL. I just want to know yes or no.

Mr. ROTHWELL. Yes. I concur heartily.

Mr. DINGELL. Do you endorse that?

Mr. ROTHWELL. I concur heartily that that language should be dropped from the bill for the reason that it gives rise to a question of Federal Trade Commission jurisdiction and it is not intended to have this measure burden the Federal Trade Commission with additional duties.

Mr. DINGELL. Then bait merchandising practice and appearance selling with intent to deceive purchasers, having published misrepresentations concerning such goods, would not constitute unfair or deceptive acts or practices?

Mr. ROTHWELL. They do, but not in terms of this remedy. Mr. Dingell, we have an anomalous situation today under the antitrust laws whereby the witnesses will say, as Mr. Dixon said over in the Senate, that the bait merchandising and predatory pricing was already forbidden by the antitrust laws, and he cited the Federal Trade Commission Act and section 3 of the Robinson-Patman Act.

The only trouble with that is that the remedy is not available to the private person.

Mr. DINGELL. A person can go to the Federal Trade Commission.

Mr. ROTHWELL. But the remedy is not available to the private person.

Mr. DINGELL. But on application the Federal Trade Commission remedy is available, is it not?

Mr. ROTHWELL. This is a Federal Trade Commission remedy.

Mr. DINGELL. By application to the Federal Trade Commission.

Mr. ROTHWELL. He can also report to the Federal Trade Commission or the Department of Justice, as the case may be, but I cite you the experience under the Security and Exchange Commission Act whereby the rendering of a private remedy made the act somewhat more enforcible than it would have been if it were entirely in the hands of the public agency.

Mr. DINGELL. So, in effect, what you are doing is coming around to the fair-trade approach, because you have essentially adopted almost every one of the language requirements of last year's Federal trade bill. You have now gone the price-range concept, which was

within the fair trade concept. I expect you adopt the retailer-suit concept, too.

Mr. ROTHWELL. I would be heartily opposed to that because they have no interest in the property sought to be protected, the brand name.

Mr. DINGELL. Do you oppose that then?

Mr. ROTHWELL. Oppose what? Giving the retailer the right of action?

Mr. DINGELL. Yes.

Mr. ROTHWELL. Wholeheartedly I will oppose it.

Mr. DINGELL. Does your organization oppose it?

Mr. ROTHWELL. The Quality Brands Associates are the only clients I have represented.

Mr. DINGELL. Are you sure you intend to stand behind that statement, and your organization?

Mr. ROTHWELL. I will personally. I can't be accountable for their moves.

Mr. DINGELL. Of course you speak on behalf of the association.

Mr. ROTHWELL. I do, but I can't be accountable for their moves in the future.

Mr. DINGELL. Except the retailers suit, by the amendments and by the changes already published you endorse all that was in the fair trade bill, do you not?

Mr. ROTHWELL. No, we do not.

Mr. DINGELL. Can you cite me one significant difference in the impact of this bill and the fair trade bill we had during the previous session of Congress?

Mr. ROTHWELL. Yes, I can cite a major impact and the major difference is in the remedy section. The injured party, the brand name owner, when subject to the practices outlined in A, B, and C, would go to the court and say, "This man has violated section 8 (a) or (b) or 8(c). Please make him stop using my brand name, or using my brand name in a way injurious to me."

It reserves to the discounters the right to cut prices on the product. The fair trade bill largely did not do this.

Mr. DINGELL. Except for this difference, the bill is substantially identical in language and effect to the fair trade bill, except for this one isolated difference, which you have mentioned to us now, today. You have essentially gone to the fair trade bill. Name me one other difference. The remedy I concede, but that is a very narrow question.

Mr. ROTHWELL. Mr. Dingell, one other difference is this: the basis of your fair trade acts in law was that of contract, that the manufacturer would——

Mr. DINGELL. Was there a contract in the last fair trade bill?

Mr. ROTHWELL. It was a contractor situation in the——

Mr. DINGELL. Was there a contract in the last year Harris bill?

Mr. ROTHWELL. I beg your pardon?

Mr. DINGELL. I assume you have studied the Harris bill.

Mr. ROTHWELL. Yes.

Mr. DINGELL. Did the word "contract" appear anywhere in the Harris bill?

Mr. ROTHWELL. The Harris bill differed somewhat from the conventional fair trade bill. When I say "fair trade" I mean the State fair

trade acts and implementing congressional legislation, the Miller-Tydings bill and the McGuire.

Mr. DINGELL. The Harris bill was actually a fair trade bill act?

Mr. ROTHWELL. Yes.

Mr. DINGELL. It was so denominated?

Mr. ROTHWELL. Close enough so I would not make any distinction.

Mr. DINGELL. And the only difference between this bill and the Harris fair trade bill in language, and broad language, and in intent, is the fact that enforcement of the price lies solely in the hands of the manufacturer as opposed to lying in the hands of the manufacturer and/or retailers under this. Am I correct?

Mr. ROTHWELL. That is only one difference. The great difference, of course, is the remedy. It is a brand-control bill, not a price-control bill, sir.

Mr. DINGELL. Actually, there are three reasons a man will go into court under this bill. One is bait, and loss leader, and so forth, but the other is sales below the established price. Am I correct?

Mr. ROTHWELL. I am sorry. I was looking for a document.

Mr. DINGELL. The real thrust of this bill is price establishment. Certainly there are other remedies with regard to acts intending to deceive purchasers and so forth, but you are going to catch a lot more people on price violations under this bill than you are under the other two items. Isn't that right?

Mr. ROTHWELL. I don't know.

Mr. DINGELL. It would be fair to expect that, would it not?

Mr. ROTHWELL. I think that is speculative, but I will agree with that. I think if this bill became law today that the immediate pricing situation would be more onerous.

Mr. DINGELL. The immediate pricing situation is precisely what this bill is aimed at, discounterism, as Mr. Anderson said it the other day. That is the real thrust of this bill, am I correct?

Mr. ROTHWELL. No, Mr. Dingell. This bill does not intend to eliminate discounters or discounterism. The proponents of this measure feel that there is a place in the economic firmament for discount merchants. Indeed they yield up to the discounter merchants the right to set the price on the product in those situations where the brand name is not involved.

Mr. DINGELL. But the only real difference here is the remedy. You have these other two peripheral situations.

Mr. ROTHWELL. You have the retailers suit, you have the misrepresentation, you have the bait merchandising, and you have the property rights concept rather than the implementation of a special contract or status———

Mr. DINGELL. You will agree that the property rights concept to which you allude is a highly philosophical one to the consumer who might not be able to get a branded article on a competitive price. Am I right? Because in effect he is going to be clipped for the higher price either way, is he not?

Mr. ROTHWELL. I don't believe so.

Mr. DINGELL. Whether it is done on a brand name basis or property name basis as opposed to the fair trade approach, whatever it might happen to be it is highly philosophical to the consumer who is going to pay a higher price.

Mr. ROTHWELL. I don't think there is any consumer detriment to this. I think it is all a consumer advantage.

Mr. DINGELL. I recognize this to be your position, but if a consumer is denied the right to get these things through competitive prices he is going to view this difference as being highly philosophical.

Mr. ROTHWELL. But he is guaranteed the right to get a competitive price for the reason that the bill cannot be effective unless there is interbrand competition.

Mr. DINGELL. I know my chairman is getting impatient and looking at the clock here, but I would like to ask one more thing.

Section 8 of the bill says:

> When goods usable for the same general purpose are available to the public from sources other than the owner of such brand name or trademark.

Now, let's take a situation where you have Kodak and Ansco, and one of your proponent witnesses testified yesterday they handled 85 percent of the film that is marketed in this country. Will they have the right to fix prices under this bill?

Mr. ROTHWELL. I believe they are subject to a consent decree.

Mr. DINGELL. Let's assume they are subject to a consent decree. Does this bill repeal that consent decree?

Mr. ROTHWELL. No, of course not.

Mr. DINGELL. What about the language then on page 6, subsection (14):

> No exercise of any right or remedy in paragraphs (1) to (13) inclusive of this subsection shall be construed to be a violation of any of the antitrust acts.

Will that repeal the consent decree in that case?

Mr. ROTHWELL. No, oh, no.

Mr. DINGELL. Are you sure?

Mr. ROTHWELL. As sure as I am about anything, sir.

Mr. DINGELL. Let's get back to this. Let's assume there is no consent decree in this. Would Kodak and Ansco be able to price fix under this bill?

Mr. ROTHWELL. If they are competitive in terms of a particular film, that film can be price maintained by either one or both.

Mr. DINGELL. I see. Where there are only two manufacturers——

Mr. ROTHWELL. It says "Goods available for the same general purpose," and if, say, 620 color film was made by both, then the rights granted hereunder would be available to each.

Mr. DINGELL. Even though they market 85 percent of the film in this country they can still price fix?

Mr. ROTHWELL. If there is something wrong with this it must be wrong under another statute. It wouldn't be wrong under this measure.

Mr. DINGELL. Would the exemption from the antitrust laws you have been discussing give them exemption to price fix under this bill regardless of other provisions of the antitrust laws where they market such a heavy proportion and percentage of the film in this country?

Mr. ROTHWELL. No.

Mr. DINGELL. It would not?

Mr. ROTHWELL. Just a moment. This bill would not permit any producer or retailer to otherwise engage in anything that would be independently unlawful under any of the antitrust laws, Mr. Dingell.

The question you have posed is that of an oligopoly situation which is generally handled under section 2 of the Sherman Act, possibly handled under section 5 of the Federal Trade Commission Act. I submit that this measure would have no effect upon judgments relating to the oligopoly situation which you postulate.

Mr. DINGELL. Let's take the situation in the pharmaceutical field where a manufacturer has a patented item. For all intents and purposes there is no other item of that kind. Now, is the manufacturer going to be able to price fix a patented item in the pharmaceutical field under this bill?

Mr. ROTHWELL. Mr. Dingell, I heard the witness, and my colleague called attention to the case he was citing, CIBA, and in his own testimony appeared——

Mr. DINGELL. I am not concerned with his testimony. I just want to know is a manuafcturer——

Mr. ROTHWELL. He used the CIBA situation as an example of the monopolization and unfair trade which is permitted, but the Federal Trade Commission says "It would appear that CIBA is in open competition with numerous other manufacturers of pharmaceuticals, which perform the same functions and produce the same results, as to those sold by CIBA. For instance, Serpasil, which you mentioned, is merely CIBA's registered trademark for resperin. There are of course numerous resperin products of other manufacturers.

So although this is patented in terms of perhaps they way it is put together, you know, such as a secret process, the process is patented, nevertheless, as long as there are other remedies suitable for the same general purpose that patent would not preclude the manufacturer from utilizing the rights under the bill.

Mr. DINGELL. So when my constituent who is a 65-year-old retiree on social security trots into a pharmacist with a prescription saying he has to have this particular pharmaceutical to ease his arthritis or to take care of his heart condition, and the same happens to be patented, he is going to walk into a situation where the price is established and he had no opportunity to get that particular pharmaceutical at a competitive price. Am I right?

Mr. ROTHWELL. No.

Mr. DINGELL. All he has is that there is a prescription in his hand which says "you have to have Drug "X" or whatever it happens to be that is patented. He is not going to have any chance to get this under competitive price, is he, because the doctor says "You have to have this."

Mr. ROTHWELL. We are postulating interbrand competition.

Mr. DINGELL. I am not postulating anything. Who is competitive in terms of price with a specific patented pharmaceutical? Nobody. There may be other items, but to get that he has to have a doctor's prescription and the advance man has been around to see the doctor and he says "This is the best thing," and the doctor says "OK." And the next patient comes along and he writes the prescription and he says "Here, this is the best thing."

My constituent goes in and he has himself a prescription for one particular patented item. He goes in with that one particular patented item listed on a prescription. He can go to 197 drugstores and

if this bill is passed, and the manufacturer has chosen to fix prices, he can't get 1 cent off the price, can he?

Mr. ROTHWELL. If there is interbrand competition, that is correct.

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

Mr. MACK. Thank you, Mr. Rothwell.

Have you completed your statement?

Mr. ROTHWELL. No, I haven't started, really, but it is so late.

Mr. MACK. I would say that it is a rather late hour to start.

Mr. ROTHWELL. And I don't intend to do so.

Mr. MACK. I do not want to preclude anyone, but I did plan to complete the testimony today.

Mr. ROTHWELL. I sort of regret that we haven't had more of an opportunity to straighten out the record and I wonder if it would be possible for me to return tomorrow and conclude my remarks. I will take 10 minutes. I am not so anxious to be in this chair, Mr. Chairman.

Mr. MACK. I will give you 10 minutes right now if you need 10 minutes more.

Mr. ROTHWELL. In that case, Mr. Mack, I will yield, because I feel it is much too late. I would feel it would be an imposition on the committee at this hour.

May I have the chairman's leave to file a supplemental covering those matters that I had intended to cover in the next 10 minutes?

Mr. MACK. Without objection, you may file that statement.

(Supplemental statement to be submitted by Mr. Rothwell follows:)

SUPPLEMENTAL STATEMENT OF THOMAS A. ROTHWELL

Mr. Chairman, at the conclusion of my oral statement on Thursday, June 14, you granted me permission to file a supplemental statement.

There were a number of matters raised in the testimony of prior witnesses as well as by their written statements that need further discussion and clarification. Many of the proponents of this legislation who have appeared before the committee, are not lawyers or technicians and have not been responsive to the more technical provisions of the statute under consideration. In addition to this and, quite understandably, the opponents of the bill have put in the record a great deal of that which is confusing rather than enlightening. It would not serve their purpose to clarify matters or to sharpen the issues before this committee. It is, of course, undesirable to leave the record in an incomplete and unsatisfactory state.

There have been several questions asked as to the meaning of the words "bait advertising" or "bait merchandising practices," as appears on page 4, line 6 of House Joint Resolution 636. Reference is made to the Federal Trade Commission publication entitled "Guides Against Bait Advertising" adopted November 24, 1959. On the first page thereof, there is a paragraph entitled "Bait Advertising Defined." This paragraph is as follows:

"Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised."

The term used in the statute, "Bait Merchandising Practices" is somewhat broader but nonetheless comprehends the FTC's definition of "Bait Advertising." "Bait Merchandising" might be defined more broadly to mean that "when one product is advertised and used with the intent and purpose of selling a substitute product * * *." One must look to the practices in the store involved in considering a charge of bait merchandising as well as the advertising practices themselves. One cannot define with precision or mathematical certainty the

amount or degree of commercial insincerity that must be present to constitute bait merchandising practices.

It is clear, however, that a court seeking to give scope to the words of the statute would apply this statute to the major forms of specious commercial conduct comprehended by the term, "bait merchandising practices." It is suggested that the Federal Trade Commission Guide on the subject matter, comprising 3 pages, be the starting point in respect to those practices to be challenged under this statutory language. Much emphasis has been placed upon the presence or absence of interbrand competition during the hearings. In paragraph 8 on page 3 of the bill, lines 19 to 21, "When goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark * * *."

This seems to be a clear way of stating that substitute products must be available before any rights under the statute may be exercised. The language seems more clear and certain than the "free and open competition" language of the conventional Fair Trade Act. There must be substitute products available for the same general purpose, manufactured by others, before a brand name owner may invoke the protection of the statute.

Section 8(b) of the bill refers to the phrase "currently established resale prices." It is the intent of this section to impose a lawful condition on the use of the trademark by those who engage in commercial dealings in the product associated with the trademark. The prices established do not have to be uniform nationally, as has been suggested, rather they may be differentiated by any criteria not otherwise unlawful. It is suggested that the committee consider the use of appropriate language which would import a degree of price flexibility into the term "established resale prices." Marketing experience indicates the desirability of a limited flexibility of resale prices between a maximum and minimum range. The important consideration is that the price range be established by the owner of the brand name or mark, and that he be entitled to condition the use of his brand name or mark upon the observance of said price range.

It was also asked why the exemption from antitrust as contained in paragraph 14, line 22 through 24. The answer to this inquiry is that such language is appropriate in the interest of clarity and certainty. Otherwise, one has to fall back upon the normal principles of statutory construction that a later enacted law supersedes and operates as a pro tanto repealer of preexisting law.

Since the law relating to individual resale price maintenance and individual refusal to deal is at present a complex mix of statutes and case law interpretations thereof, it is no doubt prudent to express the will of Congress that the exercise of rights under this bill shall not be considered independently to be a violation of any of the antitrust laws.

In the colloquy with Mr. Dingell, a member of the committee, there was much emphasis placed upon the phrase, "price fixing." It is respectfully submitted that in the context of this measure "price fixing" is wholly epithetical. No one is compelled to maintain any price whatsoever, unless that person chooses to also use the owner's trademark. Even more importantly, however, in the event the condition is not observed, the price cutter merely forfeits further use of the mark. He is not compelled to raise prices. Therein lies the great advantage of this measure over conventional fair trade proposals in that there is no mandatory price maintenance by private party, court decree, or otherwise. Rather, the substance of the bill is a rational limitation on the use of the brand name, which some elements in the distribution system may otherwise seek to exploit in a manner adverse to the interests of the owner thereof.

Neither does this legislative proposal affect preexisting law relating to trading stamps and tie-in sales. This obviously relates in part to the desirability of pricing flexibility as noted above. In the event the owner wishes to permit trading stamps to be used by his resellers, he merely notifies them that he shall not consider the use thereof to be a departure from his currently established resale price range. The same reasoning applies to tie-in sales. The owner of the mark would be vested with a discretion to determine if these tie-in sales would be permitted, or perhaps even sponsored by the owner of the brand. Otherwise, such tie-in sales could not be used as a device to reduce prices.

In the testimony of Government officials and others, there appears occasional references to the effect of this measure on the use of private brands. Antitrust officials are somewhat inconsistent in their attitude toward private brands in that the existence of additional brands on the market theoretically should serve

to stimulate competition. Therefore, it would seem that antitrust officials should be in favor of encouraging private brands rather than discouraging same, except as they perhaps offer an undue advantage to a large-scale retailer or chain of retailers.

Any prediction as to the effect of this measure on the number and importance in private brands would be highly speculative. The important point is that no matter what its effect on private brands, the statute could not be employed unless there were competing brands available, usable for the same general purpose, and from sources other than the owner of the brand sought to be protected by this legislation. This measure would probably very much stimulate inter-brand and multiple-brand competition, but whether it would encourage the use of private brands or leave them largely unaffected cannot be foretold at this point.

Another question raised during the hearings was the effect of this measure on the Robinson-Patman Act and the other antitrust laws. It is submitted that this bill does not change in any way the Robinson-Patman Act, nor the Clayton Act. Neither does it take a "substantial chunk" out of the Sherman Act or any of the antitrust laws.

It is the function of Congress to establish "rules of the road" to govern competitive conduct. The Sherman Act is one of the major sets of "rules of the road," and the Federal Trade Commission Act is another. They are themselves limitations on certain types of competitive conduct. Viewed in the same light, the quality stabilization bill establishes some additional "rules of the road." It too would establish limitations and conditions for resellers to observe. Therefore, the quality stabilization bill is supplemental and ancillary to the Sherman Act rather than in contravention thereof.

A good example of this may be found in subsections 8(a) and 8(c) of the bill, dealing with bait merchandising and misrepresentation. This act would make available for the first time a private remedy for these practices, which are also unlawful under the Federal Trade Commission Act. One would expect the antitrust agencies to welcome the partnership of interested private parties in enforcing rational and ethical commercial conduct in the public interest as to members of the business community at large. Existing law simply is inadequate procedurally to protect consumers and businessmen alike against bait merchandising and misrepresentation.

During prior hearings, the point was made that there are some circumstances in which it is impractical to remove the brand name and thus sell the product at the price selected by the retailer. To the extent that the removal of the brand name is not feasible, it can only be said that a distributor purchasing said goods with knowledge of the conditions covering resale, has purchased the goods subject to that physical limitation.

A reseller, purchasing a product from which it is impossible to remove the brand name, and who has knowledge that the product is quality stabilized, cannot be heard to complain that he finds it difficult or impossible to remove the brand. In the words of the court of appeals for the fifth circuit, when dealing with this problem in a slightly different context, such purchaser bought the product subject to the existing limitation.

There has been much made of the charge that the enactment of this measure would facilitate horizontal price combinations. Suffice it to say that the same charge could be levied against the use of the telephone.

Statistics relating to the prices of fair traded products in fair-trade areas versus the prices of the same products in non-fair-trade areas are altogether meaningless in assessing the effect of this measure on a consumer. If a price is cut on an Arrow shirt, for example, in Washington, D.C., and there is no such price cutting on Arrow shirts in Baltimore, Md., it is obvious that the average prices for Arrow shirts in Washington will be somewhat lower than in Baltimore.

However, this is not at all the point. One has to investigate and inquire into the cost of living in Washington, D.C., as compared to Baltimore, Md., in terms of actual purchases by a representative cross section of consumers. This sort of study would be detailed and most laborious, and it is not surprising that the Government economist do not attempt same.

To the extent that such statistical explorations have been made in the past, they have resulted in a finding that there is no discernible effect in the overall cost of goods purchased by the consumer attendant upon the presence or absence of price maintenance practices. Selling a particular product cheaper is not in and of itself an overriding virtue. Any "study" of such sales is by definition

only a very partial and fleeting appraisal of an "effect on consumer" analysis that requires and should have much more serious consideration.

Finally, the point must be emphasized that Federal legislation is necessary in this area so that the economic pattern may be uniform throughout the Nation. The impact of television alone within the last few years has served to merge marketing areas and makes necessary a consistent and uniform merchandising policy on the part of many producers. Under this measure as proposed there will be no loopholes. There will be no areas from which predatory pricing practices can spill across juridicial lines and defeat the carefully structured public policies of neighbor States. A clear case for Federal action has been made out by the proponents of this measure.

It is submitted that the quality stabilization bill should be national in scope with no exceptions or exemptions.

Mr. MACK. I might say that we have some rather important witnesses coming tomorrow and our witness list is almost as long as it was today. I am afraid it would be about the same hour tomorrow, so I believe if you do not mind, you should file a supplemental statement or complete your statement now.

Mr. ROTHWELL. I am completely subject to the committee's discretion on that and I think I have been given great courtesy and consideration, for which I thank the chairman and Mr. Dingell.

Mr. MACK. Is Mr. Dressler here?

Mr. DINGELL. I hope you understand I mean nothing hostile by my conduct. I oppose the legislation but I certainly respect your views.

Mr. ROTHWELL. Thank you, sir.

Mr. MACK. The committee will stand adjourned until 10 o'clock tomorrow morning.

(Whereupon, at 6:20 p.m. the committee recessed, to reconvene at 10 a.m. Friday, June 15, 1962.)

QUALITY AND PRICE STABILIZATION

FRIDAY, JUNE 15, 1962

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to recess, in room 1334, New House Office Building, Hon. Robert W. Hemphill presiding.

Mr. HEMPHILL. Mr. Mack, the chairman of the subcommittee, has asked me to proceed. He is detained on very important legislative business.

The first witness we have for today is Mr. Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice. We are mighty happy to have you, sir. Will you identify your companion for the record and give any background you care to for the record at this time?

STATEMENT OF LEE LOEVINGER, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, THE DEPARTMENT OF JUSTICE

Mr. LOEVINGER. Yes, sir. Lee Loevinger, the Assistant Attorney General in charge of the Antitrust Division. I am accompanied by Mr. James Coyle, executive assistant in the Antitrust Division.

Mr. HEMPHILL. Will you talk just a little louder, Mr. Loevinger? It is difficult to hear up here.

Mr. LOEVINGER. Yes, sir. I am here today at the chairman's request to present the views of the Department of Justice on House Joint Resolution 636, which is a companion bill to Senate Joint Resolution 159. I appeared before the Senate Commerce Committee on April 19, 1962, to express the views of the Department of Justice on the Senate bill. Since House Joint Resolution 636 is identical to Senate Joint Resolution 159, I request, Mr. Chairman, that the Department's statement on Senate Joint Resolution 159 be inserted in the record of this hearing.

Mr. HEMPHILL. Without objection it will be included.

(The statement on S.J. Res. 159 appears on p. 9.)

Mr. LOEVINGER. This bill would amend the Federal Trade Commission Act to permit the owner of a brand name or trademark to establish resale prices on goods bearing his identifying mark and to revoke the right of the owner of the goods to resell them at prices other than the trademark owners' currently established resale prices. In its essential details this is another so-called fair trade price maintenance bill of a type which the Department of Justice has consistently opposed over the years.

However, this bill goes considerably beyond prior fair trade proposals.

At the outset I would like to emphase that House Joint Resolution 636 is totally incompatible with principles of free enterprise. Although labeled a "quality stabilization bill," it would destroy the incentive to improve quality; although purporting to be in the interest of small business it would ultimately eliminate small business. It will substantially increase the cost of living; result in windfall profits to the large chains; set a climate of vertical price fixing which will facilitate horizontal price fixing among large manufacturers; impose upon the courts and the law enforcement agencies a patchwork of contradictory unenforcible laws and sharply curtail the right of the separate States to legislate in the welfare of their citizens. Hardest hit would be the senior citizens subsisting on a pension and the young couple just getting started in life. Further, it carves out from antitrust coverage an even larger segment of the Nation's economy than did prior fair trade bills.

Literally applied the proposed bill could be employed to give the cloak of legality to any horizontal price conspiracy.

It would apply to "all acts and transactions in or affecting commerce which Congress may lawfully regulate," thereby apparently covering all aspects of wholesale and retail trade as well as most of the manufacturing and other economic activity. In so doing it would largely abolish price fixing as an offense under the Sherman Act without even referring to that basic antitrust statute. Moreover, the bill is aimed at overruling decisions of the Supreme Court in *United States* v. *McKesson & Robbins*, 351 U.S. 305, and *United States* v. *Parke, Davis & Co.*, 362 U.S. 29.

It is difficult to envision any goods that would not be subject to price fixing under the bill, since its provision would encompass all goods "identified by a distinguishing brand, name, or trademark, either on the label, container, dispenser thereof, or otherwise." Although in the past fair trade has been used less extensively in some fields, such as groceries, than in others, such as drugs, under this bill it could be extended to cover all products. Little of what the consumer buys is not "identifiable" hence such commodities as fresh produce, canned goods, clothing, medicines, appliances, gasoline, building materials, almost everything, even meat and potatoes could be price fixed at the discretion of the manufacturer, wholesaler, or processor merely by imparting "knowledge of the owner's currently established price or prices" to his customer-resellers.

No sales would be exempt from this legislation—including sales to governments, Federal, State, and local. And I might add sales to charitable organizations. This would not only raise the cost of governmental procurement, but would devitalize the entire system of competitive bidding for government contracts.

This Federal system of resale price maintenance would eliminate competition and curtail free enterprise at all levels of distribution. It would eliminate effective competition by removing the reseller—whether wholesaler, retailer, broker, or other distributor—from price competition with others selling the same product. It would also serve as a means of curtailing competition among manufacturers.

It must also be emphasized that price maintenance legislation of this type would in fact subject independent retailers to severe competitive disadvantage, turning them into distributive appendages of

the manufacturer, and depriving them of their right to exercise independent judgment in establishing prices. With a price established for him by the manufacturer, the retailer would be powerless to make adjustments to conform with his own selling situation. This price could be fixed high to cover all retailers, efficient and inefficient, large and small, urban and rural, independent and chain, under an umbrella of protection, and, conversely, it could deliberately be fixed low to drive out the small independent dealer, or retailer, especially where the manufacturer is competing at the same level of distribution, as this legislation is intended to authorize him to do. Either way, the independent retailer would be barred from using competitive pricing. He could only sit and wait for customers, since personal initiative and incentive would be stifled. In this respect we would move a perceptible step closer to an economy of manufacturer dominance foretold by Justice Douglas in *Standard Oil Company of California* v. *United States*, 337 U.S. 321:

> There will be a tragic loss to the Nation. The small, independent businessmen will be supplanted by clerks.

The bill refers to "currently established resale price or prices." On the one hand, it would appear that the owner of a brand or a mark could impose uniform, nationwide resale prices for his goods, ignoring differing costs of living in various sections of the country. On the other hand, he apparently would also be free to establish several different prices for any item of merchandise. It might be, therefore, that by establishing different prices, a manufacturer could favor some retailers over others. This would be contrary to the philosophy of the Robinson-Patman Act. But the bill is silent as to what effect it is intended to have on that act, which prohibits discriminatory pricing.

This bill would also place the small retailer at a serious competitive disadvantage in his efforts to compete with the large retail chain which has established its own brand names. As the court remarked in *Bulova Watch Company* v. *Zell*, 1962 Trade Cases, 170317, handed down by the Supreme Court, State of Wyoming, on May 8, 1962, the large manufacturer "may fix one price for the article with his trademark and accept a different price for the article not bearing his trademark." In such a situation the small merchant handling the trademarked item will be bound by a rigid price control structure, while the large chain with its own trademark is free to cut the price and undersell smaller competitors who do not have the economic power to establish their own trademark. This opens a wide gap in the present legislation designed to prevent predatory price discrimination.

Under the proposed legislation, distributors, with a price established for them by the manufacturer, would be powerless to make adjustments to conform with their particular selling situation. Notwithstanding that the competitive situations confronting them may be widely different in various places and circumstances, under this legislation they must sell at a fixed price, usually a uniform national price. Independent distributors, without a private brand to advertise extensively, are under a handicap in meeting competition of widely advertised brands of large distributors. They cannot reduce prices on the nationally advertised price maintained products to meet private brand competition. Absent price maintenance, they can use nationally advertised products to compete, either with other sellers of such products, or with private brands. Finally H. J. Res. 636 places the small independent

wholesaler and retailer at the mercy of the manufacturer. Regardless of the needs or desires of the retailer or wholesaler, the price is fixed by the manufacturer in terms of his own economic advantage.

As a result of this imbalance of economic power many small businessmen who formerly supported legislation of this type now realize that fair trade prices established and maintained by large manufacturers do not in fact benefit them. A recent survey made by an impartial private organization which is experienced in the field of small business and which polled 179,000 small businessmen located in every State shows that a slight majority of such businessmen are opposed to this particular legislation. The vote was 51 percent opposed to this legislation, 45 percent in favor and 4 percent undecided.

The position taken by these small businessmen may be explained to a great extent by recent statistics compiled from data prepared by Dun & Bradstreet and submitted as appendixes to this statement. These statistics demonstrate that the rate of business failures is higher in those States which have fair trade laws than in those States where traditional antitrust laws are still in force.

Appendix A shows that in 1961, while the average failure rate per 10,000 listed concerns was 75 in the States having valid fair trade laws, it was only 30 per 10,000 listed concerns in those States, including the District of Columbia, which do not have fair trade laws. Further, in the States in which the nonsigner clause has been held invalid, the rate of business failures was 56 per 10,000 listed concerns.

Appendix B presents similar figures for each year in the period 1946–61. This shows that the relationship between business failures in fair trade States, nonsigner States, and free trade States on an annual basis is consistent with the relationship described above.

This I think to be most important, as many of the witnesses on this subject prefer to talk in general terms about business failures without making any attempt to analyze the relationship between these business failures and the proposal being urged. So far as I know, this, and the testimony of Congressman Celler, is the first serious attempt to present to this committee the relationship between the proposals before this committee and actual business failure rates.

We have also made a study of the Dun & Bradstreet figures to determine the relationship between total business failures and distribution failures, wholesale and retail, on a national basis for the entire post World War II period, 1946 to 1961. This study establishes that the distribution failures, wholesale and retail, averaged about 50 percent of all business failures and that the rate of business failures for distributive businesses, that is wholesalers and retailers, was closely correlated to the rate of failure of all businesses both for the entire period and for each separate year.

Indeed, the correlation was so close that there was no significant mathematical difference between the general rates for all business failures and the rates of failure for distributive business.

This statistical evidence suggests strongly that the ability of small firms to survive is significantly greater in a free competitive element and climate than in an economy in which large manufacturers exert price dominance over the distributive process.

The future of small business in America is closely tied to the maintenance of a truly competitive economy. We in the Department of Justice are sympathetic to the problems faced by small business in

today's economy ad intend through vigorous enforcement of the antitrust laws to oppose every unreasonable restraint on economic freedom. However, if the time-tested approach of the Sherman and Clayton Acts is abandoned in favor of further encroachment by large manufacturers upon the independence of retailers and wholesalers small business will ultimately be the loser.

This Federal system of price fixing would also destroy the right of the States to decide whether or not "fair trade" should exist within their borders. Certain States have never adopted fair trade laws; some States have declared fair trade laws to be contrary to their State constitutions, either in whole or in part; other States have allowed only minimum resale prices to be set. Various State courts have held that fair trade laws are price-fixing legislation and that, as such, they delegate legislative powers to private individuals. This bill now would override all such State court declarations, as it would also override State antitrust laws. As the attorney general of Texas said with respect to a similar bill introduced in the 86th Congress:

> To sum up, this bill invades an area that has heretofore been reserved to the States. It would, in effect, preempt the area and nullify a large portion of the area covered by the Texas antitrust laws under which we have operated since the early 1880's.

Moreover, it is not clear what the status of State laws would be under this legislation. While it would impose a Federal system of fair trade it would also leave State fair trade laws in effect. The ensuing uncertainty where State and Federal laws conflict, as for instance whether minimum prices under State law or established prices under this legislation would prevail, would give rise to endless litigation.

We must also question whether this legislation would not require enforcement by the Federal Trade Commission. It would amend the Federal Trade Commission Act, which declares unlawful unfair methods of competition and unfair or deceptive acts or practices, and specifically empowers and directs the Commission to prevent such acts or practices. It may be, therefore, that this legislation would create a situation involving Federal regulation of retail pricing.

H.J. Res. 636 would impose price control as affirmative Federal policy. By making price competition an act of "unfair competition," it conflicts with the basic philosophy of the American free enterprise system. It would hand carte blanche authority to private persons to establish prices by fiat. If such blanket authority to fix prices were conferred on a Government entity in peacetime, there would be universal protest, and justifiably so, and it is equally undesirable to confer that right on private persons.

House Joint Resolution 636 destroys common law property concepts by enabling a person to sell his property and still maintain significant control over it. By increasing the general level of prices, it will levy an indirect tax on the general public. By creating a large exemption from the antitrust laws, it will seriously weaken antitrust enforcement and deprive small business of a basic economic freedom.

The Department of Justice has had over 60 years' experience in preventing unreasonable restraints on competition. For some 30 years it has watched the operation of resale price maintenance laws. The uniform judgment of all those who have had responsibility in enforcing the antitrust laws has been that resale price maintenance legis-

lation is unworkable and does not accomplish its objective. This proposal would lead to the following undesirable consequences: (*a*) substitution of arbitrarily fixed prices for open competition; (*b*) placing sellers under Federal supervision for possible price infractions; (*c*) establishment of artificially held price lines tending toward a pronounced inflationary effect on the economy; (*d*) elimination of the States' rights to determine their own policy in this field; (*e*) flooding of the Federal courts with price litigation; (*f*) reduction of the incentive for better quality, increased standards, or better values; (*g*) stifling of private initiative and depriving small distributors of their essential competitive weapon—price; (*h*) creating an advantage for large manufacturers, who are able to pay for private enforcement, and for large distributors who can use private brands to compete, at the expense of small manufacturers and distributors; (*i*) establishment of distributive margins akin to subsidies determined privately and paid for by the consuming public; and (*j*) fostering a climate favorable to agreements among competitors.

The Department of Justice, therefore, strongly recommends against enactment of this legislation.

(Appendix A and appendix B follow:)

APPENDIX A

Business failure rate per 10,000 listed concerns[1] 1961

Fair trade:[2]	Rate
Alabama	30
Arizona	102
California	124
Connecticut	66
Delaware	35
Idaho	40
Illinois	66
Maine	17
Maryland	50
Massachusetts	35
Mississippi	26
Nevada	54
New Hampshire	20
New Jersey	73
New York	130
North Carolina	30
North Dakota	11
Pennsylvania	53
Rhode Island	84
South Dakota	7
Tennessee	44
Virginia	38
Wisconsin	50
Wyoming	1
Average failure rate	75

Nonsigner invalid:[3]	Rate
Arkansas	18
Colorado	48
Florida	122
Georgia	56
Indiana	30
Iowa	27
Kansas	29
Kentucky	22
Louisiana	34
Michigan	55
Minnesota	32
New Mexico	37
Oklahoma	29
Oregon	178
South Carolina	80
West Virginia	38
Washington	103
Average failure rate	56

Freed trade:[4]	Rate
District of Columbia	34
Missouri	23
Montana	14
Nebraska	13
Texas	36
Utah	34
Vermont	33
Average failure rate	30

[1] Listed concerns represents the number of names listed in the Dun & Bradstreet Reference Book.

[2] "Fair trade" States include those States having valid "fair trade" laws with nonsigner provisions.

[3] "Nonsigner invalid" States include those States where State "fair trade" laws have been held invalid only as applied to "nonsigner" provisions.

[4] "Free trade" States include those States either having no "fair trade" laws or where the "fair trade" law has been declared invalid as to both signers and nonsigners.

NOTE.—Alaska and Hawaii are omitted due to lack of data. Ohio is omitted due to a split in lower court decisions concerning the validity of its 1959 "fair trade" law.

Source: Dun & Bradstreet.

APPENDIX B

Distribution of business failures per 10,000 listed concerns [1] within "fair trade",[2] nonsigner invalid,[3] and free trade [4] States, 1946 through 1961

FAILURE RATE PER 10,000 LISTED CONCERNS

States grouped by "fair trade" status	1946	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958	1959	1960	1961
"Fair trade"	6	15	22	36	36	34	32	37	45	47	53	56	65	61	65	75
Nonsigner invalid						13	18	19	28	29	44	52	47	43	51	56
Free trade	3	7	9	20	15	8	9	14	19	14	21	26	26	24	26	30
Ohio															63	78
U.S. total	5	14	21	35	34	31	29	33	42	42	48	52	56	52	57	65

NUMBER OF STATES BY "FAIR TRADE" STATUS

"Fair trade"	45	45	45	45	45	44	42	42	43	39	37	34	29	29	27	24
Nonsigner invalid						1	3	2	2	5	6	8	14	14	15	17
Free trade	4	4	4	4	4	4	4	5	4	5	6	7	6	6	6	7
Ohio															1	1
U.S. total	49	49	49	49	49	49	49	49	49	49	49	49	49	49	49	49

[1] Listed concerns represent the number of names listed in the July issue for the designated year of the Dun & Bradstreet Reference Book.

[2] "Fair trade" States include those States having valid "fair trade" laws with nonsigner provisions.

[3] "Nonsigner invalid" States include those States where "fair trade" laws have been held invalid only as applied to "nonsigner" provisions.

[4] "Free trade" States include those States either having no "fair trade" laws or where the "fair trade" law has been declared invalid as to both signers and nonsigners.

NOTE.—For statistical purposes a State has been included in any one of the three designated categories, "fair trade," "nonsigner invalid," or "free States" on the basis of "fair trade" status prior to June 30 of each year.

The District of Columbia has been included as a State. Alaska and Hawaii are omitted due to the fact that Dun & Bradstreet has not included these States in their failure statistics. Alaska has never enacted "fair trade" legislation. Hawaii was a "fair trade" territory for the years 1946 through 1957, status of its statute was in question during 1958 through 1960, and in 1961 "fair trade" was specifically upheld. Ohio has been shown separately since 1960 due to a split in lower court decisions concerning the validity of its 1959 "fair trade" statute.

Source: Bureau of the Census, Statistical Abstract of the United States for the years 1947 through 1960 (data from Dun & Bradstreet) and data for 1961 from Dun & Bradstreet.

Mr. HEMPHILL. Does that complete your formal statement, sir?

Mr. LOEVINGER. Yes, sir.

Mr. HEMPHILL. Thank you very much. We are glad to have you here. If you have time the committee would like to ask you some questions.

Mr. LOEVINGER. Surely.

Mr. HEMPHILL. Mr. Dingell.

Mr. DINGELL. Thank you, Mr. Chairman.

Mr. Loevinger, I would like to commend you and congratulate you for a very excellent statement. I would also like to commend you and congratulate you for the splendid job you have done in the enforcement of the antitrust laws during your tenure as chief assistant in the Department of Justice for antitrust matters.

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

Mr. DINGELL. I am sure you are aware of my position with regard to this particular piece of legislation and other like legislation. There are a number of points I would like to have you treat. As you may be aware, for the past several days I have been treating this bill before the committee in two regards, first with regard to the manner in which it creates exemptions from the antitrust laws; and, second, the manner in which it vests in large manufacturers the power to dominate the price and to control, for all intents and purposes, the large part of the market. One witness was in here testifying on behalf of the photo finishers and we discussed this from the standpoint of the fact that it would vest, as he conceded, in two film manufacturers, Kodak and Ansco, the power to fix the prices of some 85 percent of the film marketed within the United States. I am sure that if a study were made by an unbiased agency we would arrive at a situation where we would find that this is not unique, but as a matter of fact, this is rather inherent in the bill, in almost every phase of American industrial and commercial activity.

It would vest in certain large manufacturers the power, for all intents and purposes, with combinations of just very few to control 50 percent, 60 percent, 70 percent, 80 percent, of the market. I was wondering if your agency has made any study to determine whether or not this is the fact.

Mr. LOEVINGER. There are two answers to this. The first, of course, has to do with the degree of concentration; that is, how many products are controlled by the Big Four or the Big Eight? I am informed by the staff of the Kefauver subcommittee that they are about to publish and have at the Government Printing Office now a study based on the 1958 Business Census that will give very complete figures on that. I think that will be available, however, I think that that is a secondary point, sir, under this legislation.

I would go further. I would say that if this legislation is passed, the prices for most products in the United States will be set by one dominant manufacturer and that it may very well be beyond the power of the antitrust laws to prevent this for a very simple reason. This legislation purports to establish separate property rights in trademarks from the property rights in the goods covered by the trademarks. Now this is a concept that has never been established in trademark law in this form before.

Mr. DINGELL. As a matter of fact, this is a slightly unique concept against every law and historical practice in trade in the history of the United States. Am I correct?

Mr. LOEVINGER. Yes, sir; but I would like to spell the consequences of this out for you, and actually this is not in my statement because it only occurred to me last night. To tell the truth, I was going over this last night and looking at it from the viewpoint of a lawyer representing a large corporate manufacturer who wanted to take the utmost advantage of the bill.

This is a legitimate viewpoint for a lawyer to take. I have in the past when representing business taken a similar viewpoint. We don't always do this in Government agencies, but it is quite useful to do. I therefore tried to ascertain what I would undertake to do and it suddenly occurred to me there is a very simple thing that a large manufacturer can do. In most fields there is one manufacturer who is large enough to have some degree of dominance and with whom the other manufacturers cannot afford ruinous price wars at least. They can engage in a degree of competition, but there is a degree of price competition beyond which they feel they cannot go.

Now, all they need to do in order to legitimately engage in price fixing of the kind we had in the electrical goods industry and price fixing of the kind that we are prosecuting criminally every day under the antitrust laws is for the dominant manufacturer to get a secondary trademark or tertiary trademark and license the other manufacturers to use his secondary trademark. They don't have to use his primary trademark, use his secondary trademark. There is nothing in this bill that prevents horizontal price fixing as long as it is done under the color of some trademark protection. Cross-licensing of trademarks, is a very well-known practice, is a very simple thing. We have dozens of cases that we can cite to illustrate it. This would permit the largest manufacturers to establish horizontal price-fixing conspiracies by cross-licensing trademarks rights and doing no more. It would simply be a matter of exchanging pieces of paper, and as far as I can see the effect of this bill may be to give complete antitrust immunity to such horizontal price-fixing conspiracies.

Mr. DINGELL. And under the exemption from the antitrust laws given on page 6, line 22, subsection (14), the individual so doing would have a complete exemption from the antitrust laws to perpetuate that kind of a horizontal price-fixing conspiracy in violation of the law. Am I correct,

Mr. LOEVINGER. Yes, sir; if this is literally applied, that would be the effect.

Mr. DINGELL. I was wondering this. Since essentially a Member of the Congress is rather limited as to staff, I was wondering if you would find it possible to submit to this committee examples of undue control of price for a very small segment of the manufacturing community of the bulk of the particular item manufactured by that community? For example, we went into the situation with regard to Kodak and Ansco, receiving under this bill the power to fix prices for something on the order of 85 percent of the film sold in the United States today.

I am sure that we could find this in the pharmaceutical industry in a tremendous number of instances. Would you be able to tell the

committee either this morning or to submit for the record examples of how this economic dominance would be vested in a very few manufacturers under this bill?

Mr. LOEVINGER. Well, the question of "undue" involves a matter of judgment, sir, and I am not sure that the Department of Justice would care to be on record as expressing an opinion on what is or is not undue in particular cases. However, the statistics as to concentration ratios are available. I can give you some of them. The four largest companies control over 90 percent of the total value of shipments, of, for example, watches, household sewing machines, sanitary napkins and tampons, razor blades and razors, photographic film and plates, synthetic organic detergents, outboard motors, linoleum, plastic floor and wall coverings, asbestos and cement sheets and wall board, and lamps and bulbs.

If you take the eight largest manufacturers you get percentages up to 100 percent, and all ranging over 90 percent, in additional products; including gypsum products, baking powder, yeast, thread for use in the home, salt, vacuum bottles, and jugs, cigarettes, batteries, radio receiving tubes, tires and innertubes, typewriters, compressors, and compressor units for refrigerators, electrical hearing aids, corn sirup, cotton towels, tires, and so forth.

Mr. HEMPHILL. Would you yield there?

Mr. DINGELL. Yes, I would be happy to.

Mr. HEMPHILL. We would be happy to have you insert that in the record and the names of the four companies if it is appropriate for you to do that, because it might help the committee if your office would think it appropriate.

Mr. LOEVINGER. Yes, sir. As I say, I would be glad to give a copy of this table to the committee, although I must say that by far the most complete and exhaustive study will I believe be contained in the report about to be issued by the Kefauver committee, and actually we used this source material and it goes beyond any data that we have. It will be available before the end of the month, I am assured.

Mr. DINGELL. I intend to read this with a great deal of interest but I hope for the purposes of this record that you will submit this to us. I think that would be of tremendous value.

Mr. LOEVINGER. All right, sir.

(The table referred to faces this page.)

Mr. DINGELL. So then under this particular economic situation, we have been discussing here, the language of subsection (8) appearing on page 3, line 19, of any one of these bills, really does not guarantee competition with regard to price because it vests in such a small number of manufacturers such an enormous amount of power for price fixing that for all intents and purposes in most major lines of products for sale to the American consumer or the American consuming public there is no real choice of goods usable for the same general purposes. Am I correct?

APPENDIX I

Selected retail product classes for which over 50 percent of the value of shipments were accounted for by the 4 largest companies, 1958; also included in this group is the percent of value of shipments accounted for by the 8 and 20 largest companies

Product class	Value of shipments (thousands of dollars)	Percent of total value of shipments accounted for by—		
		4 largest companies	8 largest companies	20 largest companies
Food and kindred products:				
Fresh lamb and mutton	$305,161	60	69	85
Canned meats (except dogfood)	[1] 406,520	62	83	97
Canned poultry (except soups)	25,590	63	84	99
Canned milk	352,083	78	85	97
Process cheese	[1] 161,690	71	80	91
Canned baby foods (except meat)	184,060	94	99	100
Canned vegetable juices	93,314	58	69	84
Catsup and other tomato sauces	245,621	55	65	80
Salad dressings, mayonnaise, and sandwich spreads	240,547	57	67	81
Frozen prepared foods (excluding frozen soups)	[2] 318,837	52	67	80
Prepared flour and flour mixes made in flour mills	[1] 243,686	50	66	81
Cereal breakfast foods	431,788	80	91	98
Blended and prepared flour not made in flour mills	[1] 221,810	67	80	89
Wet corn milling products	493,923	68	88	96
Biscuits, crackers, and pretzels	349,786	77	84	92
Other "dry" bakery products (including machine-made cookies and ice cream cones)	601,793	54	62	75
Refined cane sugar and byproducts	996,186	69	87	[3]
Refined beet sugar and byproducts	379,828	64	94	100
Chewing gum and chewing gum base	167,025	84	93	99
Distilled liquor (including distillers' grains) (except brandy)	144,927	55	71	95
Bottled liquors	650,770	61	80	96
Shortening and cooking oils	895,443	50	73	94
Desserts (ready to mix)	138,763	81	88	95
Sweetening sirups and molasses	90,062	63	76	90
Baking powder and yeast	83,049	78	87	94
Tobacco products:				
Cigarettes	2,137,032	80	99	100
Cigars	351,412	54	75	86
Chewing and smoking tobacco and snuff	192,772	53	78	98
Textile mill products:				
Synthetic broad-woven fabrics and related products:				
100 percent spun rayon and/or acetate fabrics	93,817	57	74	96
Nylon and chiefly nylon fabrics	111,443	52	64	89
Finished blankets	65,482	79	96	100
Wool fabrics, gray goods	128,546	62	73	87
Finished wool nonapparel fabrics and felts	64,009	58	74	96
Wool and chiefly wool blankets	15,840	73	89	100
Woven carpets and rugs, chiefly wool pile yarns	266,835	51	72	97
Woven carpets and rugs, chiefly cotton or manmade fiber yarns	31,013	68	87	98
Carpets and rugs [4]	48,777	52	63	79
Finished thread for use in the home	26,636	90	96	100
Hard fiber cordage and twine	52,260	62	85	99
Cotton cordage and twine	40,446	59	78	94
Automobile and furniture trimmings	160,564	89	95	99
Furniture and fixtures: Window shades and accessories	85,160	53	72	82
Paper and allied products:				
Oiled, waxed, and wax-laminated paper	240,296	51	71	91
Pressure-sensitive tape	183,437	76	88	97
Shipping sacks and multiwall bags	312,701	50	64	84
Sanitary tissue health products	573,240	61	75	90
Sanitary napkins and tampons	116,087	97	[3]	100
Cups and liquid-tight food containers	230,481	79	93	99
Insulating board	169,838	53	76	98
Hard-pressed wood fiberboard	78,331	79	91	99
Chemicals and allied products:				
Pesticides and other organic agricultural chemicals (not formulations)	96,186	52	74	96
Medicinal and botanical drugs (uncompounded, for human use)	302,329	50	63	82
Medicinal drugs for veterinary use	85,936	71	87	97
Antibiotic preparations for human use	361,941	59	85	98
Analgesics (including narcotics)	256,319	55	70	85
Tranquilizers, sedatives, and hypnotics	236,802	55	73	92
Hormone preparations	151,354	58	83	95
Soaps, except specialty cleaners (packaged)	313,582	74	85	92
Synthetic organic detergents (packaged)	807,699	90	96	99
Shaving preparations	74,944	58	80	96
Dentifrices (including mouth washes, gargles, and rinses)	197,833	75	93	98
Salt	86,544	81	91	99

(See footnotes at end of table, p. 345.)

Selected retail product classes for which over 50 percent of the value of shipments were accounted for by the 4 largest companies, 1958; also included in this group is the percent of value of shipments accounted for by the 8 and 20 largest companies—Con.

Product class	Value of shipments (thousands of dollars)	Percent of total value of shipments accounted for by—		
		4 largest companies	8 largest companies	20 largest companies
Rubber and plastics products: [4]				
Passenger car and motorcycle pneumatic tires (casings)	1,076,828	74	90	100
Truck and bus (and off the road) pneumatic tires	601,952	72	90	100
Other pneumatic tires and solid tires	185,455	78	92	99
All inner tubes	100,185	64	83	100
Rubber footwear	213,684	66	83	[3]
Stone, clay, and glass products:				
Sheet (window) glass	92,339	95	[3]	100
Glass containers	841,560	59	74	93
Table, kitchen, art, and novelty glassware	149,006	62	78	95
Lighting and electronic glassware	131,801	87	94	99
Vitreous plumbing fixtures	130,517	54	75	95
Vitreous china food utensils	59,995	57	76	98
Gypsum building materials	333,039	87	97	99
Asbestos-cement shingles and clapboard	50,202	73	95	100
Asphalt floor tile	77,348	81	98	100
Vinyl asbestos floor tile	66,591	78	99	100
Mineral wool for structural insulation	81,218	56	75	93
Fabricated metal products:				
Razor blades and razors (except electric)	80,713	[3]	[3]	
Vacuum and insulated bottles, jugs, and chests	41,147	79	94	100
Metal plumbing fixtures	180,153	53	70	90
Safes and vaults	45,088	87	92	99
Machinery (except electrical):				
Outboard motors	157,879	98	99	100
Wheel tractors and parts and attachments (except garden and contractors' off highway)	687,271	72	96	99
Planting, seeding, and fertilizing machinery	95,984	63	76	89
Plows, listers, harrows, rollers, pulverizers, and stalk cutters and parts	160,576	54	65	79
Harvesting machinery	321,434	70	81	92
Haying machinery	182,536	72	84	97
Typewriters and parts	188,556	79	99	100
Electrical machinery:				
Electric household ranges and ovens and surface cooking unit equipment	203,748	67	81	97
Household refrigerators	551,164	73	91	99
Home and farm freezers	178,006	58	78	99
Household mechanical washing machines, driers, and washer-drier combinations	672,213	68	90	99
Other household laundry equipment and parts	46,498	60	76	95
Electric fans (except industrial type)	77,053	54	75	93
Electric razors and dry shavers	54,091	[3]	100	
Household vacuum cleaners	155,571	64	84	99
Sewing machines	97,725	[3]	92	97
Electric lamps	393,597	90	96	99
House television receivers (including television combinations)	726,595	55	81	99
Phonograph records	136,165	74	81	88
Electron tubes (receiving type)	337,274	76	94	99
Cathode ray picture tubes	177,251	64	85	96
Storage batteries (SLI type)	278,960	66	86	92
Storage batteries (other than SLI type), including parts for storage batteries (all types)	78,511	72	93	99
Primary batteries (dry and wet)	135,679	84	94	99
Sparkplugs	123,064	[3]	[3]	[3]
Transportation equipment: Passenger cars (knocked down or assembled)	9,217,694	99	[3]	100
Instruments and related products:				
Photocopying, microfilming, blueprinting, Vandyke, and white printing equipment	57,668	63	85	98
Motion picture equipment	147,969	69	81	93
Photographic sensitized film and plates	396,014	97	99	99+
Sensitized photographic paper and cloth (silver halide type)	123,963	84	94	100
Sensitized photographic paper and cloth (other than silver halide type)	82,121	62	84	95
Prepared photographic chemicals	35,854	71	83	94
Clocks	111,385	56	72	90
Watches with imported movements	83,710	71	90	99
Watches with domestic movements and parts for all clocks and watches	85,331	82	93	98

(See footnotes at end of table, p. 345.)

Selected retail product classes for which over 50 percent of the value of shipments were accounted for by the 4 largest companies, 1958; also included in this group is the percent of value of shipments accounted for by the 8 and 82 largest companies—Con.

Product class	Value of shipments (thousands of dollars)	Percent of total value of shipments accounted for by—		
		4 largest companies	8 largest companies	20 largest companies
Miscellaneous manufacturing:				
Silverware and plated ware: Flatware	97,075	72	91	98
Pianos	64,130	53	76	100
Organs	79,375	61	79	97
Piano and organ parts	51,145	74	82	93
Lead pencils and crayons	65,317	55	72	92
Zipper and slide fasteners	87,251	64	78	91
Linoleum	47,839	96	100	
Asphalt-felt-base and supporting plastic floor covering	102,580	79	97	100
Matches	67,972	63	86	100

[1] By definition, this product class is limited to the products produced by establishments classified into the industry having the same code as the 1st 4 digits of the product code. Appreciable amounts are also made in the other product classes referred to in the product description. The total value of shipments and the percent of large companies shown here are based exclusively on the products primary to this industry.
[2] Excludes frozen soups.
[3] Withheld to avoid disclosing figures for individual companies.
[4] Not elsewhere classified.

Source: U.S. Senate Committee on the Judiciary, "Concentration Ratios In Manufacturing Industries, 1958," 87th Cong., 2d sess., table 4.

Mr. LOEVINGER. This guarantees no competition with regard to price as to all goods to which it may be applied. This is quite obviously, sir, the purpose of the legislation. I am sure that the backers of this legislation would have not the slightest interest in this if subsection (b) of section (8) were taken out. I suggested that heretofore and it is perfectly obvious this is the only reason that anybody is interested in this bill, to eliminate price competition.

Mr. DINGELL. And for all intents and purposes section (8) insofar as goods usable for the same general purpose, insofar as that language appears, is nothing more or less than a mockery and a joke upon the consuming public. Am I correct?

Mr. LOEVINGER. I don't know what that means. I suppose that you can say aluminum is usable for the same general purposes as copper, for example, the same general purpose is such vague, loose language that we would regard it as virtually meaningless.

Mr. DINGELL. The heart and liver and lungs of this legislation is price fixing?

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. On the American consumer, I would like to treat a little bit, if I may, the exemption given from the *McKesson & Robbins* decision which appears in subsection (14) on page 7 and also at the bottom of page 6. "And all such rights and remedies shall be also available to any owner of a brand, name, or trademark who, in the resale of goods identified by such brand, name, or trademark, shall compete, at any level of distribution, with any reseller offering such goods."

Essentially that is the legislative repealer of the *McKesson & Robbins* decision and also the *Secatore* case. Am I correct?

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. The case of *Esso* versus *Secatore*?

Mr. LOEVINGER. It explicitly authorizes horizontal price fixing conspiracies, heretofore always throught to be the most typical antitrust violation and restraint of trade.

Mr. DINGELL. I would like to go a little bit further with you if I may. I have been very much concerned with the whole of subsection (14) giving exemptions from the antitrust laws. This was not in the previous draft of this bill submitted to the committee during the previous Congress.

I would like to have you enunciate some of the other vices of this. I have been pecking away at this issue with a number of witnesses and have been unable to arrive at a clear determination of just precisely why this is here, what the function of this is, what the breadth of the exemption given is, and I would like to have some more comment from you, if I may.

Mr. LOEVINGER. I don't know that I can say anything to make it more clear, Congressman Dingell. It seems to me they could save themselves an awful lot of work and an awful lot of trouble in this legislation by simply passing a law that says, "Hereafter price fixing agreements, whether vertical or horizontal, shall not be construed to be a violation of the antitrust laws." This is what the legislation seeks to accomplish and all the rest is just trimmings.

Mr. DINGELL. This then is the purpose of subsection (14). Am I correct?

Mr. LOEVINGER. This is the way I read it, sir.

Mr. DINGELL. There is just one more thing. You may very well be familiar with the minority views turned in on the fair trade bill in the previous session of Congress. I assume that this bill is identical in purpose to the fair trade bills that we previously had. Am I correct?

Mr. LOEVINGER. I think this goes considerably beyond the fair trade bills and that you can make a better case for fair trade than you can for this bill.

Mr. DINGELL. In my minority views I listed a series of causes wherein fair trade had been utilized as a device for horizontal and vertical price fixing. That list is now 2 years old. I was wondering if perhaps for the committee you would submit the names of more recent cases in which fair trade or price fixing, because that is essentially what this bill does, has been utilized to fix prices in violation of the antitrust laws.

Mr. HEMPHILL. Do you want that part of that record?

Mr. DINGELL. I would like to have that part of the record.

Mr. HEMPHILL. Without objection it will be included as part of the record.

(The material referred to follows:)

APPENDIX II. CASES BROUGHT BY THE UNITED STATES UNDER THE ANTITRUST LAWS DEALING WITH DIRECT RESTRAINTS ON THE DISTRIBUTION OF CONSUMER GOODS

This appendix contains all cases brought by the United States under the antitrust laws dealing with direct restraints on the distribution of consumer goods. The cases are divided into two categories:

(A) Those cases involving horizontal conspiracies among dealers or other distributors to boycott manufacturers or suppliers who sell goods to unauthorized or price-cutting dealers or distributors and/or horizontal conspiracies among dealers or other distributors to fix the retail or wholesale price at which consumer goods will be sold.

(B) Those cases in which a manufacturer in combination with his wholesalers and/or dealers has sought to fix the resale prices at which his goods will be sold and/or to institutionalize his distribution system so as to keep his goods out of the hands of unauthorized or price-cutting retailers or distributors.[1]

A. HORIZONTAL CONSPIRACIES

1. *U.S.* v. *National Association of Retail Druggists*, (Eq. 10, 593, Cir. Ct. D. Ind., 1906) No. 32. Consent decree.
2. *U.S.* v. *Southern Wholesale Grocers' Ass'n.*, (Eq. 205, Cir. Ct. N.D. Ala., 1910), No. 72. Consent decree guilty of contempt, 207 Fed. 434 (1913).
3. *U.S.* v. *Edward E. Hartwick*, (Eq. 4121, Cir. Ct. E.D. Mich., 1911), No. 92. Consent decree.
4. *U.S.* v. *Arthur L. Holmes*, (Cr. 4750, N.D. Ill., 1911), No. 87. Nolle prosequi.
5. *U.S.* v. *Colorado & Wyoming Lumber Dealers' Ass'n.*, (Eq. 5749, D. Col. 1911), No. 96. Consent decree.
6. *U.S.* v. *Pacific Coast Plumbing Supply Ass'n.* (Eq. 92–1686, Cir. Ct. S.D. Calif., 1911) No 104. Consent decree.
7. *U.S.* v. *Philadelphia Jobbing Confectioners' Ass'n.* (Civ. 967, E.D. Pa., 1912) No. 124. Consent decree.
8. *U.S.* v. *National Wholesale Jewelers' Ass'n.* (Eq. 10–384, S.D. N.Y., 1913), No. 149. Consent decree.
9. *U.S.* v. *Eastern States Retail Lumber Ass'n.*, 201 Fed. 581 (S.D. N.Y., 1913), aff. 234 U.S. 600 (1914), No. 85. Conspiracy enjoined.
10. *U.S.* v. *Robert Knauer*, 237 Fed. 8 (C.A. 8, 1916), No. 155. Guilty.
11. *U.S.* v. *Willard G. Hollis & W. R. Wood*, 246 Fed. 611 (Cir. Ct. D., Minn., 1917), No. 97. Conspiracy enjoined.
12. *U.S.* v. *Carl C. King*, 229 Fed. 275 (D. Mass. 1917), No. 165. Guilty.
13. *U.S.* v. *National Retail Monument Dealers Ass'n* (Cr. 682, D. Md., 1917), No. 186. Nolo contendere.
14. *U.S.* v. *National Ass'n. of Master Plumbers* (Eq. 151, W.D. Pa., 1917), No. 181. Consent decree.
15. *U.S.* v. *California Wholesale Growers' Ass'n.* (Eq. H–80–M, S.D. Calif., 1924), No. 284. Consent decree.
16. *U.S.* v. *Oregon Wholesale Grocers' Ass'n.* (Eq. 8700–34, D. Ore., 1924), No. 291. Consent decree.
17. *U.S.* v. *Southern Calif. Wholesale Grocers' Ass'n.*, 72 F. 2d 944 (S.D. Calif., 1925, No. 283. Conspiracy enjoined.
18. *U.S.* v. *Shreve, Treat & Eacret* (C. 7900–J, S.D. Calif., 1926), No. 312. Nolo contendere.
19. *U.S.* v. *Eighteen Karat Club* (Civ. L–12–J, S.D. Calif., 1926) No. 317. Consent decree.
20. *U.S.* v. *California Retail Hardware & Implement Ass'n.* (Eq. 1835, N.D. Calif., 1927), No. 320. Consent decree.
21. *U.S.* v. *Northwest Shoe Finders Credit Bureau* (Eq. 579, W.D. Wash., 1927), No. 324. Consent decree.
22. *U.S.* v. *Richmond Distributing Corp.* (Eq. 162, E.D. Va., 1927), No. 326. Consent decree.
23. *U.S.* v. *Allied Cleaners & Dyers of Seattle* (Cr. 11650, W.D. Wash., 1927), No. 327. Nolo contendere.
24. *U.S.* v. *Columbus Confectioners' Ass'n.* (Eq. 546, S.D. Ohio, 1927), No. 330. Consent decree.
25. *U.S.* v. *Julius Baumgartner*, (Cr. 16267, N.D., Ill., 1927) No. 331. Guilty, appeal by some defendants: [40 F. 2d 49 (C.A. 7, 1930)] convictions sustained, cert. den. 282 U.S. 857 (1930).
26. *U.S.* v. *Chicago Ass'n. of Candy Jobbers*, (Eq. 7906, N.D. Ill., 1928) No. 334. Dismissed by government without prejudice.
27. *U.S.* v. *Confectioners' Club of Baltimore*, (Eq. 1424, D. Md., 1928) No. 350. Consent decree.
28. *U.S.* v. *Evansville Confectioners' Ass'n.*, (Eq. 86, S.D. Ind., 1929) No. 360. Consent decree.

[1] All citations will include a number, e.g., No. 32 in *U.S.* v. *National Association of Retail Druggists*. This number is the cases' citation in The Federal Antitrust Laws With Summary of Cases, published by the Commerce Clearing House in 1952, with supplement in 1957.

29. *U.S.* v. *Contracting Plasterers' Ass'n. of Long Beach, Inc.*, (Cr. 14262–Y, S.D., Calif. 1940) No. 489. Nolo contendere.
30. *U.S.* v. *Harbor District Lumber Dealers Ass'n.*, (Cr. 14302–H, S.D. Calif., 1940) No. 489. Nolo contendere.
31. *U.S.* v. *Western Washington Wholesale Grocers Ass'n.*, (Cr. 45440, W.D. Wash., 1941) No. 587. Nolo contendere.
32. *U.S.* v. *Southwestern Woodwork Ass'n.*, (Cr. 15078, W.D. Mo., 1941) No. 595. Nolo contendere.
33. *U.S.* v. *Southern California Gas Co.*, (Cr. 14832, S.D. Calif., 1941) No. 596. Nolo contendere.
34. *U.S.* v. *Westinghouse Electric Supply Co.*, (Cr. 14843, S.D. Calif., 1941) No. 597. Nolo contendere.
35. *U.S.* v. *Washington Wholesale Tobacco & Candy Distributors*, (Cr. 45510, W.D. Wash., 1941) No. 607. Nolo contendere.
36. *U.S.* v. *Retail Lumbermen's Ass'n.*, (Civ. 378, D. Colo., 1941) No. 651. Consent decree.
37. *U.S.* v. *Massachusetts Food Council, Inc.*, (Civ. 1592, D. Mass., 1941) No. 653. Consent decree.
38. *U.S.* v. *Connecticut Food Council, Inc.*, (Civ. 680, D. Conn. 1941) No. 654. Consent decree.
39. *U.S.* v. *Tennessee Retail Grocers Ass'n.*, (Cr. 10–116, M.D. Tenn., 1941) No. 658. Defendants' demurrers sustained.
40. *U.S.* v. *Maine Food Council, Inc.*, (Civ. 100, D. Me., 1941) No. 666. Consent decree.
41. *U.S.* v. *Rhode Island Food Council, Inc.*, (Civ. 157, D. R.I., 1941) No. 674. Consent decree.
42. *U.S.* v. *National Retail Lumber Dealers Ass'n.*, (Civ. 06, D. Colo., 1942) No. 677. Consent decree.
43. *U.S.* v. *National Wholesale Druggist Ass'n.*, (Cr. 618–C.D. N.J., 1942) No. 683. Nolo contendere.
44. *U.S.* v. *Union Hardware & Metal Co.*, (Cr. 15244, S.D. Calif., 1942) No. 686. Nolo contendere.
45. *U.S.* v. *Colorado Wholesale Wine & Liquor Dealers Ass'n., Inc.*, (Cr. 9514, D. Colo., 1942) No. 691. Nolo contendere.
46. *U.S.* v. *Tennessee Retail Grocers Ass'n.*, (Cr. 10223, M.D. Tenn., 1942) No. 701. Dismissed.
47. *U.S.* v. *Utah Wholesale Grocery Co.*, (Cr. 14140, D. Utah, 1942) No. 702. Nolo contendere.
48. *U.S.* v. *Retail Furniture Dealers Ass'n. of Southern California*, (Civ. 2230–Y, S.D. Calif., 1942) No. 704. Consent decree.
49. *U.S.* v. *Southern California Gas Co.*, (Civ. 2231–Y, S.D. Calif., 1942) No. 705. Consent decree.
50. *U.S.* v. *Washington Wholesale Grocers Ass'n.*, (Civ 538, W.D. Wash., 1942) No. 723. Consent decree.
51. *U.S.* v. *Washington Wholesale Tobacco and Candy Distributors*, (Civ. 570, W.D. Wash., 1942) No. 730. Consent decree.
52. *U.S.* v. *California Retail Grocers and Merchants Ass'n., Ltd.*, 139 F. 2d 978 (C.A. 9, 1943), cert. den. 322 U.S. 724 (1944). No. 689. Guilty.
53. *U.S.* v. *Spokane Fuel Dealers Credit Ass'n., Inc.*, (Cr. 7641, E.D. Wash., 1943) No. 783. Not guilty.
54. *U.S.* v. *The Metropolitan Leather and Findings Ass'n., Inc.*, (Cr. 128277, S.D.N.Y., 1948) No. 956. Nolo contendere.
55. *U.S.* v. *Leather and Shoe Finders Association of Philadelphia*, (Cr. 14820, E.D. Pa., 1948) No. 957. Nolo contendere.
56. *U.S.* v. *Greater Kansas City Retail Coal Merchants Ass'n.*, (Cr. 17328, W.D. Mo., 1948) No. 965. Nolo contendere.
57. *U.S.* v. *Tri State Retail Record Dealers Ass'n.*, (C. 13008, W.D. Pa., 1949) No. 994. Nolo contendere.
58. *U.S.* v. *Record Dealers Ass'n.*, (Cr. 15755, E.D. Pa., 1950) No. 1026. Nolo contendere.
59. *U.S.* v. *K. & L Distributors, Inc.*, (Cr. 48202, W.D. Wash., 1950) No. 1030. Nolo contendere.
60. *U.S.* v. *Ketchikan Retail Liquor Dealers Ass'n.*, (Cr. 1559–KB, D. Alaska, 1950) No. 1031. Nolo contendere.
61. *U.S.* v. *Anchorage Retail Liquor Dealers Ass'n.*, (Cr. 2379, D. Alaska, 1950) No. 1032. Nolo contendere.

62. *U.S.* v. *Billy Vuicich*, (Cr. 1523, D. Alaska, 1950) No. 1034. Nolo contendere.
63. *U.S.* v. *Tongass Trading Company, Inc.*, (Cr. 1560 KB, D. Alaska, 1950) No. 1036. Nolo contendere.
64. *U.S.* v. *Mon-Yaugh Malt Beverage Dealers Ass'n.*, (Cr. 3209, W.D. Pa. 1950) No. 1046. Nolo contendere.
65. *U.S.* v. *Eastern Electrical Wholesalers Ass'n.*, (Cr. 13332, S.D. N.Y., 1950) No. 1047. Nolo contendere.
67. *U.S.* v. *National Automotive Parts Ass'n.*, (Civ. 9559, E.D. Mich., 1950) No. 1056. Consent decree.
68. *U.S.* v. *Minneapolis Electrical Contractors Ass'n.*, (Cr. 8161, D. Minn., 1951) No. 1068. Guilty.
69. *U.S.* v. *Minneapolis Electrical Contractors Ass'n.*, (Civ. 3715, D. Minn., 1951) No. 1077. Consent decree.
70. *U.S.* v. *Allied Florists Association of Illinois*, (Civ. 51 C 1036, N.D. Ill., 1951) No. 1108. Consent decree.
71. *U.S.* v. *Allegheny County Retail Druggists Ass'n.*, (Cr. 13470, W.D. Pa., 1951) No. 1111. Nolo contendere.
72. *U.S.* v. *The Stationers Ass'n. of Southern California, Inc., et al.*, (Civ. 14777 C.S.D. Calif., 1952) No. 1148. Consent decree.
73. *U.S.* v. *Akin-Denison Co., et al.*, (Cr. 53–96F, D. Mass., 1953) No. 1164. Nolo contendere.
74. *U.S.* v. *Haverhill Fuel Oil Dealers' Ass'n., et al.*, (Cr. 53–118 D. Mass., 1953) No. 1167. Association found guilty. Pleas of nolo contendere by others.
75. *U.S.* v. *Lowell Fuel Oil Dealer Associates, Inc., et al.*, (Cr. 53–119, D. Mass., 1953) No. 1168. Guilty plea by Association, nolo contendere by others.
76. *U.S.* v. *Lawrence Fuel Oil Institute, Inc., et al.*, (Cr. 53–120, D. Mass. 1953) No. 1169. Guilty plea by Institute, nolo contendere by others.
77. *U.S.* v. *Louisiana Fruit and Vegetable Producers Union, Local 312, et al.*, (Cr. 24906 E.D. La., 1953) No. 1173. Guilty pleas.
78. *U.S.* v. *S. Barker's Sons Co., et al.*, (Cr. 21172, N.D. Ohio, 1954) No. 1187. Nolo contendere.
79. *U.S.* v. *Owuhee Bottled Gas Service, et al.* (Cr. 3434, D. Idaho, 1954) No. 1188. Nolo contendere.
80. *U.S.* v. *Maryland State Licensed Beverage Ass'n., Inc.* (Cr. 23212, D. Md., 1955) No. 1225. Nolo contendere.
81. *U.S.* v. *Garden State Retail Gasoline Dealers Ass'n., Inc., et al.*, (Cr. 154–55, D. N.J., 1955) No. 1238. Guilty plea by Association, nolo contendere by others.
82. *U.S.* v. *Garden State Retail Gasoline Dealers Ass'n., Inc., et al.*, (Civ. 482–55, D. N.J., 1955) No. 1239. Consent decree.
83. *U.S.* v. *Memphis Retail Package Stores Ass'n., Inc., et al.*, (Cr. 8315, W. D. Tenn., 1955) No. 1245. Guilty pleas.
84. *U.S.* v. *Memphis Retail Package Stores Ass'n., Inc. et al.*, (Civ. 2672, W.D. Tenn., 1955) No. 1246. Guilty.
85. *U.S.* v. *Retail Liquor Dealers Ass'n. of Chattanooga, et al.*, (Cr. 10581, E.D. Tenn., 1955) No. 1247. Guilty plea by association, nolo contendere by others.
86. *U.S.* v. *Retail Liquor Dealers Ass'n of Chattanooga, et al.*, (Civ. 2554, E.D. Tenn., 1955) No. 1248. Conspiracy enjoined.
87. *U.S.* v. *Lowell Fuel Oil Dealer Association, Inc., et al.*, (Civ. 55–586, W.D. Mass., 1955) No. 1249. Consent decree.
88. *U.S.* v. *Erie County Malt Beverage Distributors Ass'n. et al.*, (Cr. 14870, W.D. Pa., 1956) No. 1272. Guilty.
89. *U.S.* v. *Haverhill Fuel Oil Dealers' Ass'n., et al.*, (Civ. 56–532, S.D. Mass., 1956) No. 1287. Consent decree.
90. *U.S.* v. *Erie County Malt Beverage Distributors Ass'n., et al.*, (Civ. 436, W.D. Pa., 1956) No. 1295.
91. *U.S.* v. *Maryland State Licensed Beverage Ass'n., Inc., et al.*, (Civ. 9122, D. Md., 1956) No. 1302.
92. *U.S.* v. *Memphis Retail Appliance Dealers Ass'n., Inc., et al.*, (Civ. 3016, W.D. Tenn., 1956) No. 1308. Consent decree.
93. *U.S.* v. *Nassau and Suffolk County Retail Hardware Association, Inc.*, (Cr. 45037, E.D. N.Y., 1957) No. 1344. Nolo contendere.
94. *U.S.* v. *Nassau and Suffolk County Retail Hardware Association, Inc.*, (Civ. 17768, E.D. N.Y., 1957) No. 1346. Case pending.

95. *U.S.* v. *Tri-County Beer Distributors Ass'n., et. al.*, (Cr. 5644, S.D. Ill., 1957) No. 1352. Nolo contendere.
96. *U.S.* v. *Tri-County Beer Distributors Association, et. al.*, (Civ. 2385, S.D. Ill., 1957) No. 1355. Consent decree.
97. *U.S.* v. *Retail Floor Covering Association of Greater Philadelphia, et al.*, (Civ. 24401, E.D. Pa., April 2, 1958) No. 1377. Consent decree.
98, 99, 100, 101. *U.S.* v. *New York Pickle and Condiment Dealers Ass'n., et al.*, (Cr. 155–306, Civ. 132–228, Cr. 155–307, Civ. 132–227, S.D. N.Y., 1958) Nos. 1379, 1380, 1381, 1382. Nolo contendere and Consent decree.
102, 103. *U.S.* v. *Crane Co., et al.*, (Cr. 27476, Civ. 2150, S.D. Calif., 1958) Nos. 1283 and 1393. Nolo contendere and consent decree.
104. *U.S.* v. *Continental Baking Co., et al.*, (Cr. 8676, W.D. Tenn., 1958) No. 1385. Not guilty on retrial.
105, 106. *U.S.* v. *Frozen Food Distributors Ass'n., et al.*, (Cr. 156–144, Civ. 135–141, S.D. N.Y., 1958) Nos. 1403, 1404. Nolo contendere and consent decree.
107, 108, 109. *U.S.* v. *Greater Washington Chevrolet Dealers Ass'n., et al.*, (Cr. 725–58, Cr. 726–58, Cr. 807–58, D. D.C., 1958) Nos. 1407, 1408, 1409. Guilty, nolo contendere and nolo contendere.
110. *U.S.* v. *Commercial Electric Co., et al.*, (Cr. 10619, Civ. 8107, N.D. Ohio, 1958) Nos. 1419, 1420. Nolo contendere and consent decree.
111. *U.S.* v. *The Detroit Chevrolet Dealers' Ass'n., Inc., et al.*, (Cr. 37270, Mich., 1959) No. 1431. Acquittal.
112–119. *U.S.* v. *Greater New York Chrysler Corp. Automobile Dealers, Inc., et al.*, (Cr. 158–223, –224, –225, –226; Cr. 45780, –81, –82, –83. E.D. N.Y., S.D. N.Y., 1959) No. 1435. Nolo contendere.
120. *U.S.* v. *Long Island Fence Ass'n., Inc., et al.*, (Cr. 45835, E.D. N.Y., 1959) No. 1445. Nolo contendere.
121. *U.S.* v. *Metropolitan Detroit Ford Dealers, Inc., et al.* (Cr. 37504, Mich., 1959) No. 1446. Nolo contendere.
122, 123. *U.S.* v. *San Diego Grocers Ass'n., Inc., et al.* (Cr. 28475, Civ. 2347, S.D. Calif., 1959) No. 1451, 1491.
124,125. *U.S.* v. *Auto Glass Dealers Ass'n.* (Cr. 159–112, Civ. 147–53, S.D.N.Y., 1959) No. 1452, 1453. Nolo contendere and consent decree.
126. *U.S.* v. *Philadelphia Ass'n. of Linen Suppliers, et al.* (CR 19999, Pa., 1959) No. 1454.
127. *U.S.* v. *Arizona Pharmaceutical Ass'n., et al.* (Civ. 3367, D. Ariz. 1960) No. 1538.
128. *U.S.* v. *New Jersey Auto Glass Dealers Ass'n.* (Civ. 575–60, D. N.J., 1960) No. 1547. Consent judgment.
129. *U.S.* v. *Carbonated Beverage Mfgs. Ass'n. of Washington* (Cr. 674–60, D.C. 1960) No. 1556. Nolo contendere.
130, 131. *U.S.* v. *Paul Barnett, Inc., et al.* (Cr. 11953–M–CR, Civ. 10422–M, D. Fla., 1960) No. 1572, 1573. Nolo contendere and consent decree.
132, 133. *U.S.* v. *Northern California Pharmaceutical Ass'n., et al.* (Cr. 37653, Civ. 39629, N.D. Calif., 1960), No. 1575.
134. *U.S.* v. *Idaho State Pharmaceutical Ass'n., et al.* (Civ. 3654, Idaho, 1961) No. 1594.
135. *U.S.* v. *Utah State Pharmaceutical Ass'n., et al.* (Civ. 3061, Utah, 1961) No. 1595. Held pricing violated Sec. 1 of Sherman Act.
136. *U.S.* v. *Woodson Co., et al.* (Cr. 375–61, D.C. 1961) No. 1611. Dismissed as to corp. officers (overruled in *U.S.* v. *Wise*).
137. *U.S.* v. *Packard Bell Electronics Corp, et al.* (Cr. 30158, Calif. 1961) No. 1632.
138, 139. *U.S.* v. *Conn. Package Stores Ass'n., Inc., et al.* (Cr. 10580, Civ. 9157, Conn., 1962) No. 1645, 1646.
140, 141. *U.S.* v. *M. Klahn Inc., et al.* (62 Cr. 347, N.Y., 1962) No. 1656, 1959, Civ. 1576.
142–147. *U.S.* v. *Greater New York Roll Bakers Ass'n., Inc. et al.* (Cr. 62 Cr. 513, –14, –15; Civ. 62 Cr. 2030, –31, –32, N.Y., 1962) No. 1662, 1663, 1664, 1665, 1666, 1667.

B. VERTICAL COMBINATIONS

1. *U.S.* v. *Paris Medicine Co.*, (Eq. 4802, E.D. Mo., 1917) No. 190. Consent decree.
2. *U.S.* v. *Colgate & Co.*, 253 Fed. 522 (E.D. Va., 1918) Aff. 250 U.S. 300 (1919) No. 195. Defendant's demurrer sustained.

3. *U.S.* v. *American Cone & Wafer Co.*, (Eq. 155, S.D. Ohio, 1918) No. 202. Consent decree.
4. *U.S.* v. *Klaxon Horn Co.*, (Eq. 2005, D.N.J., 1918) No. 205. Consent decree.
5. *U.S.* v. *A. Schrader's Son, Inc.*, 264 Fed. 175 (N.D. Ohio, 1919), rev. 252 U.S. 85 (1920) No. 200. Defendant's demurrer sustained, reversed by Supreme Court, but nolle prosequi because of consent decree in companian civil case.
6. *U.S.* v. *Colgate & Co.*, (Cr. 2404, D.N.J., (1920) No. 212. Directed verdict for defendant.
7. *U.S.* v. *A. Schrader's Son, Inc.*, (Eq. 1116, E.D.N.Y., 1922) No. 260. Consent decree.
8. *U.S.* v. *Colgate & Co.*, (Eq. 914, D.N.J., 1924) No. 292. Dismissed by court without prejudice.
9. *U.S.* v. *Richard Hudnut, Inc.*, 8 F. 2d 1010 (S.D.N.Y., 1925) No. 266. Dismissed by court.
10. *U.S.* v. *General Electric Co.*, 15 F. 2d 715 (N.D. Ohio, 1925) Aff. 272 U.S. 476 (1926) No. 281. Dismissed by court.
11. *U.S.* v. *Western Pennsylvania Sand and Gravel Ass'n.*, (Civ. 780 W.D. Pa., 1940) No. 496. Consent decree.
12. *U.S.* v. *Waltham Watch Co.*, (Cr. 110–495, S.D.N.Y., 1941) No. 655. Nolo contendere.
13. *U.S.* v. *Hamilton Watch Co.*, (Cr. 110–496, S.D.N.Y., 1941) No. 656. Nolo contendere.
14. *U.S.* v. *Elgin National Watch Co.*, (Cr. 110–497, S.D.N.Y., 1941) No. 657. Nolo contendere.
15. *U.S.* v. *Univis Lens Co., Inc.*, 41 F. Supp. 258 (S.D.N.Y., 1941) Aff. 316 U.S. 241 (1942) No. 558. Combination to restrain distribution enjoined.
16. *U.S.* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S.D.N.Y., 1942) Aff. 321 U.S. 307 (1944) No. 559. Combination to restrain distribution enjoined.
17. *U.S.* v. *American Optical Company*, (Civ. 46–C–1333, N.D. Ill., 1946) No. 858. Consent decree.
18. *U.S.* v. *Bausch & Lomb Optical Company*, Civ. 46–C 1332, N.D. Ill., 1946) No. 859. Consent decree.
19. *U.S.* v. *Bendix Home Appliances, Inc. and Telecoin Corp.*, (Civ. 39–247, S.D.N.Y., 1946) No. 881. Consent decree.
20. *U.S.* v. *The White-Haines Optical Company*, (Civ. 2167, S.D. Ohio, 1948) No. 923. Consent decree.
21. *U.S.* v. *Uhlemann Optical Co. of Illinois*, (Civ. 48–C–608, N.D. Ill., 1948) No. 924. Consent decree.
22. *U.S.* v. *N. P. Benson Optical Company*, (Civ. 2729, D. Minn., 1948) No. 925. Consent decree.
23. *U.S.* v. *The House of Vision-Belgard-Spero, Inc.*, (Civ. 48–C–607, N.D. Ill., 1948) No. 926. Consent decree.
24. *U.S.* v. *Chrysler Corporation Parts Wholesalers*, (Cr. 47762, W.D. Wash., 1948) No. 970. Nolo contendere.
25. *U.S.* v. *Servel, Inc.*, (Cr. 13206, W.D. Pa., 1950) No. 1045. Nolo contendere.
26. *U.S.* v. *The Jacobs Manufacturing Co.*, (Cr. 21568, S.D. Calif., 1950) No. 1065. Nolo contendere.
27. *U.S.* v. *Luxene, Inc.* (Civ. 66124 S.D.N.Y., 1951) No. 1075. Consent decree.
28. *U.S.* v. *Sunbeam Corp.*, (Civ. 52–C–479, N.D. Ill., 1952) No. 1121. Dismissed by government.
29. *U.S.* v. *Philco Corp.*, (Civ. 18216, E.D. Pa., 1954) No. 1211. Consent decree.
30. *U.S.* v. *Eastman Kodak Co.*, (Civ. 6450, W.D.N.Y., 1954) No. 1213. Consent decree.
31. *U.S.* v. *Lyman Gun Sight Corp., et al.*, (Cr. 1116–55, D.D.C., 1955) No. 1265. Nolo contendere.
32. *U.S.* v. *Lyman Gun Sight Corp., et al.*, (Civ. 890–56, D.D.C., 1956) No. 1269. Consent decree.
33. *U.S.* v. *McKesson and Robbins, Inc.*, 351 U.S. 305 U.S. (956) No. 1130. Consent decree.
34. *U.S.* v. *J. P. Seebury Corp.* (Cr. 56 CR 139, N.D. Ill., 1956) No. 1270. Nolo contendere.
35. *U.S.* v. *J.P. Seebury Corp., et al.*, (Civ. 56 C 419, N.D. Ill., 1956) No. 1271. Consent decree.
36. *U.S.* v. *Shell Oil Co.*, (Cr. 5675–W.D. Mass., 1956) No. 1273. Nolo contendere.

37. *U.S.* v. *Meredith Publishing Co., et al.*, (Civ. 109–292, S.D.N.Y., 1956) No. 1280. Consent decree.
38, 39, 40, 41. *U.S.* v. *Socony Mobile Oil Co., Inc.*, (Cr. 56–152–S, 56–153–S, 56–154–S, 56–155–S, 56–156–S, D. Mass., 1956) No. 1289, 1290, 1291, 1292, 1293. Dismissed by court.
42. *U.S.* v. *R. Reginald Potts*, (Cr. 56–157–M., D. Mass., 1956) No. 1294. Dismissed by court.
43. *U.S.* v. *The Rudolph Wurlitzer Co.*, (Civ. 7337, W.D.N.Y., 1957) No. 1321. Consent decree.
44. *U.S.* v. *Toy Guidance Council, Inc., et al.*, (Cr. C–152–241, S.D.N.Y., 1957) No. 1328. Nolo contendere.
45. *U.S.* v. *Toy Guidance Council, Inc., et al.*, (Civ. 119–6, S.D.N.Y., 1957) No. 1329. Consent decree.
46. *U.S.* v. *Parke, Davis & Co., et al.*, (Cr. 444–57, D.D.C., 1957) No. 1339. Directed verdict of acquittal.
47. *U.S.* v. *Parke, Davis & Co., et al.*, (Civ. 1064–57, D.D.C., 1957) No. 1340. Dismissed by court.
48. *U.S.* v. *Necchi Sewing Machine Sales Corp., et al.*, (Civ. 112–69 S.D.N.Y., 1957) No. 1348. Consent decree.
49. *U.S.* v. *Volkswagen of America, Inc., et al.*, (Civ. 1232–57, D.N.J., 1957) No. 1368. Consent decree.
50. *U.S.* v. *The Hoover Co.*, (Civ. 131–68, S.D.N.Y., March 17, 1958) No. 1373. Consent decree.
51. *U.S.* v. *Jas. H. Matthews & Co., et al.*, (Cr. 15463, Civ. 16818 W.D. Pa., March 21, 1958) No. 1374, 1375. Consent decree and nolo contendere.
52. *U.S.* v. *Whitin Business Equipment Corp.*, (Civ. 58–567–A, D. Mass., May 29, 1958) No. 1391. Consent decree.
53. *U.S.* v. *Bostitch Inc., et al.*, (Cr. 184–58, D.N.J., May 21, 1958) No. 1388. Nolo contendere.
54. *U.S.* v. *White Motor Co.*, (Civ. 34593, Ohio, 1958) No. 1399. Summary judgment for Government.
55. *U.S.* v. *Arnold, Schwinn & Co., et al.*, (Civ. 58 C 272[3], E.D. Mo., 1958) No. 1405.
56. *U.S.* v. *Sherwin Williams Co., et al.*, (Civ. 34728, N.D. Ohio, 1958) No. 1410. Consent judgment.
57. *U.S.* v. *Hunting-Roberts Co., et al.*, (Cr. 36304, S.D. Calif., 1958) No. 1417. Nolo contendere.
58. *U.S.* v. *Gemex Corp.*, (Civ. 1350–58, D.N.J. 1958) No. 1426. Consent decree.
59. *U.S.* v. *U.S. Rubber Co.* (Cr. 16044, D. Colo., 1959) No. 1463. Nolo contendere.
60. *U.S.* v. *Firestone Tire and Rubber Co.*, (Cr. 8842, D. Tenn., 1959) No. 1464. Nolo contendere.
61. *U.S.* v. *Hamilton Cosco, Inc.*, (Civ. 147–345, S.D.N.Y., 1959) No. 1465. Consent decree.
62. *U.S.* v. *Audiofidelity, Inc., et al.*, (Civ. 150–21, S.D.N.Y., 1959) No. 1475. Consent decree.
63. *U.S.* v. *Nat'l. Dairy Products Corp., et al.*, (Cr. 20542, Mo., 1959) No. 1478. Dismissed (overruled in *U.S.* v. *Wise*).
64. *U.S.* v. *Wilson & Geo. Meyer & Co., et al.*, (Civ. 38606, Calif., 1959) No. 1484. Consent decree.
65. *U.S.* v. *Renault, Inc., et al.*, (Civ. 154–164, S.D.N.Y., 1959) No. 1488.
66. *U.S.* v. *Hamilton Mfg. Co.*, (Cr. 60–CR–1, D. Wisc., 1960) No. 1493. Nolo contendere.
67. *U.S.* v. *Hambro Automotive Corp., et al.*, (Civ. 60–729, S.D.N.Y., 1960). Consent decree.
68. *U.S.* v. *Union Carbide Corp.* (Civ. 12881, D. Mo., 1960) No. 1544.
69. *U.S.* v. *Becton, Dickinson and Co.*, (Civ. 567–60, D.N.J., 1960) No. 1546.
70. *U.S.* v. *A P Parts Corp. et al.*, (Civ. 8541, D. Ohio, 1960) No. 1568.
71. *U.S.* v. *American Optical Co., et al.*, (Cr. 61–82, Wisc., 1961) No. 1620.
72. *U.S.* v. *General Motors Corp., et al.*, (Cr. 30132, Calif., 1961) No. 1628.

Mr. DINGELL. Mr. Loevinger, I want to thank you for a very fine statement this morning.

Mr. HEMPHILL. Mr. Glenn?

Mr. GLENN. No questions.

Mr. HEMPHILL. I am not asking you to pass on someone else's testimoney, but a gentleman made a statement yesterday in which he said that the applicability of this legislation to the oil jobbers was doubtful. Upon examination of the witness he later said that was hearsay.

Would you state whether—in your opinion—whether or not this would be applicable to oil jobbers and people in the oil industry generally?

Mr. LOEVINGER. I see nothing in this legislation to preclude any seller of tangible goods from taking advantage of the legislation. It refers to the "owner of a brand name, or trademark." Which is used to identify the goods "either on the label, container, dispenser thereof, or otherwise." All you have to do, presumably, is to put your company name on an invoice for goods. It is arguable that this act would not apply to services, but aside from that, if you are dealing with tangible goods, anybody who wants to take advantage of it certainly has the way open to him.

Mr. HEMPHILL. There was also some unfortunate and I thought unwarranted criticism of the Congress and of the executive branch of the Government with respect to the antitrust enforcement and I would like to give you a chance to comment on that because that statement hit me at the time as a little reckless. Nevertheless, if you care to comment we would be happy to have your comment on the enforcement activities, which many people have expressed great confidence in, but yesterday, unfortunately, there was some expression of lack of confidence. Would you care to comment?

Mr. LOEVINGER. I am not quite sure what the statement was, sir, or what I should say in defense. Our policy generally has been not to make self-serving or exculpatory statements, but to seek to let our record speak for us rather than engage in self-laudation.

I think we have done our best to enforce the antitrust laws, in essentially the way that they have been enforced in the past. I don't think there have been radical departures. In the last year I think that the record shows that we have been at least equally vigorous and effective in enforcement of the laws and I expect that this is all that we are supposed to do. We don't make laws. We merely enforce them.

Mr. HEMPHILL. I certainly thank you. Would your associate, Mr Coyle, care to make any additional statement at this time?

Mr. COYLE. No, sir, I don't believe so.

Mr. DINGELL. I would like to ask another question. You dealt with the question of conflict of laws which would exist under this bill. This is a very interesitng point and it is one which I think has not been treated here for this, it has not been treated heretofore in this hearing. I was wondering if you would want to tell us precisely what situation the small businessman would find himself in where State fair trade laws are utilized and where this quality brand bill, if the bill becomes law, on a nationwide basis is utilized. Conceivably he would find himself sued under either statute. Am I correct?

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. And conceivably the argument could be made either that this statute does or does not usurp control of the field under the doctrine of Federal preemption?

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. Conceivably he could find himself faced with a situation where he would be charged with having failed to utilize a fixed price under this bill or having failed to use a minimum price under the fair trade bills, am I correct?

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. And so conceivably he might find himself at one time violating either a Federal or a State statute or having his option of violating either of the two. Am I correct?

Mr. LOEVINGER. This is conceivable. I must say in all fairness I don't think it is likely. I think the State laws are, of course, quite varied, and I don't claim intimate familiarity with all of them, although they do all follow a fairly common pattern and I am familiar with the general pattern. I am more interested in the conflict among Federal laws. Again referring to section (14) on page 6, it says, "No exercise of any right or remedy provided in paragraphs (7) to (13) inclusive of this subsection shall be construed to be a violation of any of the Antitrust Acts."

With respect to the question of the situation that may arise when a manufacturer for his own purposes sets differing prices in different parts of one community or in adjacent communities and when the Federal Trade Commission might feel that this constitutes a violation of the Robinson-Patman Act, does this free a manufacturer to set discriminatory prices? On its face it appears to. There is nothing in this law that says, "No exercise of any right or remedy being construed to be a violation of any of the antitrust laws except the Robinson-Patman Act, or unless it is discriminatory, or unless it is contrary to the Sherman Act." It just says, "Nothing that you do under this Act shall violate the Antitrust Acts."

This would mean even automobile manufacturers, or distributors, or anybody else who has the intangible, ephemeral thing we call the trademark to set as discriminatory prices as he chooses apparently. This is contrary to anything else Congress has legislated heretofore.

Mr. DINGELL. Let's talk a little bit more about enforcement of the antitrust laws. I have had the privilege of working on a couple of antitrust suits in my experience as an attorney. As a matter of fact, prosecution of an antitrust suit on either the criminal level or on the civil level is one of the most intensely difficult kinds of litigation that a lawyer can be faced with handling. Am I correct?

Mr. LOEVINGER. No question about it.

Mr. DINGELL. It involves an enormous amount of preparation in terms of gathering of evidence. It requires presentation in just a moderately complex antitrust suit of a substantial number of witnesses and a tremendous number of exhibits. Am I correct?

Mr. LOEVINGER. Yes, sir, I would be glad to give you moving details of the pathos of a lawyer in this situation.

Mr. DINGELL. I would like to have on the record details because I feel that this committee has to understand it. The difficulty and complexity of bringing an antitrust suit. Such an antitrust lawsuit is an enormously complex and difficult piece of legal operation to bring before the court. Am I correct?

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. Would you want to elucidate just briefly on the point?

Mr. LOEVINGER. Let me say that I think I know something of this. I represented while I was practicing law mostly business, and mostly small business. Some of the biggest may have been medium sized, and I did occasionally have the good fortune to get local representation of a large company, but not very often. I brought a number of private antitrust suits on behalf of small business.

Mr. DINGELL. Treble damage suits?

Mr. LOEVINGER. Yes, sir. You must be prepared in one of these cases in the first place to face possible retribution by the people with whom your client is doing business, who are almost always considerably more powerful.

Mr. DINGELL. Big firms of considerable economic power?

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. And who have acted in combination with others to the detriment generally of the plaintiff in lawsuits?

Mr. LOEVINGER. That is right. You have to be prepared to spend anywhere from 2 to 5 years at a minimum and on occasion it may run to 6 or 8 years.

Mr. DINGELL. This is also true of Federal enforcement of the criminal aspects. Am I correct?

Mr. LOEVINGER. It is partially true but not so true. There are differentiating aspects of Federal law, particularly on the civil side. We frequently get cooperation from defendants which permits us to try cases relatively expeditiously in order to try out legal issues, and this will seldom be the case in the situation of a small business that is trying to maintain its place in the business firmament and is being oppressed by big business.

Mr. DINGELL. Of course not infrequently you find, for example, on the Federal antitrust enforcement level, particularly with regard to either civil or criminal suits, as a matter of fact, that two or three Federal antitrust attorneys will find themselves faced by a couple of hotels full of attorneys whose sole function is to delay and prolong and harass the Federal attorneys in the prosecution of the lawsuit. Am I correct?

Mr. LOEVINGER. This situation arises.

Mr. DINGELL. And literally motions them to death and to furnish exhibits without end to the court in support of the defendant's position without number. Am I correct?

Mr. LOEVINGER. This occurrs. However, this is much more devastating to the small private litigant because his time, and his lawyer's time, and his financial resources are limited, and you can actually be literally physically drained of any financial resources simply by the necessity of paying for copies of depositions that are taken, in addition to which in preparing your case you must go through very frequently literally hundreds of thousands of documents. I practiced law in Minneapolis, a city of about a half million. It is not a small town. I represented clients that were substantial, but not very large. We did not have a large staff. There were no other people to whom I could turn this sort of thing over. In going through the documents in order to determine whether they have an antitrust significance, it was something that largely rested on my shoulders, and what this came down to is that in the end I would have as much as a year or 2 years of unpaid time invested in a case before it got to trial.

If we lost that case I might have sacrificed a year or a year and a half or 2 years of my time as a lawyer recently out of the service trying to earn a living, trying to establish a home and a family, and I would have this much time literally without income and my client wouldn't have been able to make it good.

This is the kind of hazard that you undertake, so when I say pathos I am not speaking in exaggerated terms. This is a very real and very searing experience for small businessmen who get involved.

Furthermore, the record of success is not such as to encourage a great many people to undertake it. I think I might say this, sir. In the motion picture business, with which you are probably familiar, by reputation, there was a Government decree finding the major national distributors had engaged in a conspiracy. This gave rise to a large number of private cases. I don't know how many there were all together in the State of Minnesota. I practiced in the State of Minnesota from 1946 until 1960, and to the best of my knowledge and belief I tried all the way through to the circuit court three motion picture cases against the phalanx of defense counsel. To the best of my knowledge I am the only lawyer that ever carried a private suit through to trial on the merits in that State.

Mr. DINGELL. So for all intents and purposes, to make the lot of the small businessman easier we should strengthen and invigorate the antitrust laws to protect him against economic coercion and intimidation, reprisals of this type rather than to shoot a big hole in the antitrust laws as we do here? Am I correct?

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. One last point. During the time that these private antitrust suits are pending and are going on, isn't it also a fact that not infrequently economic reprisals and coercion, intimidation, and sundry forms of subtle blandishment are going on under the nose of the small business plaintiff who is seeking to protect his right to compete in the marketplace?

Mr. LOEVINGER. Yes, sir, as a matter of fact, there is a recent decision in New York that holds that if a manufacturer or a supplier wants to cut off a businessman because of the institution of an antitrust suit, this in itself is not a legal wrong. I have grave doubts about this decision, but the case has been handed down and not been reversed.

Mr. DINGELL. Thank you very much.

Mr. HEMPHILL. Again we thank you for coming. We appreciate your testimony.

Mr. LOEVINGER. Thank you, sir.

Mr. HEMPHILL. If you will submit those other statements within the next 10 days, we will appreciate it.

Mr. LOEVINGER. Yes, sir.

Mr. HEMPHILL. I notice we have in the room our distinguished colleague from the State of Washington, the Honorable Thor C. Tollefson. We would like to recognize him at this time for whatever purpose he may be here.

STATEMENT OF HON. THOR C. TOLLEFSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. TOLLEFSON. Mr. Chairman and members of the committee, I appear as one of the cosponsors of this legislation to ask permission of the Chair to make a statement in support of the legislation.

Mr. HEMPHILL. You may proceed, Mr. Tollefson.

Mr. TOLLEFSON. I am grateful for the opportunity to testify in behalf of the "quality stabilization" bills now pending before you. For your information, I introduced one of these bills, House Joint Resolution 639. No one asked me to do so. It was just that I firmly believed in its principles, and when my distinguished colleague, Representative Ray J. Madden, of Indiana, introduced his measure I was so impressed by it that I immediately introduced a companion bill.

One of the major reasons for my support of the proposal stems from experience which I had out of my own State of Washington while serving as a prosecuting attorney in my home county. This office is similar to that of district attorney. While serving in that capacity I saw at first hand the bad effects of "loss leader" and "cut rate" sales methods. I was convinced that such methods in the long run were harmful to the public. People were literally lured into stores by advertisements leading them to believe they were getting real bargains. More often than not they were the victims of unscrupulous sales tactics and were sold inferior products or additional merchandise which they had not intended to purchase when they entered the store.

This country needs the incentives toward excellence provided in the quality stabilization bill. We need to counter the self-satisfaction of cheapness. We need a law that will encourage a manufacturer to build toward superiority of product. We do not have that law today, and evidence abounds that quality has definitely slipped. For example:

It is estimated that 1 billion ballpoint pens are sold annually in the United States. If my arithmetic is correct, this means that, on the average, about five pens are sold to every man, woman, and child in the Nation. The bulk of these wind up as so much unusable garbage in the desk drawers of America. While the individual purchaser may have thought he was getting a bargain at an individual sale, a little contemplation should convince him that such was not ultimately the case.

A trademark is easily damaged. Its owner in the public interest needs the right to safeguard his property symbolized by the goodwill for that trademark. Under present practices he does not have this. In many cases he is seriously damaged through "loss leader" and "discount" sales practices.

The quality stabilization bill is designed to recognize the property right of the manufacturer in his brand or trademark. If an unscrupulous retailer abuses the manufacturer's brand or trademark by misrepresentation, by "bait and switch" tactics, or by deviation

from the established price, then under this bill the trademark owner —the manufacturer—may deny that reseller further use of the trademark.

The ethical retailer will also be afforded protection from the practices of the unfair merchant. The proponents of this measure who are here to testify in its behalf will supply evidence to this effect.

May I respectfully urge the committee to give favorable consideration to the quality stabilization bill. It has the support of many distinguished Members of Congress of both political parties who believe as I do that the bill has tremendous merit.

Thank you.

Mr. HEMPHILL. Thank you, Mr. Tollefson. If you would like to sit up here with us we would be happy to have you.

Mr. TOLLEFSON. I have promised on behalf of constituents to appear before another committee before 12 o'clock, and I must be there.

Mr. HEMPHILL. Thank you, sir.

Mr. DINGELL. I would like to say that the gentleman from Washington is a very dear friend of mine. I have had the pleasure to serve on another committee with him. I value his reputation here in the Congress and his friendship very highly.

Mr. TOLLEFSON. Might I say to the gentleman that there is a mutuality of regard. I am only sorry that on this particular bill we have a difference of opinion.

Mr. HEMPHILL. Thank you, sir. Our next witness is Mr. Maurice Mermey, director of the Committee for the Advancement of Independent Retailing. His stated address is 10 East 40th Street, suite 1907, New York, N.Y.

We are glad to have you here, sir. Would you state any other background for the record that you think is appropriate and proceed with your statement?

STATEMENT OF MAURICE MERMEY, DIRECTOR, BUREAU OF EDUCATION ON FAIR TRADE, NEW YORK, N.Y.

Mr. MERMEY. My name is Maurice Mermey. The Committee for the Advancement of Independent Retailing is in the process of formation, Mr. Chairman. We are still the Bureau of Education on Fair Trade.

Mr. HEMPHILL. You may proceed.

Mr. MERMEY. Of course I will be glad to answer questions at any time. I am the director of the Bureau of Education on Fair Trade, a nonprofit organization established in 1949 to develop public understanding and support of fair trade as an instrument of public policy. As I indicated, the bureau is in process of change, a change in both the scope of its function as well as its name. The new organization will be called the Committee for the Advancement of Independent Retailing, a name that, we believe, fits well with a major objective of H.J. Res. 636. The committee's frame of reference will be considerably broader than that of the bureau, for it will, as it develops, concern itself with all matters relating to the welfare of the independent retailer, rather than with resale price maintenance alone.

The chairman of the new committee will be Willard B. Simmons, who is also executive secretary of the National Association of Retail

Druggists. In other appearances before this committee, extending, thanks to your courtesy, over a full decade, I have noted that support for the legislation in behalf of which I was testifying came from independent retailers in many fields as well as wholesalers and manufacturers in these fields. It has been estimated that more than 1 million retailers, wholesalers and manufacturers in these fields favored fair trade and now favor the quality stabilization bills to which the hearings of your committee address themselves: automotive accessories, bicycles, books, clocks and watches, drugs, electrical appliances, hardware, household products, jewelry, men's furnishings, petroleum products, phonograph records, photographic equipment, radio and TV sets, sporting goods, and tobacco products. And I am sure that the list is by no means complete.

Never has it been more clear than now that the support for this type of legislation comes not from one or two industries alone but is very broadly based. Some 70-odd national trade associations have endorsed the quality stabilization bills. Some of these associations are concerned with the protection of the brand name or trademark, symbol of a manufacturer's good will. Most of them are concerned with the business survival of their members, independent retailers.

Indeed, we are interested in more than mere survival for independent retailing. We are interested in the advancement of independent retailing in the interest not alone of the retailers but also of the communities in which they conduct their businesses; of the assurance of continuing competition in the marketplace which requires that there be competitors, plenty of them in order adequately to protect the consumer; and of the Nation's economy which requires for its accelerated growth the utmost in dynamic effort—selling as well as manufacturing—which in turn is sparked by economic incentive.

The present condition of independent retailing is bad by any statistical standard. Business failures in 1961, as reported by Dun & Bradstreet, numbered 17,075, the largest number since the depression year of 1923. Business mortality in 1961 was higher in 1961 than in 1960, which in turn was up 11 percent from 1959. But there was a change in the incidence of failures. Whereas the increase in 1960 over 1959 was strongest in large casualities and construction, the 1961 increase was spread over all sizes of business below $1 million, and centered in wholesaling and retailing. Drugstores, general merchandise stores, autodealers and service stations showed failures running 23 to 16 percent higher than a year earlier. About half of all business failures in 1961 were in retail trade, and small independent retailers accounted for 63 percent of retail failures.

You gentlemen appreciate that the statistics of commercial failures reflect only the casualities as reported by Dun & Bradstreet. They do not cover the far greater numbers of business establishments whose proprietors decided to call quits. These businesses did not reach the sorrowful state of commercial failure—but you can be sure that the proprietors didn't shut up shop because they were making too much money.

In addition, we have the class of the commercially or financially sick business establishments. I am told by people in manufacturing and in wholesaling that the condition of independent retailing is,

in fact, the worst it has been since the dark days of the great depression.

The independent retailers of this country believe, with a conviction reinforced by experience, that the failure of Congress to enact the quality stabilization bill will radically change the marketplace as we know it. More and more, the independent retailer will disappear from it. Moreover, his failure will also radically change the face of most communities and of the neighborhoods in metropolitan areas. Instead of housing thriving business establishments, the stores along Main Stree which are too small for supermarket occupany will display "for rent" signs.

Such a situation is bad for the aspiration and the dream of Americans to own their own businesses. It is also bad for the communities of America. The small businessman makes significant contributions to his community in leadership, membership and money. So does his family. The absentee owner is for the most part absent when it comes to communal contributions. From personal experience—I live in a small community—I can say that local community chests and other worthy causes would be 100 percent in their fundraising if absentee owners made the same contributions per thousand dollars of annual sales as local merchants. They just don't do so.

In supporting H.J. Res. 636 the independent retailer is asking for no subsidy, subvention, or handout. What he asks for is a climate of fair competition in which he has a fighting chance to succeed—a fighting chance, gentlemen, not a guarantee.

Quite a few witnesses have appeared before your committee this week who would deny independent retailing that fighting chance. They have listed a whole host of objections to legislation which is the subject of your public hearings.

The independent retailer has listened to the arguments advanced by these opponents. And I must say he is perplexed.

He hears 10 reasons, 100 reasons, why this legislation is bad for him, bad for the consumer, bad for America.

If this legislation is bad for him, bad for the consumer, bad for America, the independent retailer asks himself, how do these opponents explain the irrationality of the independent retailers' competitors—the giant chains and the supermarkets?

If it is bad for America to permit a brand owner to require all retail stores to sell his branded article at the retail price he sets, is it good when the brand owner is a chain store organization doing it? It is precisely the same thing. As a matter of fact, many brand owners do indeed set the retail price of their respective branded articles—quite lawfully, too.

Today, as always, the brand owner has an absolute legal right to establish the retail price at which his branded goods must be sold. He has this right provided he owns or controls the means of retail distribution of his branded product. The manufacturer who sells house to house instructs his canvassers that each of his branded products—whether a brush, a bottle of perfume, or a vacuum cleaner—must be sold to the consumer at such and such a price—not a cent less, not a cent more.

The manufacturer who owns the retail stores through which his branded products are sold sets the retail price for each of these prod-

ucts—and none of the store managers may sell for a cent more or a cent less than the price he fixes for each article. Most newspapers and periodicals are sold at a uniform price for each—the price that is set by the publisher in each instance and is printed on the front page or on the magazine cover.

As I have indicated, every outlet of a chain charges the same uniform price for the product indentified by its own brand.

In all of the cases I have cited—where the brand owner lawfully sets the retail price of his branded product—there is no possibility for the American consumer to shop around for items such as the above in the hope of finding a lower price for a particular brand in one part of town, or in one outlet of a chain than in another, or from one canvasser, rather than another.

Please do not underestimate the sales importance of the branded products described above whose retail prices are set by their respective brand owners. An estimated $30 billion of retail sales volume per year is accounted for by brand owners who own or control the means of retail distribution of their respective branded products.

On the other hand, the brand owner who does not own the means of retail distribution for his branded product is barred—absent congressional approval—from establishing the uniform retail price or the minimum retail price of the product identified by his brand. He distributes through a large number of retailers, the majority being independent retailers who strongly support House Joint Resolution 636.

In other words, it is lawful for brand owner A to establish the retail price of his branded product if he owns or controls the means for distributing it. It is unlawful for brand owner B to do the same thing, absent congressional approval, if the means for distributing it are thousands and hundreds of thousands of retailers—big, medium, and small, chain, and independent—none of whom he owns. Yet the effect on the consumer, if any, is precisely the same in both cases.

Under fair trade, by the way, in this country the annual sales volume of branded goods whose retail prices were set by their respective manufacturers accounted for less than $20 billion—some believe more nearly $10 billion than $20 billion.

House Joint Resolution 636, if enacted, would equalize rights in the distribution of branded goods by permitting the brand owner who does not own or control a retail distribution system to do what is already being done by the brand owner who does own or control the means for distributing his branded product.

The independent retailer does not believe there is justification for a system which permits one businessman to do something while denying precisely the same right to another businessman. If it is wrong in the one case, it ought to be wrong in the other. Legislation by the Congress can put both businessmen on the same basis as far as pricing their respective brands is concerned.

Why is it that doctrinal objections are not raised when the retail price is set by trademark owners who own or control the means of distribution for their respective branded products? Whenever the reason it is clear that doctrinal objections raised when other trademark owners seek legislation that would give them the same right overlook entirely both public policy which demands fair competition

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and the broad areas of competition which would remain undisturbed by enactment of House Joint Resolution 636.

In saying that there is a difference of opinion between supporters and opponents of this bill, it should also be noted that both agree on basic principles which the bill embodies. They agree it is proper for government—in the interest of the general welfare—to impose restrictions on the liberty of the individual to do as he pleases, or the corporation to do as it pleases. They believe in capitalism, but do not see its downfall in the fact that limitations are often placed on the freedom of the owner to use his private property solely as he sees fit. They share the view that free enterprise should be the opportunity for the many, not the privilege of the few. Most enlightened citizens support the scores of laws which prohibit business from engaging in certain specified methods of competition defined in legislation as being unfair.

As to competition, a whole host of statutes testify that competition in the United States does not mean "free" in the sense of unbridled. In the eyes of the law, price cutting is not per se a boon. Our courts under the antitrust laws and supplementary legislation have enjoined various forms of price cutting, and the Robinson-Patman Act makes unlawful any discrimination by manufacturers in their selling prices to distributors.

Opponents of the legislation under consideration by this committee would have you believe that competition would be stifled by enactment of House Joint Resolution 636. Let us take a quick look at the facts of competitive life—from the viewpoint of a branded article of commerce.

Price competition is not the only kind of competition which the maker of that branded article faces. The competition he must meet takes many forms in addition to price. His branded product must compete as to quality, as to packaging, advertising, promotion and service, and the producer faces the technological competition of research and development. All of these forms of competition will continue unabated should House Joint Resolution 636 be enacted into law.

There are certain other forms of competition that would remain totally undisturbed. For example, there is the competition for the consumer dollar. Every brand utilizing the provisions of the quality stabilization bill would continue to compete for the consumer dollar with all other goods and services in the entire economy. Further, every such brand would continue to compete with all other brands, as well as with all unidentified merchandise, of the same general class.

What competition has been lessened? Under the provisions of House Joint Resolution 636 a brand would not be required to compete with itself. Years ago reputable retailers stopped competing, each with himself. Every retail store used to be a Levantine bazaar, with buyer and seller arguing price across the counter. Different customers paid different prices for the same article in the same store at about the same time. What happened? Customers got very much upset when they learned that their neighbor paid less than they did for the very same article. It took a long time for retailers to realize that this was the way to ill will and lost business. In the late 19th century, under the prodding of the Nation's leading retail merchants, reputable retailers established a one price to every customer policy. It

has worked wondrously well. House Joint Resolution 636 would permit a brand owner, in effect, to establish a one price to every retail customer policy—just as he is required by law to have a one price to every distributor policy.

Two other observations in respect of competition as it may be affected by House Joint Resolution 636 may be useful. In its *Old Dearborn* decision unanimously upholding the constitutionality of State fair trade laws under the Federal Constitution, the U.S. Supreme Court said,

> Where a manufacturer puts out an article of general production identified by a special trademark or brand, the result of an agreement fixing the subsequent sales price affects competition between the identified article alone, leaving competition between articles so identified by given manufacturer and all other articles of like kind to have full play. In other words, such restraint upon competition as there may be is strictly limited to that portion of the entire product put out and plainly identified by a particular manufacturer or producer.

Years earlier, Louis D. Brandeis—later to become Justice of our highest court—wrote in his classic article in Harper's Weekly.

> * * * no man is bound to compete with himself. And when the same trademarked article is sold in the same market by one dealer at a lower price than by another, the producer, in effect, competes with himself.

In view of the foregoing, it is surprising to read from the statement of the Assistant Attorney General, Antitrust Division, Department of Justice, before the Senate Commerce Committee that "enactment of this quality stabilization bill would lead to * * * substitution of arbitrarily fixed prices for open competition." It would do nothing of the kind. All of the elements of competition, price and otherwise, would continue to exert their powerful influence, save for the one element of competition that is removed, namely, the competition of a brand with itself.

These further words from Mr. Brandeis' article my be called anticipated rebuttal of the "substitution of arbitrarily fixed prices for open competition" argument:

> The position of the independent producer who establishes the price at which his own trademarked article shall be sold to the consumer must not be confused with that of a combination or trust, which, controlling the market, fixes the price of a staple article, and the independent producer is engaged in a business open to competition. He establishes his price at his peril—the peril that if he sets it too high, either the consumer will not buy or, if the article is nevertheless popular, the high profits will invite even more competition. The consumer who pays the price established by an independent producer in a competitive line of business does so voluntarily; he pays the price asked because he deems the article worth that price as compared with the cost of other competing articles.

On the very day that these hearings opened, President Kennedy, addressing the annual commencement at Yale University, observed:

> For the great enemy of truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic.

Mr. HEMPHILL. Would the gentleman say there that that is the spirit of Camp David?

Mr. MERMEY. I would prefer not to answer that question, if I may.

Mr. DINGELL. You are not telling the committee that the President was speaking about fair trade or the quality brands bill when he made that statement?

Mr. MERMEY. No, sir; in an entirely different context, as I am sure everybody knows.

Mr. DINGELL. As a matter of fact, well, he was talking about something very different, though, from quality brands and fair trade?

Mr. MERMEY. That is correct, but he was speaking about a myth. I would suggest that myth is what the opponents of the legislation before you have added to the record of your committee's hearings and of those of the Senate subcommittees which heard testimony on Senate Joint Resolution 159, the quality stabilization bill introduced in the Senate by Senator Humphrey and cosponsored by other Senators.

They have asserted that this bill would breed monopoly. If monopoly means, as most Americans believe, the concentration of business in a single hand or in very few hands, then the quality stabilization bill is as antimonopoly as the antitrust laws, because it is our view and our belief, notwithstanding the distinguished witness who appeared here just a moment ago, that this bill will enable individual retailers more effectively to compete with the marketplace, and enable more competitors to be in the marketplace than you will have if this bill is not enacted.

They have asserted that the quality stabilization bill would penalize the American consumer. In 1961, I presented to the Senate Commerce Committee a series of price behavior studies under fair trade. We found no evidence whatsoever that (*a*) fair trade increased the cost of living in the United States; (*b*) in any way affected the total price mix of any type of retail store; (*c*) a diversified store—department store, supermarket, discount house, chainstore—located in a fair trade community charged less or more in its overall pricing than its opposite number in a non-fair-trade community.

We also studied some of the figures of the Consumer Price Index. There is nothing in the pattern of the Consumer Price Index of the U.S. Bureau of Labor Statistics, for 20 large cities, which suggests any influence on the index that reflects the existence or absence of fair trade, in any of these cities. Nothing in House Joint Resolution 636 suggests effects substantially different from those reported here.

Opponents promote another myth; namely, that the quality stabilization bill would prevent the efficient retailer from passing savings on to his customers. It just isn't true. The chances are great that not more than 10 percent of the retailer's stock would represent branded goods sold under quality stabilization provisions. I take that figure because I believe it was the highest figure under fair trade. He would be, therefore, perfectly free to price cut the other 90 percent to any extent he sees fit. Of course, the complaining retailer wants it the other way around because the 10 percent includes famous name, best selling brands which he would like to exploit so that he can get a reputation for low, low prices.

The opponents catalog of myths includes one of the effect that the quality stabilization bill would stimulate the growth of private brands to the disadvantage of small retailers. The fact is that giant retailers develop their own private brands and they have developed them in non-fair-trade areas as well as in fair trade areas, because they make more money out of them than out of nationally advertised brands—particularly when the national brands are being price footballed in the marketplace.

Still another myth is that small retailers can prosper by concentrating on the sale of private brands. Every marketer knows that nothing could be further from the truth. Small retailers just don't have the kind of money it takes to develop reputation either for their own names or for brand names. Accordingly, if they cannot sell—and at a profit—the nationally advertised brands, they might as well apply for listing in Dun & Bradstreet's record of commercial failures.

Then we hear that price cutting is the secret weapon of the small, independent merchant. This must come as news not only to the independent retailers still in business but also to the hundreds of thousands—perhaps even more than 1 million—who have had to close their doors during the postwar period.

Before the Senate Commerce Committee on April 19 and indeed this morning, the Department of Justice suggested an objection to the quality stabilization bill which I had never before encountered. In his statement, Mr. Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice, said that enactment of the bill would lead to a number of undesirable consequences including "elimination of the States' rights to determine their own policy in this field."

In this connection I think it is most interesting that certain Government agencies, including the Department of Justice, have unequivocally and vigorously opposed resale price maintenance legislation at both State and Federal levels at all times. As opposed as they have expressed themselves to be to the quality stabilization bill, so were they opposed to the Miller-Tydings Act in 1937 and the McGuire Act in 1952—which, by making fair trade operable in interstate commerce among the States having fair trade laws, helped the States to realize the full effectiveness of their laws.

Mr. DINGELL. You are making comment and argument and not directing yourself as to whether or not the statement of the Department of Justice is true. It would be helpful to the committee if you would tell us whether or not that statement by the Department of Justice is true or false.

Mr. MERMEY. Whether this invades the States?

Mr. DINGELL. Yes.

Mr. MERMEY. As you know, 46 of the 50 States of this Union have passed fair trade laws. There are 45, which figures I am sure you are familiar with. In addition you have Hawaii, 46 of the 50 have passed fair trade laws.

Mr. DINGELL. How many have gone through the courts who held this unconstitutional? And how many in addition to that have never passed a fair trade law?

Mr. MERMEY. Four States never passed a fair trade law, plus the District of Columbia, four and the District of Columbia, Alaska, Missouri, Texas, and Vermont.

Mr. DINGELL. There are a number of States which have held fair trade to be unconstitutional and a number of others have held the nonsigner clause as unconstitutional?

Mr. MERMEY. That is right.

Mr. DINGELL. And as a result of this, fair trade is only enforced, I believe, in about 21 of the States?

Mr. MERMEY. About 25.

Mr. DINGELL. What about these 25 States where we have no fair trade today? If this bill goes through we will for all intents and purposes have fair trade in those States?

Mr. MERMEY. Absolutely.

Mr. DINGELL. So this does in effect deny the States' rights to determine their own economic policy with regard to whether or not price fixing and fair trade shall be engaged in within their borders?

Mr. MERMEY. This is precisely so. I accept that. That is why we are here, but I would like you again to recall that this type of legislation nevertheless was passed by 46 States and State legislatures and signed by 46 Governors.

Mr. DINGELL. And held unconstitutional by 21 or 22?

Mr. MERMEY. Unconstitutional by three.

Mr. DINGELL. And the nonsigner clause?

Mr. MERMEY. And the nonsigner clause inapplicable by 16 or 17.

Mr. DINGELL. So we are going to overrule the domestic policy then of 25 States in enactment of his legislation?

Mr. MERMEY. This is true, but I don't believe this is unique in American life.

Mr. DINGELL. And this is precisely why your organization is here, to overrule the determination of the States with regard to their domestic policy in this issue?

Am I correct?

Mr. MERMEY. That is one way of putting it. I put it this way. Here we are to make sure that independent retailing has a place in American life. We don't believe it will have a place if you don't pass the bill.

Mr. DINGELL. But you are still trying to overrule the domestic policy of 25 States?

Mr. MERMEY. And I am still trying to tell you, sir, that the argument made by the Department of Justice doesn't quite ring when you realize that the Department of Justice has opposed fair trade and this type of legislation whether it was on a State level or on a Federal level.

Mr. DINGELL. But at least at the time when the Department of Justice is on the side of the States which chose not to have fair trade within their borders?

Mr. MERMEY. That is correct.

Mr. HEMPHILL. Any further questions?

Mr. DINGELL. No.

Mr. MERMEY. On that subject, it is also interesting that Mr. Loevinger in his book, "The Laws of Free Enterprise," published in 1949, a wonderful book, beautifully written, and I have learned a great deal from it, made no distinction between resale price maintenance at State and Federal levels. He leaves the reader no doubt about his position. He is against resale price maintenance.

In urging your favorbale consideration of H.J. Res. 636, I believe I reflect the views of well over 1 million small businessmen in this country. They are the backbone of independent business in America. They share with you the belief that independent business is worthy of preservation. They hope you will implement your own convictions by helping H.J. Res. 636, introduced by Representative Oren Harris, the

distinguished chairman of the Committee on Interstate and Foreign Commerce, in its progress toward enactment.

Thank you.

Mr. HEMPHILL. Thank you very much. Do you have any questions, Mr. Dingell?

Mr. DINGELL. Thank you, Mr. Chairman. This bill is essentially the same as fair trade, is it not?

Mr. MERMEY. I think it has the same objective. I think it is different in technique.

Mr. DINGELL. But the difference in technique is relatively small, as a matter of fact, when you view the end result. Am I correct?

Mr. MERMEY. The end result is about the same. The difference in technique, I think, in some respects is rather considerable, but I recognize that the philosophy is the same. The principles are the same.

Mr. DINGELL. I am rather interested in a number of comments that you made in your statement today. I would like to treat first with regard to the Robinson-Patman Act, and with regard to price discrimination, and so forth, and I would like to refer you to section (14) of the bill.

There is no requirement in this bill that a manufacturer fix uniform prices across the country, is there?

Mr. MERMEY. Uniform prices across the country?

Mr. DINGELL. Yes.

Mr. MERMEY. I don't believe that is in the bill. I would say, by the way, that any manufacturer that fixed different prices, let us say, in the District of Columbia, as against what he did—established, I don't like the use of the word "fixed"—that established retail prices in the District of Columbia different from those in Maryland would have himself quite a time. He wouldn't find any retailers to handle his products.

Mr. DINGELL. As a matter of fact, he can do that if he is of a mind to, can't he, under this bill?

Mr. MERMEY. Yes, but, Mr. Dingell——

Mr. DINGELL. In other words, let's say on opposite sides of the Potomac River or the Hudson River he can establish retail prices under this bill?

Mr. MERMEY. In the same sense that he can commit business suicide.

Mr. DINGELL. Well, two companies which market 85 percent of the film in this country would not be in danger of committing economic suicide by merely fixing different prices in different jurisdictions if they happened to fix substantially identical prices in each jurisdiction, would they?

Mr. MERMEY. I did not hear what you said on those two questions. I don't know very much about that deal. I would say you could go into court—as the lawyers will tell you—that you as a retailer could go into court and say that, "The manufacturer can't do this to me."

Mr. DINGELL. As a matter of fact, though, it would not be economic suicide for two companies which control 85 percent of the film produced in this country and marketed in this country to fix prices pretty much according to their own whims, would it?

Mr. MERMEY. I don't believe they will be able to do that.

Mr. DINGELL. You are placing an awful lot of trust in two companies which have this measure of economic power. You won't deny that they could, would you? You don't deny that they could, do you?

Mr. MERMEY. I don't deny that they could try. I don't think they would succeed.

Mr. DINGELL. And, as a matter of fact, you won't deny that they have the economic power to do it if they chose to do it?

Mr. MERMEY. I do deny that, sir.

Mr. DINGELL. Do you deny it?

Mr. MERMEY. Yes, sir. May I tell you why?

Mr. DINGELL. No, let's take a complete example. Let's go to the gasoline deal. It is a regular practice, as a matter of fact, in the gasoline field for manufacturers to fix different prices in different parts of the same town, as a matter of fact, and not only to do that, but to fix different prices in adjacent States, one right next to the other. Isn't that a fact?

Mr. MERMEY. I don't happen to know, sir.

Mr. DINGELL. As a matter of fact, this is something that gasoline retailers have regularly complained about. Isn't this a fact?

Mr. MERMEY. I do not know that, sir.

Mr. DINGELL. If this is true, this certainly poses great dangers to the independent retailers, doesn't it, under the broad language of this bill? If this is true this poses a great danger to the independent retailer, does it not?

Mr. MERMEY. It may pose some danger to some few retailers that you are referring to in the gasoline deals. I can't talk about that because I am not familiar with the field.

Mr. DINGELL. Let's go back to the film field. Isn't this a very dangerous situation?

Mr. MERMEY. I have—it is very interesting that you say so because I know that every independent retailer in the film field, well I can't say every, but most of them I have ever seen, nevertheless want this. They know the conditions that you refer to, the 85 percent and they still want this bill.

Mr. DINGELL. You wouldn't deny that this represents substantial economic danger, would you?

Mr. MERMEY. I do deny it.

Mr. DINGELL. On what basis do you deny this, when two people can fix prices, having control of 85 percent of the film in the country, according to whatever standard they choose or desire to fix those prices?

Mr. MERMEY. I think that the marketplace today, and I will take it now broadly—I won't confine it to one item—is quite different from what it was 25 years ago. The kind of competition that you have today, sir, is vastly different from what you had 25 years ago. You have retailers in the United States who are larger than any manufacturer with whom they do business. I am trying to say to you that you have new types of competition. You have private brand competition with national brand competition that very effectively determines what the total pricing shall be, what the consumer is going to pay. The consumer is more thoroughly protected than ever before.

Mr. DINGELL. But this doesn't explain away the basic danger that we have been discussing with regard to the fact that when two manufacturers are given the power to fix the prices of the commodity which they market and they control 85 percent of the production in this country, it constitutes a very grave danger for them to fix prices with-

out some control to guarantee that they won't fix these to the detriment of the little businessman. Isn't that a fact?

Mr. MERMEY. Maybe theoretically, hypothetically.

Mr. DINGELL. Remember, you are here in the committee today speaking on behalf of small business.

Mr. MERMEY. That is right.

Mr. DINGELL. We are trying to help small business here. We are not trying to have them pushed off the plank into the shark-infested water of monopolistic control by somebody who basically does not have sympathy with their point of view or with their needs. Now this is not just a question of philosophy. This may be a very real danger to little business, may it not?

Mr. MERMEY. I think you have to assume, sir——

Mr. DINGELL. I am not assuming anything. I am asking you may this not be a very real thing, a very real danger to little businessmen?

Mr. MERMEY. Business doesn't think so.

Mr. DINGELL. Let's go a little further.

Mr. MERMEY. Little business knows the conditions in the marketplace and, if I may say so, on that subject, I was brought up in a little business. I was brought up in a retail grocery store and my father did rather well until he was price cut out of business.

Mr. DINGELL. Let's proceed along this line. You won't deny that the small grocery store has vanished from the American scene for a number of reasons, apart from the fact that there has been fair trade or not fair trade?

Mr. MERMEY. That is right.

Mr. DINGELL. I do not have the list that the Attorney General is submitting to the committee with regard to economic dominance in large numbers of instances, but I am sure you heard it this morning?

Mr. MERMEY. Yes, sir.

Mr. DINGELL. Would you deny to the committee today that the economic dominance and the power to effect prices in large numbers of instances in a very small number of giant corporations without any outside and other control in this bill may as a matter of philosophy—as a matter of philosophical consideration at least constitute grave danger to the small businessman?

Mr. MERMEY. I would categorically deny, sir——

Mr. DINGELL. Didn't you already say that this may constitute a theoretical danger?

Mr. MERMEY. May I just finish? I would categorically deny that the dangers implicit in that statement will apply generally to the fair trading fields, the listing that he read to you.

Mr. DINGELL. This bill is not fair trade, is it?

Mr. MERMEY. To the fields of resale price maintenance.

Mr. DINGELL. This bill then is resale price maintenance?

Mr. MERMEY. Resale price maintenance.

Mr. DINGELL. And resale price maintenance is always the same as fair trade?

Mr. MERMEY. I thought I had answered that, philosophically the same, technically different. I am saying to you, sir, that in all of the fair trade—the fair trading fields—you have a vast competition. Where you have a few manufacturers controlling X percent of the market you will also find private brands in competition; the private brands of large retail organizations. You will find Sears, Roebuck,

for example, in many fields. Sears does $4,200 million worth of business a year, last year. Ninety-five percent of that amount was done by Sears 44 private brands. Now, Sears sets its own prices.

Mr. DINGELL. Yes, I recognize that, but you won't deny that conceivably without some other control this bill will vest in the hands in large numbers of lines of retailing of a very small number of economic agents power to fix prices in their own best interests. Am I correct?

Mr. MERMEY. I do deny that. I definitely deny that. Let me take a field called aspirin.

Mr. DINGELL. Let's talk about this. Let's just take the photographic field as an example, and I am sure that the list that the Attorney General will submit will be very enlightening with regard to the economic dominance that exists. However, essentially in regard to this point of photographic film manufacturers are able to fix prices, with very limited competition from outside, according to what they conceive to be their own economic best interests. Isn't this a fact?

Mr. MERMEY. Yes, there is their long-term best interest, that is right.

Mr. DINGELL. And this economic best interest is not restrained under the power to fix prices according to their own economic best interests? It is not restrained under the language of this bill, is it?

Mr. MERMEY. I think it is restrained by the marketplace.

Mr. DINGELL. You make allegations of restraint by the marketplace, but I say under the language of this bill there is no economic restraint imposed on these two very large manufacturers?

Mr. MERMEY. Under the language of this bill, as you know, a product may not be subjected to the provisions of this bill, unless it is in free and open competition with articles of a similar class produced by others.

Mr. DINGELL. Do you construe this bill to provide that Ansco and Kodak will be entitled to price fix on their film, or will they be denied the right to price fix on this film because there is no real competition in the industry?

Mr. MERMEY. I think when you get a situation where you have two, as you say, and I don't know what the facts are—I assume they are so—it is entirely possible that the courts would hold that that is not competition within the meaning of the law.

Mr. DINGELL. As a matter of fact, however, though, only once in the history of all law on this subject has a manufacturer been denied this right. Am I correct?

Mr. MERMEY. Insofar as I know only once has that definitely been made.

Mr. DINGELL. There is nothing in this bill, though, which says that economic competition shall be a criterion and effective economic competition shall be a criterion before price fixing under the bill, am I correct?

Mr. MERMEY. Under this bill it specifically says that the article must be in free and open competition with articles of the same general class.

Mr. DINGELL. Do you construe that language to mean honest competition, a real competition in the marketplace, or just that it is another manufacturer who manufactures the same film?

Mr. MERMEY. I think the courts could come to a conclusion on that very easily and the Federal Trade Commission. It was the Federal

Trade Commission that ruled against the film that you are talking about.

Mr. DINGELL. We have come then to a construction of this language, if I understand your testimony correctly, that we are now saying that this language means not that there shall simply be a substitute article available to the consumer, but that there must be effective competition between two manufacturers and that there must be no undue and unfair economic dominance of the field. Am I now correct in my interpretation of this language?

Mr. MERMEY. This is not what I have said, nor is that what it says. What I understand the bill to say is very simple, that the branded article in order to avail itself of the provisions of the bill must be in free and open competition with articles of the same general class produced by others.

Mr. DINGELL. Then this language does not mean, according to your interpretation, that there cannot be price fixing where there is undue economic dominance in industry in terms of the percentage control of the market of a particular item by one or two or three or four very large giants in that particular manufacturing field. Am I correct?

Mr. MERMEY. I don't know what that means.

Mr. DINGELL. This is a very important point.

Mr. MERMEY. I am saying to you, sir, that the condition that you set forth does not generally exist in the fields that will be covered by this bill.

Mr. DINGELL. Will you deny that it exists in the pharmaceutical field?

Mr. MERMEY. I certainly would.

Mr. DINGELL. Do you deny that for all intents and purposes, 90 percent of the insulin marketed in this country is marketed by one manufacturer?

Mr. MERMEY. I don't know about any particular insulin, but I am saying to you in the broad generality of articles in the drug industry as a whole you have vast competition and I would suggest, sir, that an examination of the annual Consumers Buying Guide will show large numbers of categories of products, many of which are in fields where you have resale price maintenance, will show you lots of products and lots of brands and a wide variation in price. As to aspirin, I think you will find a variance in price from about 14 or 15 cents a hundred tablets to 73 cents. There are 70 brands of aspirin on the market.

Mr. DINGELL. I will concede just for the purposes of the argument that there is competition with regard to aspirin, but is there competition with regard to film or with regard to insulin?

Mr. MERMEY. I don't happen to know.

Mr. DINGELL. Will you deny that there are a large number of instances in the pharmaceutical field where, for all intents and purposes, one manufacturer dominates the whole output of a particular pharmaceutical?

Mr. MERMEY. I would definitely deny that.

Mr. DINGELL. Then your support of this bill is predicated upon the assumption then that there is not this undue economic injustice, an undue economic dominance in the cases of specific pharmaceuticals in the pharmaceutical field, is that correct?

Mr. MERMEY. On the assumption, sir, that the competitive forces of the marketplace make it impossible in most cases for any manufacturer to price as he pleases without reference to the conditions of the market.

Mr. DINGELL. Mr. Mermey, you remember that my question was your support of this bill then is predicated on you belief that there is not control of the major portions of the production of specific pharmaceuticals in the pharmaceutical field. Am I correct?

That is by one manufacturer?

Mr. MERMEY. I don't happen to know whether there is such control by one manufacturer.

Mr. DINGELL. If you found that there was for all intents and purposes dominance by one manufacturer in a number of instances in the pharmaceutical field of the production of specific pharmaceuticals, would you then conceded that this bill is a bad bill?

Mr. MERMEY. No.

Mr. DINGELL. Would you conceded that the manufacturer should not be permitted to fix prices in those instances?

Mr. MERMEY. That would be for the court to determine.

Mr. DINGELL. Just a minute. This is your bill, isn't it, Mr. Mermey?

Mr. MERMEY. This is the independent retailers' bill.

Mr. DINGELL. I assume this is your bill, is it not?

Mr. MERMEY. The bill I am supporting.

Mr. DINGELL. And I assume you must have considered this point in your consideration of the bill and I would like to have you tell us what you think about this bill?

Mr. MERMEY. I say to you, sir, that I know of very few cases where you have the kind of a situation to which you refer. I say to you, sir, that in most cases you have a broad series of alternatives for the consumer and in each class of products. I say to you, sir, that the marketplace——

Mr. DINGELL. You haven't answered my main question at all.

Mr. MERMEY. I am trying to say to you that I am not going to say that because one manufacturer or two in a specific item may control the field that we should not have the bill. I say to you that where there are such questions the bill permits recourse.

Mr. DINGELL. Where? Where in the bill is the Federal Trade Commission or the Antitrust Division of the Department of Justice empowered to go in to prevent the utilization of fixed prices by companies which have an undue economic dominance, and for all intents and purposes substantial control either in themselves or with one or two companies or competitors of the whole market of a specific substance?

Mr. MERMEY. When you mentioned one or two companies or competitors, I think you find it in the bill.

Mr. DINGELL. Where? Where in the bill?

Mr. MERMEY. The provision which says that the branded product must be in free and open competition with articles of similar class produced by others.

Mr. DINGELL. Where in the bill is the Department of Justice entitled to see to it that prices are not fixed in that instance and where in the bill is the Federal Trade Commission empowered to go in?

Mr. MERMEY. Where was it in the Fair Trade Act? The Federal Trade Commission——

Mr. DINGELL. This is not the fair trade bill.

Mr. MERMEY. I understand that, but under the fair trade acts—the Federal Trade Commission did act and under this act it would be possible for any defendant in a case to go to court and say that "That product is not in free and open competition with articles of similar class produced by others and therefore I should be able to sell it at any price I choose."

Mr. DINGELL. Are you telling me then that under this bill a person sued for marketing a particular commodity, let's say Ansco film, or let's say insulin, just for example, or Kodak film, will be able to come in and to assert the defense that the manufacturer had such economic dominance in the marketplace and market, he had such a large percentage of the film market in this country or such a large percentage of the insulin marketed in this country that the manufacturer does not have the power to fix prices under this bill?

Mr. MERMEY. The bill does not say that.

Mr. DINGELL. I am asking you. This is what is inherent in your reply. You indicated to me that this economic dominance of the marketplace constitutes a defense.

Mr. MERMEY. I did not say that.

Mr. DINGELL. Then as a matter of fact undue economic dominance of one or two or three or four or a dozen manufacturers under this bill does not constitute any defense to the retailer or to the consumer?

Mr. MERMEY. I can't say that. I can say that if there are no brands competing or very few brands competing with that particular manufacturer's brand the defendant can go to court and say that he had a right to sell it at any price he pleased. I am not talking about economic dominance. This bill——

Mr. DINGELL. In other words, this bill vests in manufacturers who have a very, very high degree of economic dominance for all intents and purposes the power to fix prices. Either they do have the power to fix prices, or they do not have the power to fix prices. I ask you to tell me whether they do or they do not.

Mr. MERMEY. I would still say to you this bill would grant every trademark owner the right to establish the resale price on his product if that product is in free and open competition with articles of similar class produced by others.

Mr. DINGELL. Just a minute here. Under this bill a manufacturer who has the power to control the sale of, let's say, a significant part of the market of a particular item, 60 percent, 70 percent, 80 percent, 50 percent, 40 percent, either in his own right or in concert with others, will have the power to fix prices. Which is the fact? That he does have the power, that he does not?

Mr. MERMEY. The fact as I have said to you is this bill does not address itself to the question that you have raised. This bill says that a manufacturer may establish the retail price of his branded product if that branded product is in free and open competition with articles of similar class.

Mr. DINGELL. I am not talking about free and open competition, I think free and open competition language in the bill is nothing more nor less than a myth and a fiction.

Mr. MERMEY. I would have to disagree with that.

Mr. DINGELL. You talk in terms of unrestrained competition. Then you talk in terms of free and open competition. What I want to know is this. Let's just say for purposes of the argument, and you approved this particular point elsewhere in the record, that one manufacturer, or two manufacturers, or a half dozen manufacturers, either alone or in concert with others, are able to market 90 percent of the commodities of a particular type which are sold in the marketplace in this country. Are they under this bill entitled to fix prices, when they have such undue economic dominance?

Mr. MERMEY. They are not entitled to fix prices. Each is entitled to establish the resale price of his own product without collusion with any of the others.

Mr. DINGELL. Aren't you engaged in semantics?

Mr. MERMEY. I am not, sir.

Mr. DINGELL. Let's take your own word. Aren't they entitled to establish prices under this bill?

Mr. MERMEY. No, no.

Mr. DINGELL. They can establish prices under this bill even though they individually or in concert with each other, let's say without any conspiracy or without any act which would constitute a violation of an antitrust law, even though they may have the right to market between 90 and 100 percent of the particular commodity which is sold in the marketplace in the country today?

Mr. MERMEY. I still go back, and I will answer that now. Let me first say that we don't have the right to fix or establish prices. Each has the right by his little lonesome to establish his own price on his own products.

Mr. DINGELL. Even though there is independent capacity or in conjunction with a number of others, not with any concerted action, but in conjunction with others, they may, in the instances of perhaps four or perhaps eight, market between 90 percent and 100 percent of the commodities of the particular type which is sold in this country?

Mr. MERMEY. If the courts held that you had sufficient brands to be competitive, that is to say, if one brand competed with other brands of the same general class in the field, if the court held that was OK, then it is OK, but this bill does not address itself——

Mr. DINGELL. Where in this bill is there any language which prevents four manufacturers or two manufacturers, who market 100 percent or 90 percent of a particular type of commodity which is sold in the market today, from fixing prices on that commodity? Name me one bit of language in the bill.

Mr. MERMEY. Wait a minute. Not on that commodity. They may not fix prices on that commodity. Each may establish the price on his own brand.

Mr. DINGELL. But the two of them, not in concert, not engaging in any rascally actions or anything of that sort, can establish prices in his own brand?

Mr. MERMEY. And are there other brands in the field?

Mr. DINGELL. Now, there is another question that concerns me here. Do you endorse this bill as it is, or do you have amendments to this bill?

Mr. MERMEY. I think there will be amendments.

Mr. DINGELL. You think there will be amendments. What are those amendments going to be?

Mr. MERMEY. I do not know. I think you need a better definition of "free and open competition" than you have in the bill.

Mr. DINGELL. As a matter of fact, under the circumstances we will also need something to protect the consumer from having four or eight manufacturers who dominate the whole of a particular merchandising field having the power to fix prices, will we not?

Mr. MERMEY. I don't think so. I think the marketplace handles that beautifully.

Mr. DINGELL. Isn't this particularly dangerous power to vest in manufacturers of this type in view of the language of section 14 which gives them broad exemptions from the antitrust laws for acts perpetuated pursuant to the powers granted by this bill?

Mr. MERMEY. Mr. Congressman, manufacturers already have that power. All they need to do today is to own a brand and to own or control the means for distribution of that brand, and without reference to the Congress of the United States and without reference to your antitrust laws they may each establish the retail price of their own product. That power is there now. We are asking for nothing that doesn't really already exist, that isn't already applicable to manufacturers of branded products, who own or control the means for distributing those products.

Mr. DINGELL. As a matter of fact, you are repealing the *McKesson & Robbins* decision in section 14, are you not?

Mr. MERMEY. Yes, sir, that is being repealed, but, sir, this bill addresses itself to a brand owner. The history of the *McKesson & Robbins* decision goes back to the Senate of the United States in the year 1952 when in the Senate you had a debate on precisely that point.

Mr. DINGELL. You remember the colloquy between Mr. Jehle and me on this point? I am sure you have been it.

Mr. MERMEY. That is right.

Mr. DINGELL. I am sure you are sufficiently familiar with the law to know at that time the Supreme Court has the power and right to construe the statutes of the United States? They construe the antitrust laws to say that this act of fixed prices when they control manufacturing, wholesale and retailing in competition with other retailers constitutes a violation of the antitrust laws.

Mr. MERMEY. That is right.

Mr. DINGELL. Do you deny that this is so?

Mr. MERMEY. That is right, but it is also true the Congress has the power to change it.

Mr. DINGELL. But you are repealing the law. You are repealing that decision against the horizontal price fixing.

Mr. MERMEY. If the Congress would pass this bill the effect of that enactment would be to overcome the decision of the Supreme Court in the *McKesson & Robbins* case and I believe to overcome the decision of the other courts in the *Standard Oil* case.

Mr. DINGELL. This particular language then is not necessary to help the little retailer, is it?

Mr. MERMEY. I think so.

Mr. DINGELL. It is?

Mr. MERMEY. Oh, yes.

Mr. DINGELL. In other words, let his manufacturer compete with him on the retail level at the same time that he fixes his prices? This is essential to the protection of the small businessman, is that right?

Mr. MERMEY. The little retailer wants that. I must say to you that the bill also——

Mr. DINGELL. Did you poll your membership of retailers with regard to whether or not they believe in the repeal of the *McKesson & Robbins* decision?

Mr. MERMEY. No, sir.

Mr. DINGELL. Would you like to do it on that point? I think you might be surprised.

Mr. MERMEY. I might, but I doubt it.

Mr. DINGELL. I am rather interested here to note the pink sheet. Did you see the pink sheet of April 16?

Mr. MERMEY. I may have. I don't know.

Mr. DINGELL. Where Quality Brands was seeking $10,000 contributions from fair trade manufacturers and Mr. Anderson, the head of Quality Brands Associates, was offering a refund of 25 percent of contributions if the bill is not enacted. Have you seen that?

Mr. MERMEY. I have seen that, yes, sir.

Mr. DINGELL. It seems like Mr. Anderson is rather sure this bill is going to pass, isn't he?

Mr. MERMEY. I am not representing Mr. Anderson.

Mr. DINGELL. And your organization also supports this quality brands bill?

Mr. MERMEY. That is right, but we get no funds from Mr. Anderson.

Mr. DINGELL. I guess those are all the questions I have.

Mr. MERMEY. May I just make one statement in respect of the *McKesson & Robbins* decision? I think, sir, that when you decided that this bill or this law cannot apply where a manufacturer, or a retailer, or a wholesaler is engaged at more than one level of operations, when you decided that, I think you decided that no bill can possibly be passed that can be effective because in the economy as we have it there are manufacturers and distributors who operate on several levels.

Mr. DINGELL. Are you urging that Sears be given the power to price fix?

Mr. MERMEY. Sears has it.

Mr. DINGELL. That is right.

Mr. MERMEY. Sears has it.

Mr. DINGELL. You will concede then that Sears having this power doesn't need this exemption from the antitrust laws?

Mr. MERMEY. I understand that. Sears has it.

Mr. DINGELL. Sears has private brands. I am just talking about this from the standpoint of the small businessman. Are you telling me that this section is essential to the protection of the little businessman?

Mr. MERMEY. It is essential to the full operation of this bill because without that section you may not have an effective law.

Mr. DINGELL. What it really is is essential to vesting in McKesson & Robbins and other persons who had previously engaged in this unlawful practice the power to renew this same unlawful practice of horizontal price fixing, am I correct?

Mr. MERMEY. No, sir.

Mr. DINGELL. Isn't it a fact that this was construed by the courts to be unlawful horizontal price fixing, violative of the antitrust laws?

Mr. MERMEY. That is absolutely correct. But I am saying to you, sir, it is necessary if you are going to have any quality stabilization system at all.

Mr. DINGELL. This is not what we would call a small business section of the bill at all.

Mr. MERMEY. A million small businessmen say it is.

Mr. DINGELL. I would like to see that million small businessmen of this country who take this bill as you have it right now.

Mr. MERMEY. The small businessmen of this country would take this bill as you have it right now.

Mr. DINGELL. And they would take it without the *McKesson & Robbins* decision, too, would they not?

Mr. MERMEY. I doubt it. I am sure they wouldn't, because they wouldn't have a bill.

Mr. DINGELL. Why wouldn't they?

Mr. MERMEY. In my judgment.

Mr. DINGELL. Why wouldn't they?

Mr. MERMEY. Because you have a great deal of operation on several levels.

Mr. DINGELL. Let's take the small wholesaler. Do you think the small wholesaler is going to insist on this bill having this section in here?

Mr. MERMEY. So far as I know he has.

Mr. DINGELL. McKesson Robbins may be fixing his margin of profit and at the same time competing with him?

Mr. MERMEY. I didn't get that.

Mr. DINGELL. Let's take another situation.

Mr. MERMEY. I didn't get your statement.

Mr. DINGELL. Let's change that a little bit. What I was saying was this: I said do you think that a small retailer or a small wholesaler is going to rush madly out to endorse the section which would authorize his supplier to compete with him on terms most advantageous to his supplier? You wouldn't deny that this section permits the supplier to fix prices—the manufacturer, the brand name owner, to fix prices on terms which are most advantageous to him would you?

Mr. MERMEY. Oh, definitely, I don't deny it. I accept that definitely.

Mr. DINGELL. That it does permit that?

Mr. MERMEY. Oh, certainly, certainly.

Mr. DINGELL. And which conceivably might even be against the best interests of the little merchandiser and the small wholesaler?

Mr. MERMEY. The manufacturer who fixes prices or establishes prices on the basis that does not permit his distributors to realize a fair profit is not going to have distributors and is not going to be in business, and this is my point, sir. Your concept that a manufacturer can fix the prices or set the prices at any point he wants to is absolutely correct, but in fact, in fact, he must set the price at such a figure that it will yield a reasonable profit to the distributors and be attractively priced to the consumer. If he doesn't do that he is not long a businessman.

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Mr. DINGELL. Unless all of a sudden he makes his own wholesale—his own wholesaling or retailing operations be the exclusive merchandising outlet. Am I correct?

Mr. MERMEY. Then he is still fixing a price or setting a price, but in the recognition that there is competition in the marketplace.

Mr. DINGELL. But, as a matter of fact, in having so done he may have wrung from the marketplace a large number of small wholesalers or retailers? Isn't this also a danger?

Mr. MERMEY. Not the manufacturer.

Mr. DINGELL. The manufacturer might conceivably have driven out of business a large number of small wholesalers in his process?

Mr. MERMEY. Conceivably, yes, but practically impossible because the manufacturer today more than ever recognizes that he needs large numbers of customers at retail, retail stores customers, if he wants to exist.

Mr. DINGELL. Let's just get around to one other point. You represent the Bureau of Education on Fair Trade. Is that correct?

Mr. MERMEY. Yes, sir.

Mr. DINGELL. And your organization is sustained by contributions of people in industry large and small, am I correct?

Mr. MERMEY. In the drug industry.

Mr. DINGELL. In the drug industry?

Mr. MERMEY. Yes, sir.

Mr. DINGELL. Would you submit to this committee a statement of who your principal contributors have been during the past 2 years?

Mr. MERMEY. Certainly; we would be glad to.

(The following information was subsequently submitted for the record:)

BUREAU OF EDUCATION ON FAIR TRADE,
New York N.Y., June 19, 1962.

Hon. PETER F. MACK, Jr.,
Chairman, Subcommittee on Commerce and Finance, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR SIR: In accordance with Representative Dingell's request at the public hearings of your subcommittee on Friday, June 15, I am submitting herewith a statement covering principal manufacturers and wholesalers who contributed to the Bureau of Education on Fair Trade during 1958–59:

Manufacturers.—Abbott Laboratories; Bauer & Black; Becton, Dickinson & Co.; Bristol-Myers Co.; Burroughs Wellcome & Co. (USA); Carter Products, Inc.; Chanel, Inc.; Charles of the Ritz; Chattanooga Medicine Co.; Chesebrough-Pond's, Inc.; Colgate-Palmolive Co.; Coty, Inc.; Eastman Kodak Co.; Faberge, Inc.; Max Factor & Co.; Gillette Safety Razor Co.; Hoffmann-LaRoche, Inc.; Johnson & Johnson; Lanvin Parfums, Inc.; Lederle Laboratories Division of American Cyanamid Co.; Eli Lilly & Co.; Mead Johnson & Co.; The Mennen Co.; Merck-Sharp & Dohme; Miles Laboratories, Inc.; the Murine Co., Inc.; Parke, Davis & Co.; Pepsodent Division of Lever Bros. Co.; Plough, Inc.; Revlon Products Corp.; Rexall Drug Co.; Schering Corp.; Julius Schmid, Inc.; G. D. Searle & Co.; Smith Kline & French Laboratories; E. F. Squibb & Sons, Sterling Drug Inc.; Tampax, Inc.; the Upjohn Co.; Vick Chemical Co.; Warner-Lambert Pharmaceutical Co.; Whitehall Laboratories.

Wholesalers.—Brunswig Drug Co., Calvert Drug Co., Cincinnati Economy Drug Co., Cook, Everett & Pennel; Davis Brothers, Inc.; Durr Drug Co., Ellicott Drug Co., Ellis-Bagwell Drug Co., Fox-Vliet Drug Co., Gazzolo Drug & Chemical Co., The Geer Drug Co., Gilman Brothers, Inc.; The Henry B. Gilpin Co., Hensel & Sons, Inc.; D. Kaltman & Co., Inc.; Ketchum & Co., Inc.; Kiefer-Stewart Co., The Charles S. Leete Co., Inc.; Charles Leich & Co., E. C. McKallor Drug Co., McKesson & Robbins, Inc.; Mooney-Muller-Ward Co., Pennsylvania Wholesale Drug Co., Philadelphia Wholesale Drug Co., Providence Wholesale Drug Co., Scott Drug Co., Inc.; Strother Drug Co., Towns & James, Inc.; Washington Wholesale Drug Exchange.

In addition, some 8,700 independent retailers, members of the National Association of Retail Druggists, have from time to time made individual contributions to the bureau.

From 1959 until last month, the bureau made no soliciation for contributions. Those who have contributed recently are included in the list above.

Respectfully submitted.

MAURICE MERMEY, *Director.*

Mr. DINGELL. Would you tell the committee whether or not McKesson & Robbins has been a large contributor of yours?

Mr. MERMEY. Yes.

Mr. DINGELL. They have been?

Mr. MERMEY. Yes, sir. They have not contributed since 1959, because we have not solicited funds from them until just very recently.

Mr. DINGELL. They have been substantial contributors?

Mr. MERMEY. Yes, sir.

Mr. DINGELL. And other large pharmaceutical houses also?

Mr. MERMEY. Oh, yes.

Mr. DINGELL. And other large pharmaceutical houses which are also interested in this particular repeal of the antitrust laws have been contributors, have they not?

Mr. MERMEY. Yes, sir, and also about 9,000 or 10,000 retailers.

Mr. DINGELL. Have you told these 10,000 retailers about this section of the bill?

Mr. MERMEY. Yes, sir. They are thoroughly familiar with it.

Mr. DINGELL. Thank you, Mr. Chairman.

Mr. MACK. Mr. Glenn.

Mr. GLENN. Mr. Mermey, I want to compliment you for a very fine and lucid statement and also to say that I admire you for holding your own with the expert on fair trade on our committee, Mr. Dingell.

Mr. MERMEY. Thank you, sir.

Mr. MACK. Thank you very much, Mr. Mermey.

Mr. MERMEY. Thank you, gentlemen. It is a great pleasure to have testified before you.

Mr. MACK. Mr. James A. Allen, president of the Henry B. Gilpin Co. You are representing the National Wholesale Druggists Association?

Mr. ALLEN. Yes, sir, I am.

Mr. MACK. Do you have a prepared statement?

Mr. ALLEN. Yes, sir, I do have a prepared statement.

Mr. MACK. Do you include the membership of your organization?

Mr. ALLEN. Yes, sir. I represent the president today, who was scheduled to be here and due to illness could not come. At the last minute I was invited to come and I will have 25 or 30 extra copies of my statement available later this afternoon.

Mr. MACK. All right.

Mr. ALLEN. I didn't have time.

Mr. MACK. There was a representative of a wholesale druggist concern here yesterday. That is not the same organization?

Mr. ALLEN. No, sir.

Mr. MACK. I believe in his statement he indicated that the organization he represented was by far the largest?

Mr. ALLEN. He may have been from our organization. I don't know whether anybody was here from our organization yesterday or not. Our association represents 80 percent of the business.

Mr. MACK. You may proceed.

STATEMENT OF JAMES E. ALLEN, PRESIDENT, HENRY B. GILPIN CO., REPRESENTING THE NATIONAL WHOLESALE DRUGGISTS ASSOCIATION

Mr. ALLEN. Mr. Chairman and members of the subcommittee, I am James E. Allen, president of the Henry B. Gilpin Co. in Washington, D.C., a full line, full service, wholesale druggist. Our company has been in the businss of supplying and servicing retail pharmacies for 117 years. We employ 340 people, operating 4 houses located in Baltimore, Md., Dover, Del., Norfolk, Va., and Washington, D.C., that serve over 2,000 retail pharmacies in 6 States and the District of Columbia from Pennsylvania to North Carolina. I am also a past president of NWDA, National Wholesale Druggists Association, an association of full line, full service, wholesale druggists, whose members represent approximately 80 percent of all the wholesale drug business done throughout the country. At the present time I am a member of the association's senior council.

Mr. Chairman, I am grateful for this opportunity to appear before you and to offer a few thoughts which are of vital concern to me, to our company, to the members of NWDA and the nearly 30,000 persons they employ, and to the thousands of retail pharmacists whom we supply and service. We desperately need legislation to protect the sellers of brand name merchandise against the predatory selling practices which this subcommittee is investigating. Long before the Civil War, the Gilpin Co. was distributing drugs at wholesale. We have been through many crises. We have a great deal of firsthand experience with the benefits of true American competition and the disastrous consequences of unfair competition. As a result of our long experience we are thoroughly familiar with the problem with which this subcommittee is concerned. Unless that problem is dealt with decisively and thoroughly, business enterprise in this country may become one great nationwide depressed area.

A grim specter confronts the small independent businessman today. It is the fast-growing group of predatory merchants whose ruthless selling practices do not foster competition in the distribution of merchandise, but destroy their competitors and thus eventually eliminate competition and monopolize. Continuance of this process unchecked could well result in the control of the distribution of goods in this country by a few large enterprises. It would then be difficult to distinguish the American retail store from its Moscow counterpart.

The destructive commercial practices at which the quality stabilization bill is aimed are uniformly acknowledged by all reasonable men to be undesirable. Even opponents of the proposed legislation have been obliged to admit it. They have explained their opposition partly by asserting that existing law already empowers the Federal Trade Commission to prohibit such practices when they injure the public interest. Well, as a businessman who has both seen and felt the sting of predatory selling, I can only say that, although the Federal Trade Commission has been around since 1914, the problem this committee is considering is now a greater threat than ever.

I do not think that a Government agency could effectively deal with these practices even if it were authorized to do so, nor do I agree

with those who think that Government policing is the solution to all problems. We simply ask for legislation which will enable the owner of brand name merchandise to protect himself. We do not seek the expenditure of any Federal funds. We do not seek a Federal subsidy. The legislation before you recognizes the right of the owner of a brand name to keep his merchandise out of the hands of those who employ merchandising schemes destructive of the value of the trademark and ultimately the market for the merchandise.

Small businessmen who rely upon quality and reputation symbolized by the trademark and brand name ask Congress to remove the prohibition on our right to protect these valuable property rights against marauders. The proposed legislation would not make exercise of this right compulsory. Those who do not subscribe to the quality system of distribution and prefer to lead their customers to believe they really can get something for nothing are free to do so, but there is no equitable reason why the quality brand manufacturer should be prevented from withdrawing the use of his brand name from the merchant who wishes to use it as bait, even at the price of its destruction. We believe that a free market soon demonstrates that the quality system of distribution is superior.

A frequent misconception is that on this subject the interests of the consumer are opposed to those of the small businessman. Nothing could be further from the truth. It is well known that the consumer cannot get something for nothing for very long. The consumer's pretended benefactor is exacting his profit in ways which are not always readily obvious. In some cases he may be deferring his profit until he has a monopoly control of the market, but you can be sure he is making, or planning to make, a profit or he will not last in business very long. I need not catalog for you the many ruses by which a "bargain" can be turned into an expensive mistake. Other witnesses have described some of them. Their testimony demonstrates that the consumer's interest is basically the same as that of the reputable producer's. Indeed, most consumers are themselves producers. The consumer who believes he is getting a bargain may actually suffer a serious loss of it, as a result of the injury done to the reputation and brand name of the product, the manufacturer, or wholesaler, or retailer who employs him cannot remain in business.

I urge you to give serious consideration to the moral and economic principles behind this legislation. Its objectives cannot be seriously disputed. We think they deserve your immediate and sympathetic attention.

I think you very much, sir.

Mr. MACK. Mr. Allen, you have made an excellent statement in regard to the problem of small business. This committee is seriously interested in doing something which will assist them.

Mr. Dingell, do you have any questions?

Mr. DINGELL. No questions, Mr. Chairman.

Mr. MACK. Mr. Glenn?

Mr. GLENN. No questions, Mr. Chairman.

Mr. MACK. Thank you very much.

The committee will stand adjourned until 2 o'clock this afternoon.

(Whereupon, at 12:25 p.m. the committee adjourned, to reconvene at 2 p.m. the same afternoon.)

AFTERNOON SESSION

Mr. MACK. The committee will be in order.

Our first witness this afternoon is Mr. Samuel J. Rosenstein, chairman of the board of Towers Marts International.

We are glad to have you with us, sir.

STATEMENT OF SAMUEL J. ROSENSTEIN, CHAIRMAN OF THE BOARD, TOWERS MARTS INTERNATIONAL, INC.

Mr. ROSENSTEIN. Thank you.

Mr. Chairman, I am Samuel J. Rosenstein, chairman of the board of Towers Marts International, Inc., a chain of 26 discount department stores in the Eastern United States and Canada. Our latest establishment was opened only yesterday in Hamilton, Ontario, in Toronto. Before the end of the year, we expect to have 49 stores in operation, 25 of which will be in this country. We began in March of 1958 with a single store in New England.

I will not dwell on the legal aspects of this "fair trade" bill as it relates to restraint of free competition, nor on the complications such a price-fixing law would impose on the administration of our antitrust regulations. These factors have already been expounded most effectively by other witnesses this week—as well as by such distinguished officials as Congressman Emanuel Celler and Assistant Attorney General Lee Loevinger before similar hearings on the companion Senate bill.

My testimony today will deal primarily with the damaging effect this proposed legislation will have in retarding the growth of the discount industry—the one branch of retailing that has shown dynamic progress during a period when the remaining forms of retailing have exhibited what may be characterized as "stagnancy."

Since retailing is one of the largest employers of manpower in the Nation, I submit that any bill which curtails optimum employment in this business field is not in the public interest. Furthermore, since the national economy is best served by the maximum flow of goods and services, I believe any action that throws a roadblock across channels of distribution jeopardizes full realization of our economic growth.

How would this proposed legislation—which I prefer to label the "unfair trade" bill—impede our economic growth? First of all, by preventing consumers from buying goods in greater quantity, because a law of this nature would inevitably lead to higher price levels?

The discount industry has done much to lower the cost of distribution. We operate on a margin of from 25 to 27 percent, while conventional retailers work on a 40-percent margin.

Mr. MACK. You say you operate on a margin of 20 to 27 percent?

Mr. ROSENSTEIN. That is correct.

Mr. MACK. That is a 27-percent markup?

Mr. ROSENSTEIN. From selling price as compared to 40 percent which is used by conventional retailers.

This has helped put a brake on the cost of living, thus establishing a more favorable ratio between fixed family expenses and disposable income. Between 1957 and 1961—the period of greatest growth for discount operators—the cost of living rose only 6.3 percent, accord-

ing to the Department of Commerce, while disposable income shot up 21.4 percent. This favorable balance may well have contributed to the 9.5-percent rise in total retail sales during the same 5-year span.

But the advantages of low-margin retailing would be lost entirely if our ability to do business at lower cost were canceled by a law that forces us to sell goods at prices higher than necessary to return a satisfactory profit. Why should merchants be penalized for having the business acumen to run their establishments more efficiently? Even more important, why should the public be deprived of the savings that our know-how enables us to pass on to them?

Furhermore, it is simple arithmetic to conclude that if shoppers are obliged to pay more for certain items, they will have less to spend on other goods. Apart from the fact that this development would contradict the President's oft repeated goal of maintaining price stability, it would produce an ironic paradox: It would hurt some of the very interests that are pressing for this unfair trade bill.

Domestic industry today is confronted by a strong competitive challenge from foreign manufacturers. If the postwar revolution in marketing has done nothing else, it has proved that only mass merchandising can stimulate mass production. But mass buying is impossible unless prices are allowed to seek their own levels that are within the purchasing power of the modest-income families.

Thus, industries which are constantly seeking to boost unit volume—such as the drug and cosmetics manufacturers, who are pouring millions of dollars into powerful lobbies in support of this bill—are actually defeating the aims of their advertising and promotion when they advocate a price structure that can only result in a reduction of their unit sales.

The role of the drug industry in this conflict presents several inconsistencies. One motive advanced for the position of drug associations behind this bill is protection of the small druggist. This argument is a farce. I am in close contact with the problems of drug selling, since 8 percent of my firm's total volume comes from toiletries, cosmetics, and proprietaries.

I have found that independent druggists are among the most violent opponents of the fair trade philosophy. It is part of our routine operations to study the ads of all types of retailers in cities we serve—which include such major markets as Baltimore, Tampa, St. Petersburg, Jacksonville, Scranton, Pa.—and this very Capital of the Nation with five stores. We have never seen neighborhood druggists advertising fair trade prices—unless such ads are subsidized. In fact, drug retailers are now emphasizing non-fair-traded items in their advertisements because they know their customers are looking for the best possible prices.

I spoke earlier of the effect this legislation would have on employment. My first reference was to the threat to workers in the discount industry itself. There are today about 250,000 people directly employed in discount retailing. I base my estimate on an average of 100 employees per store for the more than 2,500 discount stores in operation. However, many larger discounters employ far greater staffs, and I am being conservative when I cite a figure of a quarter of a million wage earners in the discount industry who have a heavy stake in the outcome of these deliberations.

In the 5-year period of 1957 through 1961 which we have been using for comparisons, total retail employment in the United States rose by 367,000, an increase of 4.7 percent, according to the Bureau of Labor Statistics. Trade journals and other industry authorities assert that half the number of workers now in discounting were hired during this 5-year span.

Thus, at least a third of the increase in retailing employment since 1957 can be attributed to the growth of our industry. I cannot bring myself to feel that it would be the intent of the Congress to reverse the present encouraging trend in the retailing phase of total employment by handicapping, through House Joint Resolution 636 and Senate Joint Resolution 159, the industry that supports 250,000 wage earners.

This bill, however, goes beyond threatening the jobs of discount employees. By limiting the buying power of the people, it will reduce the demand for consumer goods of all types, sold through all varieties of stores. Not only would this curtail general employment, but it would also act to lower the real income of the public. I can think of nothing more damaging to our economy at this critical time.

I should like to deal next with paragraph 8(a)—on lines 4 to 6 of page 4—in the proposed legislation, which would impose restrictions on "bait merchandising practices," or what is known familiarly in trade circles as "loss leadering." The concept of loss-leadering brand names has been part of the American retailing scene throughout my lifetime, and in those 40-plus years, I know of no brand name that has been injured by its use as an attraction in a special promotion.

Has the brand name of General Electric or Westinghouse suffered because it was used as bait? Hardly—and yet, newspaper ads in any city will regularly show these and countless other famous names being used as loss leaders to draw shoppers to a store.

Since it is customary to carry many other lines of the same manufacturer in our stores—products that are often the backbone of a department—it would be a form of suicide if we were to indulge in merchandising tactics that destroyed the image of a popular group of products. On ethical grounds, gentleman, as well as in strictly business terms, loss-leadering violates no principles, neither does it pose hazards to any industry or company.

Our fundamental opposition to this bill is that it is deceptive. There is nothing "fair" about a law that imposes indirect taxation on the public, without its consent. Yet a price-fixing formula such as is being contemplated here is as arbitrary a tariff as the levies without representation that drew the ire, and rebellion, of our first citizens almost 200 years ago.

Many of the criticisms that have inspired attacks on the discount industry through such devices as this bill are similar to the disparagements aimed at supermarkets when they first emerged 30 years ago. But the supermarkets flourished and proved not only that mass merchandising, made possible through more efficient operations, was a legitimate and welcome addition to retailing, but also that branded and nonbranded merchandise can survive side by side.

Even the chain drug industry has refuted the views of many of its suppliers by refining the techniques of self-service that the supermarkets pioneered. I cannot help but return again to my amazement

that any manufacturer would want to antagonize the good will of its customers merely for the privilege of being able to dictate price levels.

But the best proof that the public does not intend to be intimidated is the growth of the discount industry itself. It would be a mistake not to recognize that price influences the purchasing habits of many shoppers. Were it not for this one factor, how could the discount industry have grown into a $4½ billion a year business in so short a time?

We do not oppose giant manufacturers who favor this bill solely for their bigness; they have their profit problems to contend with just as do other concerns. But this legislation repudiates the American business tradition that holds supply and demand determines price levels, and it is on this ground that we present our objections.

I should like to express, at this point, my appreciation to the committee for its courtesy in extending me the opportunity to submit these views.

Thank you.

Mr. MACK. Thank you, sir.

Mr. Hemphill?

Mr. HEMPHILL. Thank you, Mr. Chairman. Perhaps I do not understand the discount concept but you have to discount against something, do you not?

Mr. ROSENSTEIN. Yes. We actually have to discount against what is the common method of distribution or the standard methods of distribution. Traditional methods of distribution in this country have created a tremendous waste factor which by its very nature has caused the cost of distribution to rise substantially; and it is this cost of distribution which is being discounted, not the cost of merchandise which we purchase.

Mr. HEMPHILL. I will disagree to the extent that I think the waste factor is one of the factors of our freedoms but it occurs to me that you have to discount against what we would ordinarily call the legitimate price.

Mr. ROSENSTEIN. No, sir. I question your use of that phrase "legitimate price." What is a legitimate price, sir?

Mr. HEMPHILL. It is a price that includes integrity of service in my opinion.

Mr. ROSENSTEIN. In my opinion, if I may say so, this is pure semantics. It is a play on words. It is terminology selected by the retailing fraternity, which has established certain practices, which it feels accustomed and consequently would love to maintain.

Mr. HEMPHILL. You do not mean my words are selected by the retailer, I am sure.

Mr. ROSENSTEIN. Those words that you used?

Mr. HEMPHILL. Yes.

Mr. ROSENSTEIN. Perhaps not selected knowingly by retailers but developed indirectly through propaganda. You know when words are repeated often enough and are spread through business groups and advertising frequently enough, most people tend to accept them as the norm.

Mr. HEMPHILL. For your information those are my own words and no retailer has ever talked to me about this particular thing that I know of.

Mr. ROSENSTEIN. I do not imply that they did, sir.

Mr. HEMPHILL. I might inform you that when you say that the discount price has to be against the ordinary price to include waste, it has been the experience of some of my people that have not talked to me but whose operations I have observed that, while they sell the same product as the discount house, they give real service. They have the integrity of guarantee and they do not put you off with some sort of fool excuse when you call back and say something is wrong with the product. That concerns me because I am as interested in the consumer as you profess to be.

Mr. ROSENSTEIN. Sir, I would like to give you an answer to that as it refers to Towers Marts, which operate right here in the city of Washington. If you refer to such consumer service as delivery and pickup—no, we do not offer such service. But I will venture to say that if you attempt to return any item for any reason whatsoever, whether through an error in judgment, or selection of the wrong size, or if the product proves defective, you will get a more rapid refund of your money in Towers stores than in any store in the city of Washington—and I know that, sir, because I tested this myself.

Mr. HEMPHILL. I am not familiar with your operation and do not intend to be.

Mr. ROSENSTEIN. We are a discounter and there are many other recognized, respectable, and responsible discounters throughout the United States. Otherwise this industry could not have grown. There are stores with shoddy practices, that is true. You will find this among conventional stores as well. But legitimate discount people will follow legitimate practices.

Mr. MACK. How long have you been in business?

Mr. ROSENSTEIN. I have been in this business 4½ years. I have been a manufacturer 18 years prior to that.

Mr. HEMPHILL. Of course, I am a little naive. I come from a section in which the average retailer is a small merchant. He does not have the cloak of the metropolitan area, the cloak of sophistication or any of the other things which allow people in the bigger city areas to get by with the practices which I have personally observed. I happen to know of their integrity because in a small town, you know, everybody knows whether you are honest or not.

Mr. ROSENSTEIN. That is right.

Mr. HEMPHILL. And you cannot get by because you have a Philadelphia lawyer sitting in the complaint room because there is no complaint room. Of course, the thing that bothers me is that the discount houses come in from the metropolitan area and appeal to the local fellow and he goes 40 miles from his home and buys something and then, bless my soul, he cannot get service, he can hardly get anybody to answer on the telephone and the consumer is just beat down and kicked around or outtalked. It is a sad thing. That has been my limited observation of discount houses, being as I say naive and from a country sort of community. That concerns me because they are my dear people. They are honest. They do not practice anything but honesty and they do not expect anything else. Of course, the appeal of 20 percent discount against this price or that price, which I call the legitimate price, because I believe in the fellow making a little money down on the local level you know. I feel like you have got to discount against some price and that is the price you are dis-

counting against, the price that the local merchant has to charge to carry the goods maybe for a period far longer than the discount houses, to carry the credit because we do not have the money in the rural areas, to give the service because if Mrs. Jones calls up and wants the service everybody knows that your integrity depends on your satisfying Mrs. Jones as to the quality and operation of the commodity. That is one of the things that really concerns me here because rural America I suppose is sitting in the wings looking at the controversy which has been waging back and forth for perhaps almost a decade or maybe a generation. I am not sure.

Mr. ROSENSTEIN. There are several aspects of the remarks you have just made which I think require clarification. In the first place, many people travel as far as they do to shop at discount houses because there are not as many discount houses operating now as there may be 5 years from today; as time goes on, they will have to travel less.

Mr. HEMPHILL. If this goes on there are not going to be any local merchants.

Mr. ROSENSTEIN. This is equivalent to saying there will not be any more local grocers. The supermarket industry did replace to a very substantial extent the local grocery store. Yet local grocery stores exist, and to claim that the discount stores will replace the local merchants is not true. The local merchants will still continue to exist. You see, the discount stores did not just come about because somebody had the bright idea of opening a business to grab an advantage. Discount houses came out, sir, because of an absolute economic necessity. Nothing in this country of ours, nothing in these United States, grows and can continue to grow unless the basis for it is economically sound. If we can save the consumer 12 to 15 percent on the average purchase, thus spreading their dollar further, shoppers are willing to travel a little to save this money. You must also distinguish between two types and two economic levels of consumer. You have the consumer who would never go into a discount store, the middle or upper middle class, as you might describe them.

Mr. HEMPHILL. Wait. I do not believe in class distinctions in America. I am a southerner, remember.

Mr. ROSENSTEIN. People in an economic level where the income is possibly $10,000 a year or above would never go into a discount house no matter what kind of bargain it is offering to the public. On the other hand, the great majority of the people in the country fall into a lower income level and have to make their dollars spread as far as they can. They will go to the discount house purely because they must save that money and make that dollar spread further.

Mr. HEMPHILL. You are in the analogy of the loan sharks down in my part of the country who come in and say, "We will charge people 30 percent interest because the banks won't loan them any money."

Mr. ROSENSTEIN. If I may say so, sir, this analogy is quite farfetched and I would like to explain why. We offer the same merchandise with the same brand names produced by the same manufacturer as the lines carried in traditional stores—and sell it for 12 to 15 percent less; it is all guaranteed first-class quality merchandise and we refund the money if it is found not to be first quality or if the customer is not satisfied. We are not taking advantage of customers

by charging them less, and, therefore, I think the analogy is an unfair one.

Mr. HEMPHILL. Let us direct our attention to something else. I see here that you say that, "We do not oppose giant manufacturers who favor this bill solely for their bigness." I would like to know to whom you have reference because if that is true I may think there is some merit to your proposition.

Mr. ROSENSTEIN. If I interpret this act correctly and the sponsors of it, I believe that this measure and these bills are being primarily promoted by the drug industry.

Mr. HEMPHILL. What giant manufacturers do you mean?

Mr. ROSENSTEIN. I am referring to the big drug manufacturers.

Mr. HEMPHILL. We had a fellow yesterday who made a statement and he finally admitted it was hearsay and then he began to cuss the Congress and everybody else before he got through and I listened with some distress because I knew how much of a fee he might be getting, you know, because we had this legislation here. When you make a statement about "we do not oppose giant manufacturers," to whom do you have reference? I am interested as a Congressman.

Mr. ROSENSTEIN. I have specific reference to the drug industry, to the giant drug manufacturers.

Mr. HEMPHILL. Who? Name them. We say in my country that you have to answer if you make the statement.

Mr. ROSENSTEIN. I think I would be hard put to name the manufacturers per se.

Mr. MACK. I would like to join with my colleague in supporting his request. I think that you, as a witness, ought to produce the names of people whom you say are backing this proposal. The gentleman is correct. We had a witness yesterday who reflected upon the integrity of the Congress. I think that you are falling in the same category. This bill was introduced by myself and by some of the most distinguished Members of this Congress and I will certainly stack their integrity against yours today or any other day and if I heard you correctly, and I intend to read this record, if you said what I understood you to say, then I think you should answer the question of the gentleman from South Carolina.

Mr. ROSENSTEIN. My reason for interpreting this as a bill sponsored by the drug industry is because in our experience——

Mr. MACK. I think the gentleman from South Carolina asked you to supply the names of these manufacturers that you refer to.

Mr. ROSENSTEIN. I do not have any such names.

Mr. MACK. I want to say that I think that was a reasonable request and that he is being perfectly fair with you as a witness before this committee and, if you are going to stand by the statement that you made, I think that you should supply the names of these manufacturers you refer to.

Mr. ROSENSTEIN. In that case I will be perfectly willing to withdraw that part of my comment as part of my statement.

Mr. MACK. That part of his statement will be withdrawn.

Mr. HEMPHILL. I have no further questions.

Mr. MACK. I have a couple of questions. You mentioned that the reason people travel as far as they do is because they are saving, I think you said, 12 to 15 percent in buying merchandise from you for 12 to 15 percent less?

Mr. ROSENSTEIN. That is correct.

Mr. MACK. Less than what?

Mr. ROSENSTEIN. Than the average retail price which would normally be applied to this merchandise by traditional retailers who use the traditional 40-percent markup.

Mr. MACK. But you say that is not the legitimate price that was recommended by the manufacturer?

Mr. ROSENSTEIN. Well, it may be a price that is recommended by a manufacturer but this does not make it any more legitimate or illegitimate than our price. It is simply a question of cost of distribution.

Mr. MACK. You are speaking of the price recommended by the manufacturer when you speak of 12 to 15 percent less?

Mr. ROSENSTEIN. That is my intent, in an instance where a manufacturer recommends a price.

Mr. MACK. Well now, how far do these people travel to buy from you at 12 to 15 percent less?

Mr. ROSENSTEIN. Well, this varies with locality.

Mr. MACK. I feel quite certain that you have done some research.

Mr. ROSENSTEIN. Yes, I have. I will give you the answer on this subject. For example, we have a store in Hazleton, Pa. In this area we find that we have customers traveling anywhere up to 20 miles to shop at our stores, whereas here in the Metropolitan Washington, D.C., area, I venture to say that people would not travel more than 3 miles to visit our stores. So that the geographic location of the store is a very important factor influencing the distance a customer will travel.

Mr. MACK. I travel 10 miles back and forth when I come to work in the morning. Surely some people here in Washington travel over 3 miles to get to your store. Are you saying that you sell to a 3-mile radius here in Washington?

Mr. ROSENSTEIN. We sell far beyond that, but the preponderance of our trade comes from within the 3-mile radius of each store. We have people in this Washington area who will travel as much as 10 or 12 miles on occasion, but this is not our consistent trade. Our consistent trade we find to be within a 3-mile radius of our Washington stores and within about a 5-mile radius in our Baltimore stores, whereas we have found them coming from as far as 15 to 20 miles away in Hazleton, Pa.

Mr. MACK. Did I understand you to say that you did not think that the discounters caused some small merchants to go out of business?

Mr. ROSENSTEIN. I am sorry. I did not get that question.

Mr. MACK. Did I understand you to say in your testimony that the discount operation did not cause some small merchants to go out of business?

Mr. ROSENSTEIN. Oh, no. I did not say that at all. I said that in the long run we will continue to have the small merchant just as in the supermarket business we still have the small grocer, but there is bound to be some dislocation. Some small merchants will get hurt and others will replace them. We will still continue, in my opinion, to have small merchants.

Mr. MACK. Your answer is, then, that you did not make that statement?

Mr. ROSENSTEIN. No, sir.

Mr. MACK. If I understood you correctly the discount operation does cause some small——

Mr. ROSENSTEIN. Dislocation; yes it does.

Mr. MACK. Very good. Then, if this bill were passed would that adversely affect your business or your net profit?

Mr. ROSENSTEIN. It might adversely affect our net profit. I could not say with certainty.

Mr. MACK. I am sorry. I did not understand.

Mr. ROSENSTEIN. I say it might affect our net profit but I do not think it would affect our net profit as such materially.

Mr. MACK. It might affect your gross sales?

Mr. ROSENSTEIN. It might affect our gross sales, yes.

Mr. MACK. Would it reduce your gross sales or increase them?

Mr. ROSENSTEIN. It might tend to reduce our gross sales, and conversely it might tend to increase the profit that we would make on those items that we were selling at a higher price. However, we would under those circumstances be selling smaller quantities of the same item, in my opinion.

Mr. MACK. Well, isn't the economic interest of discounters one of the main reasons that they are opposed to this bill?

Mr. ROSENSTEIN. Well, I would say so.

Mr. MACK. In your statement you said, "Our fundamental opposition to this bill is that it is deceptive." Your real interest is an economic one, isn't it?

Mr. ROSENSTEIN. Yes, because anything that affects the economy will obviously have to affect our industry. I think if anything restricted the purchasing power of the people, it would naturally affect their ability to buy in our stores, therefore this is a matter in which we would be affected economically. But we would not be the only ones to be affected; in my opinion all retailers would be affected.

Mr. MACK. Why is it that you operate only in big cities? Why don't you operate in smaller communities, say, less than 50,000?

Mr. ROSENSTEIN. Well, we operate in Hazleton, Pa., which has a population of 36,000, if I remember the figures correctly.

Mr. MACK. In the metropolitan area?

Mr. ROSENSTEIN. No, it is on the outskirts of Hazleton.

Mr. MACK. I say in the metropolitan area it has 37,000.

Mr. ROSENSTEIN. Yes, Metropolitan Hazleton has 37,000. We also operate in Merritt Island, Fla., which is near Cocoa Beach, next to Cape Canaveral. That has a population, in the metropolitan area, of 26,000.

Mr. MACK. There are more than 26,000 employees at Cape Canaveral.

Mr. ROSENSTEIN. That is at the cape itself, which is a separate municipality. The municipality of Merritt Island has something like 26,000.

Mr. MACK. My question was, Why don't you operate in areas of less than 100,000?

Mr. ROSENSTEIN. We do. I say that we do.

Mr. MACK. Actually you are limiting the immediate area of a 3-mile radius or so to your store just as you did in Washington here and maintaining that you are operating in areas with a small population?

Mr. ROSENSTEIN. No. I am not referring to the Washington, D.C., area, sir. I am referring to a city the size of Hazleton, Pa.

Mr. MACK. I am very familiar with the Cocoa Beach area and Melbourne.

Mr. ROSENSTEIN. We are near Melbourne, but the total size of the Cocoa Beach area within a radius of 15 miles does not come to 80,000.

Mr. MACK. It does not miss it by much.

Mr. ROSENSTEIN. It is pretty close. That is in a 15-mile radius.

Mr. MACK. You also have quite a few people working at that area who maintain a residence at Orlando, Fla.?

Mr. ROSENSTEIN. Yes, that is so. They live in Orlando and work there.

Mr. MACK. That is substantial numbers.

Mr. ROSENSTEIN. Yes, I would say so, but Orlando has its own discount houses so that we do not consider them as a potential draw, not to our store. But in partial answer to your question, the reason we select areas that have what we consider to be a sufficiently large population supply is the size of the store that we put up. Our stores range from 60,000 to 80,000 square feet and consequently, in order to do the necessary volume, we need adequate traffic.

Mr. MACK. Then one other question with regard to the retailing. I notice that they have not been entering into many communities under 100,000, and I do not know of any operating in a community under 25,000 offhand. There may be but I do not know.

Mr. ROSENSTEIN. There may be, but if there are they are few.

Mr. MACK. One other operation a lot of the discount houses seem to engage in is operation on Sunday. I was in St. Louis over the last weekend and I had occasion to drive in on Sunday morning and I noticed two big discount houses on Route 48 in St. Louis operating on Sunday morning and a group of ministers parading up in front of the highway for about a quarter of a mile or so objecting to the selling of nonessential items on Sunday. The discount operations have seemed to engage in the Sunday operation and I am wondering if this is something that is associated strictly with the discount operation. In other words, is it necessary for you gentlemen to operate on Sunday to make a profit?

Mr. ROSENSTEIN. Well, let me say, in answer to that question, that in our chain we are violently opposed to Sunday openings. We do not stay open on Sunday. We did stay open in Baltimore last year in a competitive situation because we were near another outfit that stayed open on Sunday; when the Supreme Court ruling was handed down, we closed on Sunday in spite of the fact that our competitor down the street still remains open. I might add that our volume has gone back to normal.

Mr. MACK. I was not reflecting upon you as an operator but this is a policy generally, it seems to me, that discounters do operate on Sunday.

Mr. ROSENSTEIN. Let me put it this way. This policy is the individual choice of a discount operator. It is not at all universal. But my objection to the general opposition to Sunday openings touches a point on which there seems to be a clearcut conflict. It seems to be a religious issue rather than a custom or preference. If Sunday openings were not desirable, if the public, which is actually the key

factor in this controversy, were opposed to Sunday openings why would they shop on Sundays? Our chain does not stay open so I am not referring to Towers as such, but I question the wisdom of laws requiring Sunday closings when there seems to be such a preponderant demand on the part of the public for an opportunity to do such a large amount of their shopping on Sundays.

Mr. MACK. Some of the States do not have the blue laws.

Mr. ROSENSTEIN. That is true.

Mr. MACK. Yet the merchants close on Sundays. But the discounters seem to always remain open on Sundays. I do not mean always.

Mr. ROSENSTEIN. No, they do not.

Mr. MACK. Many of the large discounters seem to remain open on Sundays and my question was, of course, is it necessary for you to remain open on Sunday in order to make a profit?

Mr. ROSENSTEIN. No, sir. Coming back to our experience in Baltimore—in spite of the fact that we were once open on Sundays but have since decided to close on Sunday, our present volume for six days now exceeds the volume we realized previously for 7 days. Therefore, it is not a matter of essential necessity. We would not lose money or business by remaining closed on Sunday. At least this is what we have found. However, I think it is unfair to oppose Sunday openings just because conventional retailers have opposed it. I say that stores should be open for the convenience of the customer and for no other purpose. The only reason the store is in business is to service its customers. If customers find that the only time they can do their shopping is from 6 to 10 in the evening, which is when we do 60 percent of our business, or on Sunday because they may be working 6 days a week and have no other time to do their shopping, why should we deny those shoppers who want to shop on Sunday the right and privilege of doing so?

Mr. MACK. Well, there seems to be some complaint against it in southern Illinois.

Mr. ROSENSTEIN. I can understand it. The complaint would obviously be on a religious basis which is quite understandable.

Mr. MACK. There was quite a demonstration there on Sunday. I presume that the ministers only appeared on Sunday, but they had quite a group of people that seemed to be supporting their cause.

Mr. ROSENSTEIN. My main feeling is that people should have a right to shop when it is convenient for them to shop, and anyone who has a religious conviction that it is contrary to their religious belief to shop on Sunday should not by all means do their shopping on Sunday.

Mr. HEMPHILL. Would the gentleman yield? Can I assume that there is nothing; either holy or moral about the discounting business?

Mr. ROSENSTEIN. Neither holy or moral?

Mr. HEMPHILL. That is right.

Mr. ROSENSTEIN. I have not found that people go into business for holy or moral reasons. They go into business to make a profit. That to my knowledge, is the only reason why people go into business in this country.

Mr. HEMPHILL. I know some people, and I would love for you to meet them, who carry their religion and their Christianity and every-

thing else and their Hebrew philosophies into the business world and I am proud to know them.

Mr. ROSENSTEIN. People can be of the most religious nature in the world and insist on a right to their religious choic or preferences—but this has nothing to do with their desire to earn money. I do not think that the two have anything to do with each other. A man in business must have moral ethics, but this philosophy should not be in conflict with religious beliefs.

Mr. HEMPHILL. He should never let his religion interfere with his profit?

Mr. ROSENSTEIN. Well, I would not say that this is so.

Mr. HEMPHILL. That is what you are saying.

Mr. ROSENSTEIN. No, I am not saying that. I am saying that a man goes into business to make money regardless of his religious beliefs or convictions.

Mr. MACK. If the gentleman will yield I would like to ask about your statement on page 2 where you say that "some of the very interests that are pressing for this unfair trade bill" would be hurt. That is page 2 at the end of the third paragraph.

Mr. ROSENSTEIN. Yes, sir.

Mr. MACK. Who are these interests?

Mr. ROSENSTEIN. Again I will withdraw any reference in these comments that may impugn the motives of any individuals who may be backing or supporting this bill. However, I believe that any manufacturer who would support this bill—regardless of the products that he manufactures—thus requiring a fixed price which is higher than the price at which that merchandise can otherwise be distributed, is hurting his own volume and consequently his own profits. I would like to be a little bit more specific about that. Let us assume that a manufacturer is selling a product for $2 to a given retailer and the given retailer, based on his normal markup procedures, sells that product for $2.98. The manufacturer who sells that product to the retailer, whether it be a conventional retailer or a discount retailer, still gets the same $2. The only difference in the price to consumers is the cost of the distribution. Now, if Towers buys a product for $2 and then sells it for $2.39 or $2.49 as compared to a conventional retailer who may sell it for $2.98, we are obviously going to be selling more of those products than the men selling it for $2.98. Yet the manufacturer received the same price from us. Consequently by not dealing with us he may be selling that many less of the same commodity and consequently hurting himself.

Mr. MACK. You are assuming, of course, that under this system that he would sell less than he is selling today?

Mr. ROSENSTEIN. It must follow because of my ability to sell it for $2.39.

Mr. MACK. You would not be able to sell it at that price.

Mr. ROSENSTEIN. I would. The manufacturer still sells it to me for the same $2.

Mr. MACK. Under the provisions of this act?

Mr. ROSENSTEIN. No, I would not then be able to sell it for $2.39.

Mr. MACK. You mean that there would be fewer total sales?

Mr. ROSENSTEIN. Exactly. That is exactly my point—and the manufacturer is thereby hurt because he does not get any less money from us than he gets from anybody else.

Mr. MACK. And they would be buying some other manufacturer's product who is in competition with this man.

Mr. ROSENSTEIN. Exactly, a product which might not be fair traded; which may not have the brand name on it.

Mr. MACK. That seems to me to be a very good argument in favor of the bill.

Mr. ROSENSTEIN. On the contrary. It may be an argument against the proponent manufacturer's arguments in favor of it but it is not an argument in favor of the bill.

Mr. MACK. It indicates that there would be much less competition.

Mr. ROSENSTEIN. Why would there be less competition? It seems to me that there would be more manufacturers who would try to get their merchandise branded. It would certainly tend to increase prices and, therefore, cut down on the ability of the consumer to spend more money, to buy more units.

Mr. MACK. If I understand you correctly you are indicating that, if the manufacturer's retail prices were higher, then there would be more competition for that from other manufacturers.

Mr. ROSENSTEIN. Well, I would like to cite some of my own experiences in this connection.

Mr. MACK. And it would have the effect of keeping the manufacturer's price at a reasonable level, would it not?

Mr. ROSENSTEIN. There are too many other imponderables which are involved and which would negate it. I would like to give you my experience as a manufacturer for 18 years. We manufactured products which we sold to the retail trade and which we also sold to other manufacturers who put their own brands on the merchandise. We made the identical merchandise in exactly the same plant, paying the same price for labor and providing the same conditions for work. Yet our product was sold in competition with the higher price brand merchandise for less money. You are putting a premium on a man to support a brand name.

Mr. MACK. It would be in competition with private brand as well as name brands.

Mr. ROSENSTEIN. Yes, he would have to be in competition with private brands.

Mr. MACK. But according to your statement he would have an even greater competition if we passed the bill.

Mr. ROSENSTEIN. I think there again the laws of supply and demand would apply because if you try to hold a supply in the market on the expectation of getting a higher price as the result of price support, the purpose would be defeated. We have found that the fair trade laws that have been in existence have pretty well vanished, except in the drug industry and for only a few items in the soft goods industry.

Mr. MACK. How many stores do you have?

Mr. ROSENSTEIN. We have 26 stores as of now.

Mr. MACK. You have five stores in Washington?

Mr. ROSENSTEIN. Yes, sir.

Mr. MACK. You must find this a very profitable business.

Mr. ROSENSTEIN. Well, we have only been in Washington less than a year.

Mr. MACK. But you have only been in business for 4½ years.

Mr. ROSENSTEIN. That is right.

Mr. MACK. That is quite an expansion program.

Mr. ROSENSTEIN. That is correct.

Mr. MACK. Do you make a profit from your discount operation?

Mr. ROSENSTEIN. We do.

Mr. MACK. The reason I was detained this morning coming to the meeting was because the Chairman of the Securities and Exchange Commission and another Commissioner thought it was quite important that they get together with me immediately and I was with them for an hour this morning so that it will be most convenient for me to check the rates.

Mr. ROSENSTEIN. It is available.

Mr. MACK. Are there any other questions?

Mr. DINGELL. Just briefly, Mr. Chairman.

Have you ever been indicted or prosecuted for operating on Sunday?

Mr. ROSENSTEIN. No, sir.

Mr. DINGELL. In jurisdictions in which you operate this is a perfectly lawful and legal practice?

Mr. ROSENSTEIN. We have 26 stores in operation. There is only one store in our entire chain that remains open on Sunday and this happens to be in Jacksonville, Fla. (I forget the county). This is a matter of very dire competition because our very strongest competitor, who is located very close to us, remains open. We do not expect to stay open there too long. We expect to follow the same procedure that we observed in Baltimore and close down the Jacksonville branch. All of our other stores throughout the United States and Canada are closed on Sunday and there has never been any legal action brought against us in that regard.

Mr. DINGELL. Do you loss leader?

Mr. ROSENSTEIN. I do not think there is a discount house in the United States that does not, so I must say that we do.

Mr. DINGELL. Do competitors loss leader?

Mr. ROSENSTEIN. Yes, sir.

Mr. DINGELL. Do the standard traditional merchandisers also engage in loss leaders?

Mr. ROSENSTEIN. They sure do. All you need to do to satisfy yourself on that score is look at any of the newspaper advertising that appeared in the city of Washington during the month of December 1961 and examine what the major department stores, including Woodward & Lothrop or any of the others in the Washington area, did to the toy industry. They loss leadered every item in the toy industry during the entire month of December.

Mr. DINGELL. Has your organization, your firm ever been scrutinized by the Federal Trade Commission for unfair business practices?

Mr. ROSENSTEIN. Yes, they were. At one point in Baltimore we were criticized for one act wherein we used a comparative figure. We corrected that immediately. We acquiesced to the Federal Trade Commission's request, and we have never had a violation of any type since. As a matter of fact, we have been commended very recently by the Better Business Bureau in both Washington and Baltimore.

Mr. DINGELL. Has your organization ever been indicted for violation of the antitrust laws?

Mr. ROSENSTEIN. No, sir.

Mr. DINGELL. Your statement was very helpful.

Thank you very much.

Mr. ROSENSTEIN. Thank you.

Mr. MACK. Thank you very much for your statement, Mr. Rosenstein.

Our next witness is Mr. Michael Carosella, from Bethel, Conn.

STATEMENT OF MICHAEL CAROSELLA, HIGH VIEW TERRACE, BETHEL, CONN.

Mr. MACK. Are you appearing here as a representative of an association?

Mr. CAROSELLA. No, sir; I am appearing here in behalf of our family business.

Mr. MACK. As an individual business?

Mr. CAROSELLA. Yes, sir.

Mr. MACK. You may proceed.

Mr. CAROSELLA. My name is Michael Carosella, from Bethel, Conn. I represent our family business.

Mr. MACK. Do you have a copy of your statement?

Mr. CAROSELLA. I only have a few notes here.

Mr. MACK. You may proceed.

Mr. CAROSELLA. I am representing our family business which my dad started some 40 years ago when he first came to this country from Italy. In these 40-some-odd years we have worked very hard as a family to promote this business. The two main things that have helped our business progress in these 40-some-odd years are the quality brands which we had sold in our stores and the quality service which the Carosella family has given to the community.

Mr. MACK. What kind of operation is that?

Mr. CAROSELLA. A shoe store. We would like to continue this business, we think it is a fine business, and we feel we are very fair in the community in our dealings.

Now, in the past few years not only ourselves but other small independent dealers in the community have experienced very bad competition. And at this point I would like to mention that we are not afraid of competition, for good clean competition is good in any given area, it is a healthy climate for all of us. As I mentioned in my letter to President Kennedy and Secretary Hodges, all we ask, especially the small businessmen, our family, and the other small businessmen throughout the country, is that we get a chance to operate our business in a very healthy climate.

What has happened in several cases in our particular community, I think, is very unfortunate, and it is very unfair. To give you a specific example, we handle mostly all name brands. One of our name brands which we handle is the Florsheim shoe. A discount operation in our area advertised these particular shoes at a very low price. These shoes normally retail, let's say, from $20 up. This particular operation advertised these shoes below cost, as a matter of fact, the ad read, $11.80 a pair. Naturally my friends and neighbors who had been

doing business with me for years mentioned to me, "Gentlemen, how come these shoes advertised are $11.80, and if I come in to your store you charge me $20-some-odd and over?"

We went down and checked out this particular ad. This was the same day that the particular ad came out. We went to this particular store, and we asked to see the particular shoe department, the gentleman directed us down to the end of the building. And in this particular group of shoes, they had two or three hundred pairs. These were all imports, and there was only one pair of Florsheim shoes in that particular pile. We looked that pile over very, very closely, and very, very carefully. There was only one particular pair of these shoes which were advertised.

Now, I won't say that particular style was an old style, a shopworn style, I will inject a little humor and say it is probably the same pair that Christopher Columbus wore when he first came over here.

Now, competition like that, I think, is unfair.

We had another discount store which advertised American-made rubber footwear. This ad appeared at 4 o'clock in our local paper. After supper that night I went to check this ad out. There were no American-made arctics in that group, they were the Chinese, or Hong Kong, etc.

And going into another specific example, another discount operation advertised name brand children's shoes in our particular area, formerly selling downtown—that is, where we are—from $6.98 to $8.98, at a price of $4.47, or $3.47, I forget just exactly what it was. We again checked these shoes out, it was not first quality merchandise, they just had a few shoes there which were name brands, but it was shopworn merchandise which would not be considered firstline in a fine shoe store.

Now, I say this: We can exist in a community with discounters. I am not against the discounters, but we are against people that will take name brands and use them as bait advertising. That, I think, is very unfair. I don't think it is fair to us. We have been hurt very badly by it, and not only have we been hurt but many other small retailers throughout the country. This situation reminds me of a wounded American soldier on the battlefield. Unless he gets some protection and some first aid pretty quick, he is in some real trouble.

So I am here today to testify before you gentlemen and urge you to pass some legislation or try to pass some bill which would definitely help the small businessmen, the legitimate businessmen in America.

Mr. MACK. Does that complete your statement?

Mr. CAROSELLA. Yes, sir.

Mr. MACK. Are there any questions?

Mr. DINGELL. Mr. Chairman?

Mr. MACK. Mr. Dingell.

Mr. DINGELL. You have read the bill, sir?

Mr. CAROSELLA. Yes, sir.

Mr. DINGELL. Under this bill, what would you have to do to conduct a clearance of unseasonable merchandise?

Mr. CAROSELLA. I believe under this bill the manufacturer would set aside possibly twice a year a certain time in which there would be a clearance, which exists today, I imagine they would do the same thing.

Mr. DINGELL. In other words, you would be at the mercy of the manufacturer as the time for clearance under this bill, is that right?

Mr. CAROSELLA. I don't think we would be at the mercy, sir—I think he would time his clearance in the best interests of his product and in the best interests of us moving this merchandise from our store.

Mr. DINGELL. You mean you hope he would do this?

Mr. CAROSELLA. Well, we would think it would be natural.

Mr. DINGELL. But you have no assurance that he would do this, do you?

Mr. CAROSELLA. We have no assurance, but I am sure that he would do it in the best interests of his merchandise as well as our own particular integrity.

Mr. DINGELL. Let's suppose that you have some smoke-damaged merchandise, what would you have to do to clear off that merchandise?

Mr. CAROSELLA. That I can't answer, sir.

Mr. DINGELL. You would have to write to the manufacturer for permission to conduct a fire sale, would you not?

Mr. CAROSELLA. Possibly.

Mr. DINGELL. Is that what you want to do, is that the way you want to conduct your business, at the sufferance of your manufacturer?

Mr. CAROSELLA. The way we want to conduct our business——

Mr. DINGELL. Just a minute. Do you want to have to go to the manufacturer to conduct a fire sale, or to conduct a clearance?

Mr. CAROSELLA. I can't answer that.

Mr. DINGELL. Don't you prefer to conduct your own business in your own way without going to the manufacturer to get his permission before you conduct a fire sale?

Mr. CAROSELLA. Sir, if I take on a manufacturer's property rights I feel he has a right to tell me how I should promote his product in the best interest of his sales and in the best interest of my store and in the best interest of the community.

Mr. DINGELL. How about a going-out-of-business sale? Are you going to have to go hat in hand to your manufacturer and request his permission to go out of business?

Mr. CAROSELLA. Possibly it would have to be cleared through him.

Mr. DINGELL. And that is what would have to be under the bill; would it not?

Mr. CAROSELLA. Possibly they might come in and buy up the merchandise. Mr. Dingell, unless we can get some legislation that would possibly help the small independent businessman, he will go out of business—I see no bills in Congress that are as good as this bill for the independent. Unless I see something as good as this bill——

Mr. DINGELL. Does your store handle Goodyear, Goodrich, or Firestone rubber footwear?

Mr. CAROSELLA. We have the Ball brand, sir.

Mr. DINGELL. Do you ever handle Goodrich, or Goodyear, or Firestone?

Mr. CAROSELLA. No, sir.

Mr. DINGELL. If you did handle Firestone do you feel that it is appropriate that Firestone should be able to handle its own merchandise in competition with you and fix the prices at the same time? You are aware that Firestone has its own retail operations?

Mr. CAROSELLA. I believe they do not have anything in footwear, sir.

Mr. DINGELL. Under this bill, though, I am sure that you are aware that Firestone would be able to handle its own merchandise, its own rubber footwear in competition with you and fix your prices?

Mr. CAROSELLA. Yes, sir.

Mr. DINGELL. So that they control your margin of profit, and also assure themselves of maximum profit as a result.

Do you endorse that kind of practice?

Mr. CAROSELLA. What I tried to point out——

Mr. DINGELL. Let me ask you this: Do you feel that this section of the bill is to the best interest of the small businessman who competes with Firestone on the retail level?

Mr. CAROSELLA. I pointed out before, sir, I am not going into the specifics because I don't know it that well, I leave that up to you distinguished gentlemen——

Mr. DINGELL. Do you think this is good practice?

Mr. CAROSELLA. I say that any manufacturer who has a property right should be entitled to control the distribution of that product right straight through until it reaches the consumer.

Mr. DINGELL. Do you feel that he ought to be able to fix your prices and compete with you on a retail level; do you feel that that is wholesome and in your best interests?

Mr. CAROSELLA. I don't like the words "fix prices"——

Mr. DINGELL. He does fix prices, doesn't he, under this bill?

Mr. HEMPHILL. Will the gentleman yield to me?

Mr. DINGELL. Yes.

Mr. HEMPHILL. I missed the first part of your statement.

I was in Japan a number of years ago and I went into a large textile manufacturing plant that had been assisted by your tax money and mine to compete with American firms. And they were somewhat jubilant about an order from one of the big mail houses here, I think the order was $3 million, which is a lot of money down in my country. And under your theory would that Japanese manufacturing plant have the right to set the prices at which the products would be sold to the United States?

Mr. CAROSELLA. Do I feel, would he have the right?

Mr. HEMPHILL. Yes. Of course, it is American machinery, American patents and American know-how, and a State Department uptown that made it all possible. But I want to know if you think the manufacturer could say what price would be charged per yard for a garment or per unit, along with Mr. Dingell's line of questions.

Mr. CAROSELLA. Again, I would say, if that particular product carried a particular trademark——

Mr. HEMPHILL. It carried a trademark.

Mr. CAROSELLA. Then I would say, if you wanted to carry that particular product you would have to go along with what the individual says.

Mr. HEMPHILL. What they said the price should be? What the Japanese manufacturer said the price should be?

Mr. CAROSELLA. Yes, providing the Japanese manufacturer did not violate our laws.

Mr. HEMPHILL. Thank you, sir.

Excuse me, Mr. Dingell.

Mr. CAROSELLA. May I add something?

Mr. MACK. Yes.

Mr. CAROSELLA. The most important thing that we as small retailers are after, as I mentioned before, we are not against competition, the competition is wonderful, it is fine, if it is fair. But when an individual, shall we say, who is not supposed to carry a trademark, or a brand name, comes into a given area and shows through advertisement in the newspaper—to give you this small example, if one of you gentlemen had come into my store and had paid me $20 for that particular pair of shoes and you thought that you had paid a fair price, went home that night, picked up the paper and saw $11.80 a pair in the ad, you might say, "Gee, how much is this individual making on this particular pair of shoes if this store can sell them at $11.80 a pair?"

In other words, we feel that we are on trial in the community as well as the manufacturer is on trial, because we feel that we are honest and we are legitimate, and we charge a fair price for a fair product, and when a certain group or an individual can come into a given area and practically say, "Well, look, folks, we will give you the merchandise for half of what this guy is charging you for it. Why pay them that price?"

It sort of makes us look a little—well, shall we say, unbusinesslike, after being in business for so many years. I don't think it is very fair. If they want to advertise price and not attach the brand name to it, fine, all well and good, if they want to advertise shoes for $2 a pair, $3 a pair, fine, it is good competition, if you want to put $26.90 a pair, fine. But don't come into a given area and take any particular brand names—and show Mr. and Mrs. John Q. Public, "This guy here has been sticking you for 40-some-odd years. Why don't you come over and buy from us?"

We had another name brand that the manufacturer would not sell to one of our competitors. Well, he would have one of his friends get the merchandise out of State, bring it in and sell it at $6 or $7 below our retail price, which was a fair retail price, it was an established retail price.

Now, we thought it made us look pretty sick in the community when we think we are a part of the community, we think we are good Americans in a small town, and we are proud to be Americans there, and when someone can come in and practically show that we are being unfair and unscrupulous I don't think that is right.

Mr. HEMPHILL. What is the population of the town, sir?

Mr. CAROSELLA. 8,000, sir.

Mr. HEMPHILL. Well, I live in a town of 6,000, and I have been in the law business there, and I have been in business off and on, and I don't know much about all those city phrases that come up here. But it appears to me that when the competition is unfair, ordinarily it is just because he is beating the other fellow to the punch. It is just like in the law business, if you can't produce you don't get the business.

And I have been in the wholesale grocery business at one time, just on a part-time basis. And what worries me—and I am deeply concerned—is whether or not, in order to help the small businessman—

and let me say that my distinguished chairman is their champion, the reason we are having these hearings is because he feels the dire need of some legislative creation or origination in this field—I am much concerned over whether or not, in an effort to do what we want to do, we might not be undoing something which is already precious to us, and that is the free enterprise system, and competition.

And that is no criticism of you. I certainly admire you for coming here and appearing before us.

Mr. CAROSELLA. When you were talking about beating to the punch and competition, the point that I wanted to make here was that it was not fair competition—let's say the manufacturer delegates one or two retailers in a given area to promote his products—now, when an individual can come into that area and pick up that same merchandise and advertise it in the paper at, let's say, half, and he is not even supposed to have the merchandise to start out with—that is another thing that is what I want to bring out. I think the bill is very fair, because it gives the manufacturer an opportunity to exercise his right—he doesn't have to if he doesn't want to, but at the point we are at now, when I went to my manufacturer and mentioned this thing he said, "I am sorry, we can't do anything about it, we are not selling this merchandise to your competitors. We don't know where he is getting it, so you are just going to have to put up with it."

And, in the meantime, we are selling the merchandise at a fair price, our competitors do not have the merchandise to begin with to back up the ads. I think that is very unfair, I think it is unbusinesslike, and I think it is un-American. I don't think it should be allowed. I don't think that is fair competition.

Mr. HEMPHILL. It is quite a problem on a local basis. You may like a particular line of clothing, and you want to trade at home—of course I don't like my wife to go out of town to shop, and I am like a lot of other folks—anyway, when she or any woman from my town goes to a metropolitan area, for instance, to North Carolina, which is only 40 or 50 miles, the money that they spend up there comes out of my community, and it does not get back, and they would not give a hoot if my town would dry up except for the money they get out of it, and it concerns me a great deal, because I have seen the little hamlets that I knew as a boy which were thriving local communities with a population of 100 or less, and they had two or three little stores, and a post office, and they were thriving, but they have dried up.

Now I see the smaller towns drying up. And the metropolitan areas are increasing. Perhaps it is best for America, we being an urban population, dependent upon the mass production of great farms, fiber and food processes over the country. But I am just not sure. I am very much concerned over what is happening, because I don't advocate change unless the change is progress.

I wonder from a health standpoint, and the standpoint of national morality, if progress made by industrial change and a high standard of living—the reason I am interested in this legislation is because of that impact. That doesn't have any connection—maybe it does or does not. Of course, we are always seeking some solution.

Mr. CAROSELLA. We feel, sir, that up to this point this is the best bill that can help these individuals in America, up to this point, we don't seem to have anything that can curb these unfair practices.

Mr. HEMPHILL. I could not quarrel with you there.

Mr. CAROSELLA. Yes. If you fellows can come up with some legislation a little different or a little better, fine, all well and good, we are willing 100 percent, but at the present time it is like I mentioned before, unless something is done to help these small businessmen, it is like a wounded soldier on the battlefield, if he doesn't get first aid he is going to be in trouble, and I mean real trouble. Thank you.

Mr. HEMPHILL. Thank you.

Mr. MACK. Are there any other witnesses who desire to testify on this subject?

I would say, also, in conclusion, that one of the national magazines last week carried an article concerning the medical profession and indicated that there were such things as kickbacks by druggists and others. It occurred to me that the enactment of this legislation might correct that situation, since some of the so-called discount chain drugstores are giving additional discounts to members of the medical profession. It seems that that problem might be solved in part by the enactment of this legislation.

The Chair would like to include several additional statements and letters from various people on the subject.

(The material referred to is as follows:)

STATEMENT OF G. G. BLAISDELL, PRESIDENT, ZIPPO MANUFACTURING CO.

Some 30 years ago, in the dark depression days following the market crash of 1929, I began the manufacture of a cigarette lighter which I called Zippo. I hope it's familiar to you because since then we've spent about $10 million in advertising to tell you about it.

I learned early that things happen in manufacturing which can result in a faulty product or even one that can wear out too quickly. I learned that when this does happen, you had better be ready to fix it fast—and preferably, without charge.

This, then, is the policy on which Zippo Manufacturing Co. has been built. Because of it, we have been impelled to build the finest lighter that we know how. Thanks to it, our product has attained an enviable position with millions of smokers as a lighter that works. Always, or Zippo fixes it—free. With this kind of acceptance has come a brand recognition enjoyed by few other products.

It has enabled us to withstand the many, many production and business problems of the last 30 years. Because of it, we have weathered the mass importation of tens of millions of cheaply made, detailed copies of our lighter, most of them from Japan, but from many other countries as well.

Currently, we are caught up in an avalanche with which we, or few other manufacturers of name brand products, can cope. Our products are being featured by unethical and unprincipled retailers in "bait" or "loss leader" advertising. The objective is to build traffic on known brands and to make a profit on unknown and unbranded merchandise displayed in adjoining aisles.

Present fair trade laws, even where they are in effect, have proven useless in dealing with this kind of deceptive selling practice. In many areas, unethical retailers are, in effect, monopolizing the retail markets on name brand quality merchandise.

As manufacturers, we sorely need legislation that recognizes our rights, our investment in the integrity of the name brands we make and sell and advertise, the trademarks that identify them and represent our obligation to the consumer. Legislation of this kind would, in addition, protect the small and independent retailer against deceptive pricing practices against which they, like we, have no recourse.

The quality stabilization bill (H.R. 10335) would insure the protection of name brand quality of product to the consumer. It would provide for price protection and an adequate profit margin for the retailer and wholesaler. It would assure the ethical manufacturer that his long-term investment in the quality of his product and its recognition by the consuming public can be legally safeguarded, so that his integrity can remain unquestioned.

STATEMENT OF HERMAN C. NOLEN, PRESIDENT, MCKESSON & ROBBINS, INC.

Mr. Chairman and members of the subcommittee, I welcome this opportunity to submit to this committee my views and those of McKesson & Robbins on the important legislation now under study, House Joint Resolution 636. Permit me to summarize briefly my qualifications and experience: Both my academic and professional careers are centered in the field of marketing; from 1933 to 1947, I was a professor of marketing at the Ohio State University; during the war years, I served with the Office of Civilian Supply in Washington and later as head of the Price Control and Rationing section for AEF Military Government; I joined McKesson & Robbins in 1947 as vice president in charge of drug buying and merchandising, and was elected president of McKesson in 1956.

McKesson & Robbins is a long-established wholesale distributor and manufacturer of drug products. Our principal customers are some 38,000 drugstores, most of which are independently operated and outstanding examples of American small business.

In behalf of these independent drug retailers and other segments of small business in this country, we urge the committee's favorable action on House Joint Resolution 636, the quality stabilization bill. McKesson & Robbins strongly supports this proposed legislation not only because of its interest in the welfare of its retail customers, but also because of our continuing concern with the marketing forces that influence this Nation's general economic well-being. In recent years the retail sector, in which small business finds its widest and most valuable expression, has been torn by disruptive forces and victimized by predatory merchandisers. Small business failures are increasing, the traditional incentives toward individual enterprise are withering, and important brand marks are being deprived of their value in the retail trade.

If these abuses of orderly marketing are permitted to continue, we foresee a growing concentration of retail distribution in the hands of a few large enterprises. We foresee a lessening interest in quality as continued price slashing devalues our well established trademarks. And we foresee disenchantment among American consumers when they no longer find nationally advertised quality products on the shelves of their neighborhood stores. In short, the so-called bargains on the tables of the discount houses will cease to be bargains.

Bait merchandising of well-known brand names is not pursued out of any real concern with the public interest, but rather as a lure to attract the unwary to the cheap-in-standards and overpriced-in-value merchandise on which these cunning merchants offset their losses on the well-known, respected brands. Operating costs have to be met if a retailer is to stay in business.

Plainly, these merchandising tactics do not serve the best interests of American consumers, nor do they fit into any acceptable scheme of fair competition for American business. This type of merchandising is truly predatory in that the fast-buck operator or the large firm with sufficient resources to play the waiting game can force the small independent retailer out of business by forcing him to sell the well-known, high-demand trademarked products at a loss or to put them under his shelf because the profit value in them has been squeezed out.

Manufacturers with substantial investments in their brand names and trademarks are also victimized by these reckless marketing tactics. As experience has shown in a number of price wars in the past, these manufacturers discover that their distribution suffers and naturally their sales and profits are affected adversely. Repeated occurrences of this series of events certainly build up to recessions in the industries affected.

Our company has long supported efforts to find some legislative remedy for the unscrupulous marketing practices that spread throughout retailing following the breakdown of fair trade. At the same time, we appreciate and share the genuine concern of our legislators and Government bureaus on the issue of insuring that price competition prevails.

The proposed legislation known as the quality stabilization bill would not, in our view, eliminate the healthy price competition that now exists among producers of brand name products. These producers, in setting their prices for their particular products, are competing for the consumer's favor against similar products under other brand names. And, importantly, producers themselves are left free to decide whether or not they want to market their products under quality stabilization. Depending on the nature of the product and its distribution, the manufacturer elects the marketing method that best suits his needs. Those manufacturers who wish to maintain orderly distribution of their products and to stabilize the quality standards that both brand name and price

structure suggest should have the legal right to do so. The manufacturer who produces shoddy merchandise for price-slashing purposes still has his rights in the market and he will continue to find his outlets.

Experience shows that the manufacturer who prices his product beyond its value is taking the first step to eliminating himself from the market because competing products will soon win away his customers. Therefore, it seems to me that the proposed legislation embodies the reasonable safeguards that honest marketing men, the Government, and the American public expects. It does not restrict competition among products, nor among retailers.

This proposed bill does not eliminate or handicap price as a competitive element at the retail level. The public would still enjoy its historical freedom to choose what it wants to buy, where it wants to buy it, and at the price it wants to pay for it. Most of us would agree that competition centers on price and quality, although there are other important elements in purchasing preference such as service, convenience of location and hours, credit, etc. Some merchants provide all these elements; others concentrate on price for a while and price-slashing quality to give the impression that they are literally giving good products away. Obviously, these price merchants cannot operate for long at a loss, nor can they neglect certain services that repeat customers expect. For these reasons, many discount outlets are moving in the direction of traditional retailers.

It appears to me that the proposed bill in no way restricts the retail merchant from selecting the type of operation he wants. House Joint Resolution 636 would help to insure that both types continued to exist for the benefit of the consumer who would still buy wherever he chose. On the other hand, when the independent, service-minded retailers are knocked out by predatory merchandising, the consumer's choice of where to buy is limited accordingly.

As to the public choosing what it wants to buy, this right remains because the quality stabilized products are still competing with both other quality stabilized products as well as other products in the same category not covered by such protection, including many private brands.

Regarding private brands, manufacturers of well-known, nationally advertised products are now competing with private label products on an increasing scale. They would expect to continue to do so, even after electing to quality stabilize their brand name offerings. This type of competition will not lessen the ability of the small retailer to stay in business because trademarked quality products will always be preferred by many consumers. Some retailers may offer a private label on a few products, but the fact remains that most of their business is done on the nationally advertised brand names. The small independent merchants need these consumer-preferred items to stay in business and, having them, they are well equipped to compete with those who offer private labels or other competitive products. We know from our close relations with our independent retail pharmacist customers that these nationally advertised, brand name products provide the community drugstore service on which the public depends. When a drugstore fails, there is a gap in an essential distribution network and these gaps are growing. When more and more small businesses fail, there is a serious threat to the traditional and healthy balance of large and small enterprises which make up our economic system. For these reasons, I would say that legislation, as proposed in House Joint Resolution 636, is urgently necessary.

Certainly today manufacturers need many widely scattered retail outlets to insure full and profitable distribution for their mass-produced products. They, too, view the growing concentration of retail distribution as a dangerous and monopolistic development. I do not believe that any manufacturer who elects to sell his products under quality stabilization lessens his own or his retail distributor's competitive flexibility. Changing consumer preferences, as well as the ingenuity of competing manufacturers, enforce flexibility in today's market.

I have said on other occasions that respected, well-established brand names constitute the strongest currency in our marketplace. This currency is being debased by irresponsible retailers. If this continues, we will certainly weaken one of our strongest economic resources. Manufacturers must be able to reverse this trend legally and to restore order to the marketing and distribution of their brand name products. In one sense, these manufacturers no longer have secure rights to their trademarks if both manufacturing and marketing controls are considered a part of those rights. I would urge restoration of this property right to any manufacturer who elects to market his product on a quality stabilized basis.

It is our opinion that manufacturers should have the right to protect their trademarks from exploitation and abuse, as proposed in House Joint Resolution 636. The wide support that this proposed bill has among small business in various industries is, I think, clear evidence that some relief from predatory merchandising practices and widespread abuse of brand names is long overdue.

All arguments for and against some form of Federal legislation to protect small business and to foster fair competition must deal with the effect of such legislation on the consumer. It is true that a number of laws now exist to protect the consumer from misleading advertising and other misrepresentations concerning price, quality, and effectiveness. We all recognize, however, that the American consumer is becoming increasing price conscious. As such, he is becoming easy prey for those who use price as a bait stuck on a very sharp retailing hook.

Of course, a careful buyer can pick up a bargain or two by dealing with the price-slashing merchandiser, but in the long run his shopping practices probably do not level out to the fair pricing average or quality norm he is likely to find in his neighborhood store. Beyond this, as I have pointed out earlier, the consumer is not well served if the number of stores ready to serve him is reduced by business failures. Nor is he well served if unreasonable price pressures induce manufacturers to reduce the quality of their products as a part of the discounting chain reaction. Therefore, it appears obvious that consumers will benefit from the enactment of this proposed legislation.

I do not believe that trademark exploitation, bait advertising and shady merchandising practices are necessary to achieve low-margin retailing. Such practices run counter to our national economic well-being. They make new business starts less attractive and weaken the stability of established segments of small business.

It is well to remember that the services rendered by our traditional retailers were developed in response to a consumer demand that still exists despite the current high traffic in discount centers. When these services are discontinued or curtailed, it is the consumer who suffers the loss. The vast majority of our citizens, I am confident, recognize that these services are reflected in a fair price. Americans are price-conscious but they are not price-hagglers seeking to outwit proprietors of bazaars. They respect standards of fair play and this legislation seeks to reestablish such standards in the sale of quality products.

Therefore, it is the well considered view of McKesson & Robbins that some rule of the road need to be established in retailing. A good start in that direction would be enactment of the quality stabilization bill.

I would add to this statement my personal view that orderly marketing and reasonable price stability are reliable curbs to inflationary cycles that plague our economy. The debasement of quality products through ruthless price-cutting, chaotic distribution patterns, marketing uncertainties and production cutbacks all weaken the healthy balance of supply and demand. When this happens, another inflationary cycle is set in motion.

This, I think, is another strong reason why prompt but careful study should be given to enforceable legislative measures to restore orderly marketing of brand-name products, and to encourage fair competitive practices throughout retailing.

I thank you for the privilege of presenting McKesson & Robbins' views on these important issues and respectfully urge you to give your support to the enactment of House Joint Resolution 636, the quality stabilization bill.

STATEMENT OF PHILIP CORTNEY, PRESIDENT OF COTY

I appreciate this opportunity to appear before you in support of the quality stabilization bill. My name is Philip Cortney. I am president of Coty and a student of economics. I am appearing here today on behalf of my corporation.

I studied engineering and economics at the University of Nancy, France, where I graduated in 1916. I also studied political sciences and international law for 2 years at Columbia University, preparing for a Ph. D. I have an honorary degree of doctor of laws from Hamilton University. I am a fellow of the Royal Economic Society of Great Britain; a member of the American Economic Association; and a fellow of the New York Academy of Sciences. I am vice chairman of the Monetary Committee of the International Chamber of Commerce.

I have written many articles which have appeared in newspapers and in the "Commercial and Financial Chronicle," all dealing with economic and monetary issues and international trade, and for about 8 years I wrote a weekly column on economic and monetary problems for the French newspaper "Le Figaro." I am the author of the book "The Economic Munich," and of an essay on "The Political and Economic Consequences of Lord Keynes' Theories."

My role as an economist and manufacturer has been a most unusual one. Looking back, I find that I have been on both sides of the subject matter of this legislation. In my earlier years, when my experience was limited to the university and all my learning was derived from other people's books, I was firmly opposed to price maintenance on purely theoretical grounds. I considered and evaluated all of the conventional arguments in favor of orderly marketing and dismissed them as so much special pleading.

However, it was my good fortune to subsequently obtain a large amount of firsthand experience in the marketplace where the goods manufactured by my industry are sold. My experience in the practical world of my business has served to convince me that some of my former economic notions and theories do not always square with reality. The most complete and dramatic about-face I have made during the course of my career has been on this very subject of resale price maintenance—call it fair trade or call it price-fixing, as you will—we are talking about the same economic phenomena.

As an economic theorist I have been opposed to resale price maintenance. Experience in my business taught me, however, that resale price maintenance is not only pragmatically justifiable, at least as far as my industry is concerned, but the very existence of quality goods which the consumer can trust depends on trademarked goods, price maintenance and orderly distribution.

It is very important to understand that without orderly marketing, including resale price maintenance, the existence of brands and trademarks themselves are jeopardized. The rapid growth of discounters in recent years presages a mass attack upon the value of brand names, for the discounter exists only by exploiting these priceless items of intangible property which he did not help create. The very existence of brand names is being threatened. Once brand names and trademarks disappear, we can build several new buildings for the Federal Trade Commission to engage in their necessary grade labeling in order to protect consumers.

I speak only of experience in my industry, with its peculiarities in submitting this written statement on the quality stabilization bill. It is the candid opinion of a man who is anxious to uphold his reputation of intellectual honesty as an economist. I would earnestly and strenuously urge this committee, the Congress of the United States, as well as my professional colleagues, to heed and mark well the real-life experience of businessmen who believe in competition but wish to foster the making of a great variety of quality goods which are the pride of a civilized society.

I shall endeavor to be brief, and in particular to avoid repeating what you have already heard from previous witnesses. In fact, the statements by Senators Capehart and Mundt in the hearings on this bill by the Senate Commerce Committee pinpoint the needs for this legislation so clearly and so forcefully that one wonders what one can add to their arguments. However, I shall point out some aspects of the question which are relevant and may be worthy of your consideration.

I wish to state emphatically that I would not be in favor of the proposed bill in cases where a manufacturer sells goods which are not in free and open competition with articles of the same general class produced by others.

There is no doubt that the consumer endeavors at all times to get the highest quality products at the lowest price. However, the very multiplicity of existing products of the same kind, while redounding to the benefit of the consumer, also creates the problem of selection of the best quality of the goods he wishes to buy. It is in this particular respect that trademark goods render an exceptional service to the consumer, for the simple reason that the manufacturer who produces and sells these goods has his reputation and his very existence at stake.

I have a good example at home of what happens to the consumer when he is not able to purchase goods which have the prestige and reputation of a known manufacturer behind them. My wife discovered that when she has to purchase meat or fish, the quality of the commodity she will get depends a great deal on the reliability of the retailer. When she has discovered a reliable retailer she maintains her patronage with him as long as she continues to be satisfied.

This is nothing else than the equivalent of a trademark, represented in this instance by the name of the retailer.

Trademarked goods have accustomed the consumer to quality goods. Even then, competition between manufacturers being keen as for example in my industry, the consumer is often hesitant about what he should buy. However, the mere existence of trademarked goods which the consumer has the occasion to try, permits him to obtain high quality goods at the lowest possible prices. A buyer may be fooled once by an unscrupulous manufacturer, but any businessman knows that in the long run he can survive only if he supplies the best kind of goods at reasonable prices, because of the competition from other similar goods.

Granted that the consumer has an advantage in the very existence of trademarked goods, one is entitled to ask whether the prices charged by the manufacturers of trademark goods are not higher than they would otherwise be. Logic and experience prove the contrary. Trademarked goods permit mass production and mass consumption, as well as the creation of a demand for these goods by means of advertising. These factors, together with competition between manufacturers, make it imperative for the manufacturer at all times to produce goods at the lowest price.

The prices of trademarked goods are usually maintained either with the help of fair trade laws, where they are in existence, or by means of what is known as a policy of suggested prices.

One is entitled to ask whether a policy of prices, maintained or suggested, does not result in higher prices than would otherwise be. I am always startled by this question. Indeed, if a manufacturer does not maintain or suggest the prices for his trademarked goods, who decides the price at the retail counter? It is obviously the retailer. Has anyone of us had the experience of going into a retail shop and bargaining with the retailer? Is it not more reasonable to expect that the retailer will try to obtain the highest possible price if the consumer has no way of checking on him? Anyone who has been in the Orient, where the practice of bargaining continues to exist in line with classic theory, knows that the seller begins by asking a very high price, expecting the consumer to offer a much lower one.

Gentlemen, I submit that the confidence given to the consumer in the quality and price by manufacturer of branded name goods is a priceless advantage to the consumer. Everything should be done to protect the consumer in this matter.

The theoretical prepossessions or prejudices of the Department of Justice and of the Federal Trade Commission against the maintenance of prices of trademark goods is indefensible for anyone who has a clear and realistic view of what is going on in the marketplace.

Experience has taught me that the prices of trademark goods are the lowest possible prices which a consumer may expect for that particular quality of goods, provided that these goods sell in free and open competition with articles of the same general class produced by others.

This is true for the following reasons: Any manufacturer of trademarked goods, fighting for the good will of the consumer, knows that he can very easily price himself out of the market if he is not careful. As long as he can afford it he will endeavor not to increase his prices, for two reasons: one, that he doesn't know what his competitors are going to do; and second, once he is committed to a price, it is very difficult for him to change it.

The retailers who cut prices suggested for trademarked goods, or who adopt predatory pricing policies, are doing it precisely because they know that the consumer has confidence in the quality and in the pricing of the manufacturer of trademarked goods. When a merchant advertises cutrate prices on nationally advertised trademark goods, he is doing it most of the time to bring customers into his store, a practice known as loss-leader selling, thus debasing the national brand. He tricks the consumer into falsely believing that all the goods he sells are low priced, whereas actually he makes his profit on other goods which carry a normal or an abnormal markup. If other merchants in the same community try to meet the cut prices of the trademark goods in order not to get the reputation of overcharging their customers, the final result is that the particular brand loses its customer-pulling power. The unscrupulous retailer has the ability to recoup his losses on nationally advertised merchandise by selling to his customers, attracted to the store by the promise of bargains, unfamiliar merchandise on which there is a substantial margin of profit. In fact, it is not the manufacturer of trademark goods who benefits in any way

from the policy of maintained suggested prices. As I said before, competition keeps him on his toes at all times, and forces him to produce, advertise, and sell his goods at the lowest possible price to the retailer. Hence, the maintained or suggested price has mainly the virtue of protecting the retailer, and particularly the small retailer. Discounts for our kind of goods to the retailer vary from 30 to 40 percent. Does anyone contend that the small retailer makes too much money?

On the other hand, if the small businessman is not afforded the opportunity to make a profit by enabling him to compete pricewise on nationally advertised branded merchandise, we shall find ourselves faced in a few years with the biggest concentration of retailing, in the hands of a few giant corporations, that this country has ever seen. This trend is obvious right now. Neither the manufacturer nor the consumer has any interest in destroying the small retailer, who, besides, is an important factor in maintaining a democratic society. Mainly because of the high cost of advertising, manufacturers of nationally advertised branded goods, need the small retail outlets as well as the large ones, in order to provide a broad base for the distribution of their products, and thus obtain the volume they need to manufacture and market their merchandise at as low a price as possible.

The so-called discount houses are the worst enemies of trademark goods. The material recently filed with the Securities and Exchange Commission by a Kansas City drug chain which operates under leases drug departments in so-called discount houses shows that the original concept of "true discounting"—selling everything at a lower price or markup—is being slowly laid away in favor of the old-fashioned system of loss-leader price cutting. If the policies of the so-called discount houses were to become generally prevalent, the result would be that the manufacturer would have to try to reduce his costs by reducing the quality of his goods. Mass production, mass consumption, and employment would suffer, because it is most probable that under such circumstances the manufacturer of trademark goods would dispose of less money to spend on advertising, thus reducing the demand for his goods. The short-term results of the price policies of the discount houses may have a deceptive attractiveness. However, there is no doubt that the long-term result would be to harm competition, to the detriment of the consumer and of our economy.

The proposed bill recognizes the property interest of the manufacturer in the brand name or trademark, as well as his interest in the orderly distribution of his products after the retailer has bought them. This property right for trademark goods seems to me obvious. A manufacturer of nationally advertised branded goods may have invested millions of dollars in promoting his identified products. His reputation and good will are established by these products, and therefore he is entitled to be protected. Price cutters who take advantage of the wide public acceptance of such merchandise, and upset and manipulate the market for these products for their personal advantage, are injuring the manufacturers. Moreover, and most important for our argument, the demand for the trademarked goods is created by the advertising paid for by the manufacturer. How then can anyone take the unreasonable position that the manufacturer has no further interest in his goods once they have been sold to the retailer?

I fully concur with the following statement made by Senator Capehart:

" 'Quality stabilization' is not a slogan. It is a prescription. It is meticulously prepared as a complete remedy for a known malady. The American economy is not only suffering from a circulatory blood clot; its very survival is being threatened if quality stabilization is delayed."

I strongly urge that the committee recommend the adoption of the bill. It fosters competition, with considerable product differentiation. It encourages mass production and mass distribution. It provides the consumer with high quality goods at the lowest possible prices. It gives him the possibility of shopping with confidence in big and small stores, in villages and in large cities, and it protects the proprietory interests of the manufacturer in his trademark or trade name after he has sold his identified merchandise to distributors.

I thank you.

STATEMENT OF FRITZ G. LANHAM

Mr. Chairman and members of the subcommittee, my name is Fritz G. Lanham and my home city is Fort Worth, Tex.

I have keen appreciation of your efforts in these hearings as it was my privilege to serve for 28 years in this distinguished body of Congress.

You are now engaged in considering one of the most worthy and important legislative proposals pending in the Congress and it is my hope that the testimony I shall offer may prove helpful toward its speedy enactment.

I refer to the many bills and joint resolutions, identical in text, which have been introduced in both the Senate and the House of Representatives properly designated for shorthand purposes as "quality stabilization" bills.

In confirmation of the wisdom of the judgment of the many sponsors of the quality stabilization measure, which include—

Representative Ray J. Madden, Democrat, of Indiana.
Representative Oren Harris, Democrat, of Arkansas.
Representative Peter Mack, Democrat, of Illinois.
Representative Chet Holifield, Democrat, of California.
Representative Thor Tollefson, Republican, Washington.
Representative John McMillan, Democrat, of South Carolina.
Representative Milton Glenn, Republican, of New Jersey.
Representative John H. Dent, Democrat, of Pennsylvania.
Representative Ralph Harvey, Republican, of Indiana.
Representative Catherine May, Republican, of Washington.
Senator Hubert Humphrey, Democrat, of Minnesota.
Senator Homer Capehart, Republican, of Indiana.
Senator William Proxmire, Democrat, of Wisconsin.
Senator Olin D. Johnston, Democrat, of South Carolina.
Senator John McClellan, Democrat, of Arkansas.
Senator Hugh Scott, Republican, of Pennsylvania.
Senator Jennings Randolph, Democrat, of West Virginia.
Senator Eugene McCarthy, Democrat, of Minnesota.
Senator Karl Mundt, Republican, of South Dakota.
Senator Francis Case, Republican, of South Dakota.

a very great array of our citizens engaged in the various avenues of commerce are supporting vigorously this proposal as a necessary and vital requirement for the successful operation of their respective trade relationships.

And we must bear in mind that those in small business are insisting that it is absolutely essential for them to have the merited enactment of this quality stabilization principle to continue to carry on the needed service they render.

The menace today to small business in particular arises from subversion in practice by those who seek to prey for selfish advantages on the property rights of the producers of the "stars" of the merchandising world—the honored trademarked products that are regarded as welcome and necessary household companions because of proven values at reasonable prices.

By unanimous U.S. Supreme Court decision, property rights in trademarks and brand names have been clearly established.

In the *Old Dearborn* case (299 U.S. 183, 1936) the court said:

"We are dealing not with the commodity alone, but with a commodity plus the brand or trademark which it bears as evidence of its origin and of the quality of the commodity for which the brand or trademark stands. Appellants (resellers) own the commodity; they do not own the mark or good will that the mark symbolizes. And good will is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation * * *. The ownership of the good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with * * *."

The quality stabilization bill merely confirms and implements those property rights so emphatically stressed in the *Old Dearborn* case. Subsection 7, the first substantive provision of the bill, recites in statutory language the Supreme Court's ruling. This subsection provides also that a reseller may employ the owner's brand, name, or trademark but only in effecting the resale of goods bearing such identification.

Those who would disregard those property rights are seeking to deprive small business of any opportunity to serve those who naturally prefer such products. And, in this connection, let us remember that "favorite" products and "trademarked" products are, for all practical purposes, synonymous.

My purpose in testifying for the approval of the quality stabilization proposal so necessary for orderly marketing is based on the fact that I am an original sponsor of our present Trademark Act, which in references to it, usually bears my name.

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Grim realities have forced upon us the conclusion that property rights in a worthy trademarked product, betokening the toil and research and expense on the part of the owner of the trademark in contributing to the progress of our country, is of little practical value to such owner in commerce if he is afforded no adequate protection in the marketplace of those rights in dealings with the product the trademark identifies.

By way of background in your consideration of the quality stabilization bill, for 25 years I served as a member of the standing Committee on Patents, Trademarks and Copyrights of the House of Representatives. During that service it was brought forcefully to the attention of the committee that the trademark laws of 1905 and 1920 in their application to modern business conditions and practices were archaic and practically obsolete by reason of the development of the American brand name system of distribution.

Through my study for several years, I realized that this serious problem needed to be solved. Accordingly, for 8 years, through four Congresses, I labored diligently as chairman of an appropriate subcommittee in conducting extensive hearings that led fortunately, to the enactment of our present Trademark Act, which was then and is now regarded as a great step forward in the proper administration of matters to which that law pertains. In practice, that enactment has met with general and complimentary approval, especially of its substantive provisions. Suggested amendments have related merely to some simplification and clarification in the matter of facilitating administration.

Perhaps I, more than anyone else, realize—and have realized for many, many years—that the legislative job of protecting and preserving the worthy principles and purposes which should characterize our country's trade relationships affecting trademarks is, and was, only half completed by the trademark legislation that bears my name.

Because of certain selfish and unjustified merchandising practices which have arisen on the part of some engaged in various avenues of trade and which jeopardize the integrity of dealing with popular and respected trademarked products of approved quality standards, we are now confronted legislatively with the absolute necessity of preventing such disastrous predatory abuses in trade by those who would trespass upon the recognized property of others and use it for their own selfish ends. It is this deplorable situation which makes it imperative that we amend appropriately as proposed the Federal Trade Commission Act by adoption of the quality stabilization measure.

A vital issue is presented in the quality stabilization bill that must be met by this Congress. That issue is whether a fundamental principle—namely, the protection of property as enunciated in the Constitution—shall be given congressional reaffirmation. If the answer is "No," then you have destroyed the incentive to create and you are destroying the free enterprise system because the protection of property rights is essential to that system.

Many witnesses, I feel sure, will bring to your attention the dangers in their respective lines of business which threaten the deserved and continued successful operation of worthy manufacturers, wholesalers, and retailers and which now deny to consumers the assured continuing stabilization of the high quality of their favorite products.

In conclusion, may I add briefly one pertinent consideration which doubtless will be stressed and emphasized by witnesses who will testify in more detail with reference to the merits of the provisions of the quality stabilization proposal.

We all wish to protect small and independent businessmen and enable them to stay in business. The enactment of the proposal now before you will prove most effective in fulfilling that wish. Lenin, the accredited writer of the Communists, has declared that the prevalence of small and independent business in America is the only thing that will keep us from succumbing to communism from within.

The annual report of the Senate Small Business Committee for 1959 showed an alarming increase in the number of failures of small businesses. Its annual report for 1960 showed the percentage of such failures much higher, and in the annual report for 1961 the percentage of such failures was given as higher still.

We certainly have no disposition to confirm Lenin's prediction, but we must take, and take promptly, the necessary legislative action to make our trademark law adequately effective as the Congress intended. We must not permit commercial pirates to capture our ship of state to the advantage of any totalitarian regime.

Many thanks for the kindness of your patient hearing.

STATEMENT BY JOHN W. HUBBELL, VICE PRESIDENT, SIMMONS CO.

My name is John W. Hubbell. I am vice president of Simmons Co., a national concern with regional manufacturing plants in the States of Georgia, New Jersey, Massachusetts, California, Indiana, Florida, Ohio, Texas, Kansas, and Wisconsin.

It's appropriate to emphasize my enthusiastic interest in marketing by saying that I am a former chairman of the board of the Brand Names Foundation, I am a past president of the Sales Executive Club of New York, and I have served as a vice president of the International Sales Executives.

Both in my daily tasks and in extracurricular activities I associate with other marketing men who are very concerned about the best interests of the consumer, the retailer, the wholesaler, and the manufacturer as we face the tremendous expansion of our distribution system. I share this deep concern. I'm concerned with the problems that face us in the marketing of all of Simmons' products. And I'm particularly concerned with the future marketing of our well known, trademarked Beautyrest mattresses.

I mention Beautyrest at the risk of appearing commercial, because it is this trademark which involving our greatest research efforts, our most extensive advertising campaigns, our most consistent sales promotion program, our most thorough sales training, our most enthusiastic sales effort, that is by far the greatest target of those who wish to prey on our good name. Some merchants who have contributed nothing to the development and the establishment of Beautyrest go all out in their attempt to use dishonest practices that tear down this honored trademark.

The quality stabilization bill, when enacted, will:

(1) Protect the consumer from deceptive retail selling practices.

(2) Protect the ethical retailer from sharp pricing practices, practices not in the public interest.

(3) Protect the manufacturer from individual retailers who do not hesitate to destroy the manufacturer's reputation to further the reputation of the retailer.

The only losers under quality stabilization will be the predatory price cutters and dishonest merchants who will be deprived of the opportunity of abusing and tearing down famous names.

No retailer cuts a price as an act of kindness or as a matter of generosity. Retailers cut prices to attract trade. The store offers to sell an article below the going price to create in the consumer's mind that this is a bargain price. And beyond that there is the hope that the consumer will believe that all of their prices are lower. The initial price cutter of an item enjoys a temporary advantage by leading the public to believe that he has lower prices generally—with the special price-cut item as an example.

Other stores are put in an unfavorable position unless they meet the price, which they are obliged to do to avoid the embarrassment of seeming to be overpriced on the famous article, and presumably on all other articles. Meeting the price establishes a new going price which will subsequently be cut for the same reason that the original price was cut. This process will continue to a point where the merchandise is so unprofitable that the advantages in extra traffic do not offset the losses incurred.

The retail price is now lowered to a point where many reputable dealers will be unwilling to sell the merchandise. This in itself can be undesirable for those consumers who have used the product, are satisfied with it, and would like to be able to buy it again.

This chain reaction is particularly important with retail stores that sell items regarded as major purchases. These are items infrequently bought that represent an investment, such as furniture, appliances, and other "big ticket" merchandise.

In these cases, the salesperson in the store is an important factor, because the consumer looks to salespeople for honest and objective information about the merchandise that they are buying, particularly in reputable retail stores. This salesperson will dissuade the customer from buying the cut-price item because the store cannot afford to sell it at a loss. In discouraging the purchase, the salesperson will make unfavorable and derogatory remarks directly, or indirectly, about the cut-price item. Simultaneously, the salesperson will make extravagant statements about a substitute product although the substitute was not considered as good before the competitive loss-leader item became unprofitable. This sales misrepresentation is a distinct disservice to the consuming public who

expect and are entitled to fairplay and honest representation of the true values of the merchandise. In the long run, and short run, the consuming public cannot benefit from any system which breeds sales misrepresentation. Even an honorable store would be compelled to do everything possible to discourage the sale of a famous product which they are forced to sell at a loss.

This chain of events is not theoretical.

A case in point is a large discount house in New York which advertised the fact that it had Simmons Beautyrest mattresses at cut prices, despite the fact that it was not an authorized sales outlet for the Simmons Co. Many consumers told us that our merchandise was maligned in this discount house. This was no surprise, because the store found it necessary to degrade our merchandise to avoid selling it. (It was difficult for the store to get a supply on one hand, and they had to sell it at a loss on the other hand.)

One of our employees and his wife went to this discount house as shoppers and were exposed to a tirade of untruths about the Beautyrest mattress. This discount house advertised the Beautyrest because it wanted to attract trade. It felt that it would be able to cope with the situation by sales manipulation (polite word for misrepresentation). The store switched customers to an inferior product which it could buy at a cheaper wholesale price. A fictitious price label on the cheaper mattress led the public to think that the mattress was worth $20 more than its real value. This inflated price label was a device to aid the discounter.

Price cutting usually winds up with a cheapening of merchandise. In the first stage, there is a drive by retailers for a lower wholesale price to offset the reduced gross margin of profit. The lower wholesale price leads to a general cheapening by the manufacturer in the quality to meet the lower wholesale price.

Many manufacturers have substantial appropriations for research and development of new products. These manufacturers are disinclined to invest money in research if the products which are developed are going to be torpedoed by price cutters at the very outset. Our national economy is strengthened by the injection of new products, and it is weakened when predatory price cutting obstructs the natural development of markets for these new products.

Honorable retailers are entitled to protection from merchants who desire to exploit the maker's brand and reputation for the purpose of leading their customers into thinking that they sell all merchandise at lower prices. If a manufacturer establishes a quality-stabilized price, and this is too high, he will be at a competitive disadvantage with other manufacturers who established a lower price for their goods. In the final analysis, there is no reward for overpricing merchandise.

This statement, up to this point, has been focused on the consuming public and retailers and the desirability of protecting these two groups from predatory price cutters and their unfair tactics of "bait and switching" and of misrepresentation.

The manufacturer is also entitled to protection. He owns the trademark and the goodwill that he has built into it down through the years. His ability to employ labor and to make capital investments is challenged when irresponsible forces in the marketplace tear down his good name and endanger the sale of the end products. His property rights in his brand name must be protected so that his long-range contribution in the fields of research, quality control, supervision, and market development can continue.

A system which weakens the markets for the manufacturer is going to have unfavorable effects on the national economy.

When a manufacturer builds a good product, advertises it, distributes it, establishes a reputation for it, services it, if necessary, his position should not be jeopardized by some opportunistic retailers who have no interest in the manufacturer's goodwill and are perfectly willing to abuse it for the purposes of their own gain.

A manufacturer has property rights based on his product research, quality control, and distribution efforts. Morally and legally, he should be protected from the wiles of predatory price cutters whose sole interest is the development of their own business.

The widely read columnist, Ray Reed of Home Furnishings Daily, a Fairchild publication, summed it up so well in his column of February 14, 1962. Ray Reed said:

"The quality stabilization bill aims to protect the manufacturer from those cutthroats who would despoil his name and brand acceptance; to protect the

independent, service-minded retailer from unethical competition which 'cons' instead of considers the consumer and his best, personal interests.

"The quality stabilization bill enables the manufacturer to keep his hard-won product birthright, not give it away on every resale order he ships. The bill provides that a manufacturer who has built a brand name retains a property right in that brand name, can specify the conditions under which the brand name may be used, can take legal action and revoke the right to use the brand name if those conditions are violated.

"Let's quit shadowboxing on the discount facts of life. Which brand-name lines are the discounters most hellbent to get, to despoil, to hang on their barn door of cut price? Isn't it those lines whose birthright and market right have been most scrupulously protected through clean, strictly administered distribution, by sales executives who have had the guts, fight, and foresight to protect their highly desirable franchises which took them years to build?

"We don't have to name names. If you've been around, in the home goods business for a few year, you should know by now, should be able to separate the determined men, who have made their franchise mean something, from the weak-willed boys who swap it for a mess of pottage.

"The quality stabilization bill it not slanted to put the discounter out of business, but is honestly aimed to keep the independent, service-retailer in business, keep our national distributive economy in healthy, balanced condition. It encourages rather than discourages free enterprise. But it does penalize the ruthless wrecking of established brand names, established brand qualities, and consumer confidence in those two buying standards.

"It will affect discounters or other retailers only to the extent that they engage in deceptive and unfair practices involving those products which manufacturers elect to place under quality stabilization. It provides the manufacturer with the legal and equitable right to protect his product, trademark, birthright and market acceptance which have taken him years of integrity, determination, retailer/consumer loyalty to establish."

Enactment of the quality stabilization bill and its broadened protection against deceptive pricing practices, against "baiting and switching," and against misrepresentation will have a pronounced positive effect upon our economy.

STATEMENT BY FREDERICK MOORE, EXECUTIVE SECRETARY, RETAIL GASOLINE DEALERS ASSOCIATION OF MASSACHUSETTS

This quality stabilization bill, H.R. 10335, is the most important piece of legislation that has been considered by the Congress in recent years in the eyes of the retail gasoline dealer in the New England States of Massachusetts, Rhode Island, Connecticut, New Hampshire, Maine and Vermont.

We have been faced with more destructive price wars in the past 5 years than in the entire history of the retail petroleum industry.

The discount houses throughout the State of Massachusetts last year practically ruined every small independent gasoline dealer in the tires, battery, accessory and antifreeze market by selling as loss leaders many of their products. Prestone antifreeze, for example, was sold as much as 67 cents per gallon lower than the wholesale price that our gasoline members had to pay for this product.

Surveys that we have taken of the Massachusetts gasoline market as late as April 5, 1962, show conclusively that the practices used by destructive gasoline dealers throughout the State are causing price wars that are forcing small independent gasoline dealers into bankruptcy.

Those that survive in the New England States are sustaining financial losses running into the millions of dollars because of this type of destructive competition.

The normal margin of gross profit per gallon for the retail gasoline dealers in Massachusetts, based on a wholesale price of 15.4 cents per gallon for regular gasoline, is 5.9 cents per gallon.

This margin is necessary to enable the dealers to give the consuming public essential service affecting the motorists' safety.

The chaotic market situation is now forcing the small independent retail gasoline dealers to reduce their margin from 5.9 cents per gallon as low as 3.5 cents per gallon.

Since the average cost for rent in the State, whether the dealer is an independent dealer or a lease dealer, averages 1.5 cents per gallon, this means that the Massachusetts retail gasoline dealer now has only 2 cents per gallon left to cover all other overhead, including labor.

A net profit has become almost nonexistent in this industry.

This explains why there was approximately a 37-percent turnover of gasoline dealers in the years 1960, 1961, and 1962, caused by destructive competition.

In summary, I think it fair to say:

I. *The dealer is hurt.*—Gasoline distribution is an economically sick industry in New England today. Dealers are being hurt by margin reductions and chaotic conditions to the point where 37 percent are going out of business annually in the Massachusetts area.

II. *Labor is hurt.*—The 8,935 motor fuel licensees in Massachusetts have 16,000 full-time employees and 8,000 part-time employees. These jobs are imperiled by margins which are inadequate to pay fair wages.

III. *The public is hurt.*—Inability to hire competent help on present margins and the 37-percent turnover rate for dealers mean that the public safety is threatened by inexperienced dealers and lack of competent help in service stations.

As executive secretary of the Retail Gasoline Dealers Association of Massachusetts, I am instructed to urge that your committee quickly give this quality stabilization bill, H.R. 10335, a favorable report so that it may be passed in the Senate and in the House in 1962.

STATEMENT IN BEHALF OF DALTON OF AMERICA, INC.

Dalton of America, Inc., one of the major manufacturers of women's sweaters and coordinates in the United States, has spent considerable moneys in gaining recognition by the public that the "Dalton" trademark represents the finest of quality and the ultimate in style and make. Because we believe every manufacturer similarly situate who has spent time, money, and effort in establishing the importance of a brand name of trademark is entitled to protection against unfair or deception acts or practices which may destroy the good will inhering in such marks or brands, we strongly and respectfully urge your committee to approve the quality stabilization bill or Madden bill (H.R. 10335 or H.J. Res. 636 both 87th Cong., 2d sess.) deleting therefrom, however, the provisions of paragraph (8)(b) (lines 7 through 11 on page 4) which would, by indirection, establish price fixing on a national basis.

The bills in question would grant the manufacturer the right to prevent his brand or trade name from being destroyed by unfair or deceptive acts or practices. Under the present state of the law, as set out in the *Colgate* case by a unanimous Supreme Court (250 U.S. 300) (1923) while a manufacturer may lawfully decide to whom he would sell his products, and to whom he would not sell, when branded goods fall into the hands of an unwanted customer, a retailer whose practices are highly undesirable, the owner of the brand is powerless to act. Under present law the owner of the brand must sit helplessly by while the trespasser, an uninvited and unwanted retailer, wrecks havoc with the brand and destroys its market. The Madden bill will permit such brand name owner to vindicate his rightful interests, promptly and effectively. To accomplish this purpose the bill would amend section 5(a) of the Federal Trade Commission Act by adding at the end thereof new paragraphs (7) to (14), inclusive. In substance, the bill provides that the owner of a brand name or trademark retains his property rights therein after the sale or transfer of goods identified by such brand name or trademark (sec. 7); that he may revoke the right of persons to utilize such brand name or trademark in reselling identified merchandise where the reseller engages in "bait merchandising," sells at unauthorized resale prices, or publishes misrepresentations concerning the identified goods (sec. 8); and that the owner may sue in any U.S. district court for damages and injunctive relief where his brand name or trademark is utilized after the right to use it has been revoked (sec. 10).

The proposed bill is completely fair and equitable to all resellers of merchandise. Section 9 protects resellers against any unfair or confiscatory consequences of revocation of their right to use a brand name or trademark. Section 11 provides that lack of due diligence by trademark owner in revoking the rights of

offending competing resellers to make use of the trademark will constitute a defense. Section 12 preserves the owner's right to bring actions otherwise provided by law for wrongful use of a brand name or trademark.

The central concept of the bill is that the brand name or trademark used to identify goods constitutes a separate property interest severable from the goods themselves, and, like other property interests, entitled to be protected by law.

It has long been recognized that while a retailer may own a commodity which bears a trademark, his ownership pertains to the commodity alone, and not to the mark or the goodwill that the mark symbolizes. The Supreme Court in *Old Dearborn Distributing Co.* v. *Seagram-Distiller's Corp.*, 299 U.S. 183, 194 (1936), explicitly recognized this concept, and further stated:

"* * * And goodwill is property in a very real sense, injury to which, like injury to any other species of property, is a proper subject for legislation."

It is this goodwill which this bill proposes to protect and which we respectfully urge be protected.

Dalton of America, Inc., does not believe price fixing or fair trading is in the public interest. While we suggest retail prices of our products we believe our customers should have the right to control then our margin of profit. It is our belief that the provisions of 8(b) of the proposed bills, lines 7 through 11 on page 4 of said bills, should be eliminated. We believe the passage of the price fixing or fair trading provisions of the proposed acts would be against the interest of the American consumer. We do, however, heartily endorse the other provisions of the proposed bills.

When a retailer engages in "bait merchandising," publishes misrepresentations concerning a branded or tradmarked product, or sells it at unauthorized prices, the manufacturer, under the proposed bills, may notify the retailer that his right to use the trademark in the resale of trademarked or branded product has been revoked. Should the reseller, after receiving notice of the revocation, continue to employ the mark in selling trademarked or branded product to the public, the manufacturer, under the proposed bills can bring suit for damages and/or injunctive relief in the U.S. district court for the district in which the defendant resides or is found. Where defendant has used the mark in interstate commerce, the court obviously has jurisdiction to entertain the action. Moreover, since section 13 of the bill invokes the full sweep of Congress' power, there is no jurisdictional bar to a suit against persons selling wholly within a State, where such intrastate sales affect interstate commerce. This is a right which a manufacturer should have if he is to prevent "bait advertising" and "misrepresentation" from destroying his brand or trademark. It should be noted that the manufacturer is not obligated to take such action. Furthermore, nothing in the bill can prevent the reseller from continuing to sell the product so long as he does not use the brand name or trademark in so doing. Dalton's position in this market is built on a hard-earned reputation for quality. We have preserved our standards while selling in volume in this highly competitive marketplace. Maintaining the quality reputation of a fine trade name such as Dalton's in today's marketplace is not easy. The problem extends far beyond the question of price cutting. We have become increasingly aware of practices on the part of some merchants which are even more damaging to a fine reputation than price cutting. The fair-trade laws do not help in these areas. Resellers have entered the soft goods field. We have on several occasions been informed by our own customers that merchandise bearing our trade name had been advertised, fictitiously priced, or misrepresented, or sold as new styles whereas in fact the styles were up to four seasons old. Complaints to the Federal Trade Commission are so long in being processed, if they are processed at all, the major damage is done without our being able to help ourselves, without our being able to protect our good name and the goodwill we have built up surrounding our trade name. This bill would put in our hands an effective means of protecting our trade name, and prevent its use by unscrupulous resellers of merchandise bearing our brand or trade name. It seems somewhat appropriate and discreet to authorize a Federal court to help a private party restrain the unauthorized use of his property—his brand—via the Madden bill, than to have that same party apply to the Federal Trade Commissioner or a local prosecutor on the State or lower level to invesitgate and ultimately halt bait advertising and misrepresentation.

We have spent years building up and making known one of America's finest trade names for women's sweaters and coordinates. It competes today in a market in which some retailers will not hesitate to degrade that name, to

cheapen it, to misrepresent it, or to use it to defraud the public if that serves their purpose. We need a means to stop such activity from destroying our reputation. We think the Madden bill, H.R. 10335 or House Joint Resolution 636 is the most practical answer, and we hope it will soon become law, subject, however, to the elimination of proposed section 8(b) which would permit price fixing.

STATEMENT BY MICHAEL DAROFF, PRESIDENT OF BOTANY INDUSTRIES, INC.

Honorable chairman and members of the committee, I appreciate this opportunity to appear before you in support of the quality stabilization bill, Senate Joint Resolution 121. I will make my remarks as brief as possible in view of the time available and the facts I desire to present to you.

My name is Michael Daroff and I am president of Botany Industries. I also am president of H. Daroff & Sons, makers of Botany 500 clothing for men, and the House of Worsted-tex, makers of Worsted-tex clothing for men. These two firms comprise the largest division of Botany Industries.

I was head of the two clothing manufacturing firms before becoming president of Botany Industries and have spent nearly 40 years in the men's clothing industry. So I am essentially a manufacturer of brand name clothing.

The Botany 500 and Worsted-tex firms together are the largest men's brand clothing manufacturers in the country, making over a million units a year. This clothing is distributed in all States of the Union through 2,700 independent franchised retailers and by more than 50 of our own retail stores. A majority of our 2,700 independent dealers represent small- and medium-size businesses.

Our two brands are nationally advertised. We began the production of our first branded clothing 21 years ago. Since that time we have spent $40 million and over to make the names, "Botany 500" and "Worsted-tex," accepted names in the men's clothing field.

The quality tailoring and the materials used in our nationally branded clothing is the rock on which our volume, the reputation of our brands, and, therefore, our business has been built. Year after year our clothing has been given top ratings by a widely known consumers research organization.

To achieve and maintain this quality, and therefore the reputation of our two brands, we also have invested millions of dollars in special manufacturing equipment, much of which we have designed and created.

The brand labels in our quality clothing not only serve to identify the clothing but, more importantly, are proof to our retailers and to the consumer of our willingness to be identified with our product. A brand name is a maker's reputation—for good or bad.

In using our brand names, we suggest to the retailer that he put a price on our suit of clothing that we know represents a fair profit to him in covering the many costs and risks he incurs in serving his customers. Our brands are thereby offered to the public in the medium $69.50 to $79.50 price category, the most popular price bracket in today's clothing market.

But let me emphasize that our main concern lies with the consumer, because his continued and increasing acceptance of our Botany 500 and Worsted-tex clothing has made and keeps us successful.

The consumer today is confused and is at the mercy of many sharp operators. The revolution in retailing that is occurring today tends to destroy recognized standards of value by which the consumer may judge his purchase.

There's no doubt in my mind that the best way to get the consumer out of this quandary in which he finds himself is by enactment of the quality stabilization bill. This law would give the trademark owner the right to deny the use of his trademark to those retailers using deceptive and dishonest practices upon unwary consumers.

In addition, if our two clothing firms cannot control the manner in which their brand names are used, then the price of our clothing at retail will rise—not drop. I say this because I can prove that a great deal of the unbranded, unidentified clothing on today's retail market is priced higher than branded goods of better quality.

American men today often are asked to pay prices that are too high for the quality of the unbranded, unidentified clothing they are getting.

We know this because we "shop" the retail market. We purchase unbranded clothing at higher prices than ours sells for. We send this clothing to an independent laboratory for testing. Time and time again we have been able to

prove that it is overpriced to the consumer when compared to the quality of our garments and the price for which they are sold to the public.

We are old-fashioned enough to believe that we can never go broke by giving the consumer as much as he pays for and a little bit more. We are not trying to be noble or generous. We simply know this is good business.

And it is hard to convince us that we are wrong when our volume, from the time we first started to make nationally branded clothing in 1941, increased from 200,000 units a year to our present 1 million units and more annually.

But we can only continue to give the consumer the dollar-for-dollar value he is getting in our clothing if we can control the use made of our brand names. That is why enactment of the quality stabilization bill is necessary if we are to maintain our quality standards.

I spoke of the revolution going on in retailing today and I claim, gentlemen, that much of what is happening is to the detriment of the public and the small, conventional retailer.

I come now to the serious problem of "baiting," misrepresentation, and price cutting as conducted by some discounters through the misuse of national brand names. Permit me to cite just one case of many to you as an illustration of what I mean.

Not too long ago a discounter in the Philadelphia area ran a big ad in the daily press announcing he was selling Botany 500 clothing at an extremely cutrate price.

Where this discounter got this clothing we don't know. Possibly from some conventional retailer who was going out of business and who failed to follow our demand that the brand labels be removed from any clothing so disposed of.

We sent a shopper from our firm—a man who knows clothing—out to this discount store. He found about 150 Botany 500 suits on sale at a price that was only a dollar or more over our wholesale price.

But here's what this shopper also found. He found about 700 other suits on the racks bearing a different, and to us in the clothing business, a completely unknown label.

Inspection by our man showed him they were quite obviously of a very cheap make and of greatly inferior quality compared to our clothing. When he asked about these suits, he was told and I quote:

"Oh, these were made by the Botany 500 firm. They just put a different label in them."

That's the answer he got. And let me point out that it was the Botany 500 name that was advertised, not the name in those 700 cheap suits. That's what I mean by using respectable, accepted brand names as "bait" for a gullible public.

Fortunately, in this case, we were able to obtain an injunction against this particular discounter and stop him from misusing our brand name. In this case we were able to protect the public as well as ourselves and our independent dealers.

But it is not always possible for us to do that. We need this quality stabilization bill on which you are now conducting these hearings if we are to halt all bait advertising, deceptive pricing, and published misrepresentations of our product.

As a manufacturer of quality merchandise, I have the responsibility of protecting our 2,700 independent retailers and the vast public that have come to accept our brand names as representing quality. I cannot do it, gentlemen, unless this quality stabilization bill becomes law.

The majority of our 2,700 independent dealers are small businessmen. They have built their businesses and their store images on brand names. They have gained their reputation for quality merchandise through the brand merchandise they have carried year after year. They depend on our national advertising and our instock service.

If we cannot prevent—and are not given the means to prevent—the misuse of our brand names, then these small businessmen in every State of the Union are at the mercy of such unprincipled operators as the one I just told you about. We manufacturers might weather the storm, but believe me, gentlemen, many of these small businessmen will go under.

As a manufacturer of two national brands of quality clothing, nationally advertised, I do not want hose brands exploited—and the public exploited—by interests with a selfish, short-term viewpoint.

I want to be able to continue to provide brand clothing of good quality at a middle-of-the-road price that men can afford to pay. Doing just that has made my business a success.

And I want to be able to protect my independent dealers—the small businessmen of this country—from larger and more powerful and unprincipled retail interests willing to misuse and abuse brand names for their own selfish purpose without thought of giving the consumer the proper value for his dollar.

It is for those reasons that I urge your favorable consideration of the quality stabilization bill now before you. It is legislation very much in the interest of the small businessman and in the interest of the consumer.

I thank you for your courtesy and the privilege of appearing here. And I will be pleased to answer fully any questions you may have.

CHAFFEE & CO., INC.,
Detroit, Mich., June 7, 1962.

Hon. PETER F. MACK,
Chairman.

DEAR CONGRESSMAN MACK: Attached statements are facts, not theories. Small businesses of all types are crumbling because of the unfair practices. As a wholesaler, I have firsthand information. Two more of our customers filed bankruptcies. Morning mail brings N.S.F. checks from customers who never missed discounts in the past. I predict many more of our customers will be out of business before the year is over unless quality stabilization is enacted into law this year.

Sincerely yours,

V. H. NALBANDIAN,
President-Treasurer.

STATEMENT OF V. H. NALBANDIAN, PRESIDENT, CHAFFEE & CO., INC., DETROIT, MICH.

Mr. Chairman, I am a wholesaler who has been servicing small businessmen for 43 years and who has been fortunate enough to survive the disasters of depressions, recessions, bank holidays, and wars.

I had occasion recently to look for a new warehouse facility for our business and I was sick at heart to see what is happening to our wonderful State of Michigan and especially to dynamic Detroit. On avenue after avenue, buildings, showrooms, and stores stand empty like ghosts. Buildings are being torn down in order to pay taxes on the land only. Millions of dollars in taxes are being lost to the city, the county, the State, and the Federal Government.

Once prosperous merchants, who made jobs for others, are now themselves seeking employment. Dun & Bradstreet reports monthly the alarming and progressively increasing rate of small business bankruptcies. This problem then is nationwide, not just peculiar to Detroit and to Michigan.

The reason for this havoc afflicting small business, the cause of this burgeoning economic disorder, is the breakdown of laws that protect the manufacturers, the wholesalers, and the retailers from ruthless, vicious, cutthroat, dog-eat-dog competition.

Unprincipled competitors can with impunity take nationally known brand name merchandise and use it as a "loss leader" as a come-on to entice and attract consumer traffic and ultimately to monopolize the retail market. To the seduced segment of the consumer public, these cunning operators offer aisles and aisles of unknown merchandise, the cost and the value of which the consumer is and remains totally ignorant. No small business can withstand the onslaught of this type of competition.

E. B. Weiss in his book, "Merchandising for Tomorrow," states that we are approaching a period in which no more than 50 giant retail organizations will account for one-half of this Nation's total retail volume in most major merchandise categories. He states further that this tremendous concentration of retail volume in a few powerful hands will have important repercussions on the economy of distribution.

Mr. Jerome Kaufman, of national reputation, has predicted that within 20 years there will be no wholesale distributors as we know them today. The problem is imminent.

If small business is to survive, the quality stabilization law must be enacted.

The leaders of organized labor who have succeeded in "fair trading" the service of its members, above all others should be sympathetic in this fight to save small business and champion fair and clean competition to the end that

millions of small businesses shall survive, prosper and be able to absorb the goods labor will produce.

The quality stabilization law will not penalize large department or variety stores, or national food and drug chains. "Bigness" is no crime if it is achieved through service and efficiency. With the passage of the quality stabilization bill, competition will be predicated upon efficiency, service, courtesy and not upon cunning, deceit, misrepresentation, and fraud.

Opposition to quality stabilization legislation follows the line of the age-old arguments of freedom of action, individual enterprise. But we all know that freedom of action is desirable only so long as one does not injure or destroy his neighbor.

Chairman Dixon of the Federal Trade Commission has provided, unintentionally of course, some of the best reasons for the quick enactment of the quality stabilization bill.

Mr. Dixon in his statement to to the Senate Commerce Committee regarding the quality stabilization bill, testified: "The survey of 10 chain grocery stores in the Nation showed that 64 percent of their sales were their own private labels and only 19 percent were brand packers labels."

We know that the chain grocery stores Dixon refers to did not start with 64 percent of their merchandise under private labels. The national brands were used as bait, as a come-on, to increase traffic and volume. As the chain grocery stores monopolized the market, they replaced national brands one by one with their own private brands. As their monopolistic purpose was being accomplished, they had no more use for national brands which had served their purpose.

Mr. Dixon states that 19 percent of the sales are still "national brands." Interestingly, this alleged 19 percent sale of national brands is not made because of the chain grocery stores' love for "branded" merchandise. How long will it take—6 months or 1 year—before the 19 percent branded sales will also disappear from the supermarket shelves only to be replaced with the chains' private label brands. It didn't take long to gobble up the 64 percent in "branded" merchandise.

Mr. Dixon does not take into consideration that the national brands were not made national overnight. Millions of dollars went into research, and many millions more into various types of advertising to create an image and the desire for their product to the consumer. The national brand manufacturer has great investments in his brand merchandise and guards it jealously as to quality, etc.

As to Mr. Dixon's professed concern about the disadvantage to the small grocer that would result from the enactment of the quality stabilization bill, Mr. Dixon should look up the statistics as to the mortality rate of the small grocers under the present vicious and sordid competitive system.

Why did Mr. Dixon limit his testimony to groceries and supermarkets? What about the 50 other types of retailers—the druggist, the hardware, the apparel shops, the furniture shops, the toy shops, etc.? Is it because the money spent for the market basket has more appeal to the segment of the consuming public who cannot take time to analyze his testimony and visualize the trend and the consequences of our present destructive method of distribution of merchandise?

Quality stabilization legislation will arrest and reverse the tide of small business destruction. Let us put some reason and order in the jungle of the distribution of merchandise.

STATEMENT OF NATIONAL RETAIL HARDWARE ASSOCIATION, PRESENTED BY RUSSELL R. MUELLER

This statement of the National Retail Hardware Association is presented by Russell R. Mueller, managing director of the association.

The National Retail Hardware Association is a federation of State and regional hardware associations with approximately 22,000 independent retail hardware store members in some 10,200 communities throughout the United States.

Our support of the quality stabilization bill is without reservation. This position is concurred in by and overwhelming majority of our member stores. Less than 1 percent registered opposition in a membership poll.

We submit that the status of hardware merchants and similar independent, service-type retailers, should have a material bearing on the consideration of this legislation. The nearby hardware store is a familiar member of America's retail marketing scene. Their interesting stocks of tools, housewares, building

supplies, farm and garden supplies, sporting goods and other service items are readily reflected in the minds of nearly every adult citizen.

Over half of the Nation's hardware stores are located in towns of less than 5,000 population. Three out of four are in communities of under 25,000 populations. In total, they do an annual business of nearly $3 billion. These stores provide a maximum of convenience to the purchasing public.

Probably no category of retailing markets a higher proportion of quality merchandise identified by a manufacturer's brand name. To operate profitably hardware stores are extremely dependent on the services of independent wholesale sources of supply. Approximately 85 percent of the goods sold through hardware stores is obtained through independent wholesalers. In order to gain mass distribution through our stores, manufacturers of many lines must use the services of wholesalers. Manufacturers' brand name merchandise is the backbone of a hardware store's inventory.

In our considered opinion, manufacturers should be granted the brand control rights and privileges afforded by the quality stabilization bill. Legal obstacles which prevent manufacturers of mass-marketed branded goods in the hardware field from maintaining some measure of control over distribution, are working serious hardships on retail hardware, and similar service-type establishments.

We strongly disagree with those who attempt to discolor the practical facts of competitive marketing by affixing to the quality stabilization bill a false label of "price fixing." To the contrary, we are convinced that this legislation is in full accord with antitrust law philosophy. Its enactment would benefit all elements of the economy. The conclusions are based on these major factors and considerations.

1. Manufacturers who choose to distribute their brand name products through independent wholesalers and retailers are discriminated against under existing law.

Why should some manufacturer brands be required to compete with themselves—while others are not?

Today there are many methods (completely permissible under antitrust law) by which manufacturers "fix" retail prices and maintain absolute control and protection of their trademarked products. Some of the widely practiced methods are:

(*a*) *Factory owned and controlled wholesale and retail outlets.*—This is prevalent in numerous chainstore operations. For example: factory-owned shoe stores, clothing stores, paint stores. No one shops for a lower price on "Robert Hall" clothes.

(*b*) *Retailer-owned brand names.*—This is widely practiced by large chainstore operations and giant retailers. For example, one of the largest selling brands of major appliances, "Kenmore" is completely "price fixed" by Sears, Roebuck & Co. Likewise, the "Craftsman" line of tools and lawnmowers is absolutely "price controlled" by Sears. There is no price competition on products bearing these brands. Complete brand control is permitted.

(*c*) *Exclusive franchising of outlets.*—Through dealer franchise agreements, manufacturers can effectively control the manner in which retailers handle a branded product. Normally, such franchises require factory distribution directly to retailers. This system is practical for some high volume, fast turnover items.

(*d*) *Consignment selling.*—Manufacturers of some products can market successfully through consignment of their branded goods to retailers. Under such a system legal title is never passed to the retail seller, who acts merely as an agent. If factory policies are violated, the manufacturer merely withdraws its consigned goods and revokes the consignment agreement—absolute brand control.

(*e*) *Factory direct salesmen.*—The wide range of branded products sold door to door by factory salesmen graphically illustrates this technique. For example, "Avon," which is reputed to be the Nation's largest selling brand of cosmetics, is marketed exclusively in this manner. This brand and others similarly marketed never "competes with itself." Its prices are established absolutely by the factory.

There is nothing wrong in our opinion with any of these practices. Every brand so marketed must compete with other brands. Their retail prices are ultimately determined in competition with similar products designed to serve similar purposes. Yet, each of these approaches possesses every alleged evil advanced by opponents of the quality stabilization bill.

Why is it "evil" for some and not for others?

Unfortunately the above enumerated methods of brand control can be practiced most successfully by huge operations and/or in limited areas of marketing.

Merchandising giants and great retailing syndicates should, in our opinion, be permitted absolute control over their brands, so long as they have effective outside competition.

Why, then should not similar controls be permitted for brands marketed through small independents? Why should brand protection be removed the instant wholesalers enter the marketing picture? Why should small retailers be deprived of the same measure of brand protection enjoyed by their competition?

2. We submit that the quality stabilization bill would strengthen competition among brands and greatly expand markets. It would prevent rather than encourage monopolistic practices.

By providing a practical method by which manufacturers can competitively achieve brand control, retailing giants are forestalled from engaging in practices which lead inevitably to monopolization of distribution.

In our field the severe price competition on some leading brands of power tools and small electric appliances had demonstrated how such situations practically eliminate all but the large volume operators and ultimately restrains distribution by depriving manufacturers of the brands involved of access to the merchants with whom they want to do business.

In such markets hardware retailers have no alternatives other than to deemphasize or discontinue brands which can no longer be sold profitably or in which consumer confidence has been killed.

3. All existing legal competitive safeguards would be preserved. Manufacturers availaing themselves of privileges under the quality stabilization bill would be required to be in competition with makers of other brands.

Price competition is assured when a brand must have competition from other brands. Monopolistic trends are invited when brands must compete with themselves. Any retail pricing established for a branded product is at the competitive peril of the owner of the brand. If the price is out of line another brand, or other brands, will get the business.

4. This legislation is completely permissive.—Use of the legal rights granted under the proposed bill is entirely voluntary. Owners of branded products are in no way required to make use of these privileges. A facility is merely provided for those who desire to use it.

5. Continuation in business is a prime economic contribution of independent retailers.—Maintenance of a healthy business establishment is a foremost civic responsibility and service of a retail business. When hardware retailers and other independents find it impossible to sell goods profitably a community economy suffers.

Reduced sales means reduced employment, reduced dollars in local circulation, reduced tax dollars, and a stifled economy. Would-be purchasers are deprived of the convienience and confidence in trading in customary outlets, and the ability of the total economy to absorb the productive capacity of manufacturers is lessened. Hardware retailing, acording to Dun & Bradstreet, has for many years rated among the most stable forms of retailing. No category of retailing surpasses hardware stores in average longevity of operation, or in the low incidence of bankruptcy.

Return on investment in both hardware wholesaling and retailing have shown constant and parallel courses of decline for more than 10 years.

The following figures show the pattern of decline in average net profits on sales for retail hardware stores for the years 1951–60:[1]

	Percent		*Percent*		*Percent*
1951	3.95	1955	2.25	1959	1.30
1952	3.30	1956	1.90	1960	0.75
1953	2.85	1957	1.45		
1954	1.90	1958	1.00		

CONCLUSION

The quality stabilization bill is vitally needed. Enactment would broaden competition and distribution of quality-branded goods, assure healthier independent business through removal of inequities under existing law, and be in

[1] Source: Annual cost of doing business survey, National Retail Hardware Association.

the public welfare. We respectfully urge, in behalf of independent hardware dealers nationally, favorable consideration of the bill by this committee.

STATEMENT OF JOSEPH KOLODNY, MANAGING DIRECTOR, NATIONAL ASSOCIATION OF TOBACCO DISTRIBUTORS

Mr. Chairman, the National Association of Tobacco Distributors is a nationwide business league whose members represent the wholesale tobacco trade which annually supplies nearly $7 billion in tobacco, confectionery, and allied products to more than 1,400,000 retail outlets throughout the United States.

An April 5, 1962, this association during its annual convention, unanimously adopted a resolution which reads in part as follows:

"This association, which, for a period spanning more than one-quarter of a century, has been militantly in the forefront of the endeavor to safeguard the survival of small business in the United States by sponsoring such legislative measures as are in the public interest and the bulwarking of the exercise of initiative in our Nation, deems its endorsement of the quality stabilization bill in full keeping with its enunicated policy which is the preservation of the bastion of American freedom—the small businessman."

The disreputable and dishonest price cutting or bait merchandising practice at which this bill is aimed, is not a new practice in the business sphere. A study of the mercantile history of the United States reveals that it was vicious and predatory price cutting, particularly among popular national brands, which in large part caused and inspired the enactment of the Clayton Act and the establishment of the Federal Trade Commission in 1912.

Tobacco products have long been a prime target for the cut-price merchant. Tobacco products, especially cigarettes, fulfill all the requirements for a "good" bait item. They are sold at reasonable price, they are widely accepted (nearly 70 million smokers in the United States) and they are readily available in more than 1,400,000 retail outlets.

Few industries have suffered so often and so bitterly from bait merchandising and its usually inevitable concomitant of full-blown price wars followed by wholesale bankruptcies of the virtually defenseless small tobacco merchant.

To enable manufacturers of brand name or trademarked products to protect their commercial reputations from unwarranted and unethical use by unsavory sellers of such products, is important, and the stake of retailers and wholesalers in this right is equally important. Wholesale and retail dealers in brand name products build up their own reputations for honesty, integrity, quality, and service by carrying and selling such products. The plundering tactics of unethical dealers in these products, while damaging to manufacturers' reputations and products, can be equally devastating to the reputations of wholesale and retail dealers in these products whose investment in inventory may also be wiped out or seriously depreciated by the unfair and dishonest implication of a cut-price or product misrepresentation.

Bait merchandising, because it involves the taking of little or no profit or even a loss on the merchandise, is generally not available as a competitive weapon to the small merchant. The limited inventory, limited capital, and limited marketing area of a typical small retail merchant are not conditions conducive to cut-price operations on his part. If he can't make a profit on every item he handles, he either quits the item or quits the business.

The small retailer is for the most part a specialist. He knows his customers, he knows their wants and he supplies them. Compare this with the vast, faceless, personality-lacking chain supermarket or discount store handling thousands of items and the difference is readily apparent. The giant retail store can cut the price on 1 or 5 or 10 particularly attractive items calculated to entice the consumer into his store and by applying slightly higher markups to other of the thousands of items in his store, never lose a cent on the transaction. But while a cut price on cigarettes in a giant supermarket hardly causes a stir in the store itself, that cut price may well put the neighboring small businessman, whose inventory and sales are 50 percent in cigarettes and tobacco products, out of business overnight because he just can't meet the lower price and survive.

The manufacturer, wholesaler, and retailer of a branded product all combine, at a cost almost prohibitive in amount, to provide public exposure of such products in the Nation's more than 2 million retail outlets for the sole purpose

of winning consumer acceptance of the merits and intrinsic value of such product. No willful small minority should be allowed to debase this value and acceptability by resorting to unsavory techniques or methods of marketing which inevitably create unwarranted doubt as to the product's value, blunt its character and prestige and vitiate the huge investment, both physical and financial, of manufacturers, wholesalers, and retailers. The inescapable consequence of permitting the use of practices prohibited by the quality stabilization bill is not only to prevent free and honest competition and destroy the integrity of the product, but also it leads to sharply curtailed production, higher unemployment, and attendant chaos in the marketplace.

We are fully cognizant that the quality stabilization bill is no panacea for the vicious disease of unfair price cutting. We also recognize that those whom we here represent can be only secondary and contingent beneficiaries of the good which can arise from the enactment of this law. We know that the effectiveness of the law will depend entirely upon the interest of the manufacturer or brand owner in protecting his brand's integrity and the diligence with which he pursues the remedies provided. However, we hail this as a positive step in the right direction and are confident that most ethical manufacturers of consumer goods or owners of brand names and trademarks will avail themselves of any opportunity to protect their own products and the distributive apparatus which conveys them to the public as well.

We earnestly solicit your speedy and favorable consideration of H.R. 10335, the quality stabilization bill.

STATEMENT OF T. F. SOUTHGATE, JR., VICE PRESIDENT, P. H. HANES KNITTING CO.

My name is T. F. Southgate, Jr., vice president of the P. H. Hanes Knitting Co. of Winston-Salem, N.C. I have spent the major portion of my life in the men's underwear industry, and I am completely familiar with its problems.

My purpose in presenting this statement is to express the support of my company and the thousands of Hanes distributors and retailers the country over for the quality stabilization bill.

We at P. H. Hanes Knitting Co. feel that there is a definite need for the type of protection that would be afforded the consumer, the retailer, and the manufacturer under the quality stabilization bill. My experience in this field has been such that I can document with specific instances what I mean when I say that this bill is needed by all three segments of the community.

I. THE INTEREST OF CONSUMER IN THE QUALITY STABILIZATION BILL

Damage to the consumer because of uneconomic price cutting has both short-run and long-run impact.

During the fall of 1947 P. H. Hanes Knitting Co. witnessed an extremely damaging period of price cutting among the New York City department stores on Hanes children's sleepers. This item was and is one of the most popular sleeping garments for children, if not indeed the most widely used brand. By way of background—just prior to the second World War we had succeeded in establishing our brand among the large stores in New York City. All stores were selling these at our suggested nationally advertised retail prices, although the markup was less generous than that afforded by several competing brands. Because of the values offered, the Hanes garments sold readily.

In November of 1947, one of the leading Fifth Avenue stores cut their price on these garments to substantially below the nationally advertised price. Other stores in competition with it felt impelled to meet this store's price, and threatened to drop our brand completely. In fact, a number of them did drop our line and replaced it with other brands.

The consumer was the prime loser. Almost without exception these brands retailed at higher prices than our own and in some instances the quality was decidedly inferior to that offered by Hanes.

Over the intervening years we have gradually won back most of the outlets that had dropped our brand because "Hanes" was competing with "Hanes" from store to store. The damage to our brand name had run so deep, however, that two outlets declined to restore our brand into their stores until 1961, 14 years after the uneconomic price war. In the interim consumers could not purchase our excellent values from these stores.

II. THE INTEREST OF THE CONSTRUCTIVE RETAILER

The unethical merchant will stoop to subterfuge, bootlegging tactics, and almost every conniving act that can be imagined to obtain a famous brand name product.

For example * * * an export representative stopped in our New York office, showed us supposedly authentic export documents to prove that the merchandise was to be shipped to a Scandinavian country, and then placed an order for some 2,000 dozen Hanes briefs which retail at a suggested price of 3 for $2.95.

Later it was proven that he was in collusion with an ex-employee of a steamship line who had been fired from his position, that the steamship employee had stolen export documents, but that these were forged.

The merchandise ultimately wound up in Houston, Tex., in the hands of a grocery chain who then proceeded to offer them at 3 for $2.33.

The honest retailers who were trying to make a living by selling a brand such as Hanes at the legitimate markup were thus forced to meet a price below their operating costs.

A great deal of damage was done to the honest retailers who supplied quality products and service to the community. They lost a substantial portion of income because their market had been wrecked.

This Houston incident is not an isolated one. In all sections of the country, we have seen instances where a local retailer, active in the affairs of his community, has been economically crippled by the "hit-and-run" parasitic merchandiser.

III. THE INTEREST OF MANUFACTURER

We at Hanes are unfortunately all too familiar with the harm that can come to a manufacturer who seeks the path of orderly marketing.

The New York City example, mentioned above, shows how a single price cutter can cause his competition to drop a good line in disgust and replace it with a second- or third-best line.

When this happens, we must somehow regain the confidence of the stores for our brand. This requires much time and effort, all of which could be avoided if there is protection against those selfish merchants who are rudely and arrogantly indifferent as to how such practices damage others.

The quality stabilization bill must be added to the laws of this land so as to enable a manufacturer to protect his good name that he has placed on his product just as an individual can protect his good name from libel.

There have been many instances from coast to coast in which we, the consumer, and the ethical retailer have suffered from indiscriminate price cutting.

Several years ago in San Antonio, Tex., a "closed-door" discount house obtained our merchandise and offered it at drastically reduced prices. Other retailers in the area were forced to meet this competition. In time, because of our lack of control in this market, practically every good account in the city dropped Hanes underwear.

We had spent many years of hard work and a great deal of money in trying to build up a market for our products in San Antonio, only to see it all go down the drain because of unscrupulous action on the part of a newcomer to the retail field.

I might add that after the discounter had accomplished his purpose of using our brand as a loss leader, and after other retailers had seen fit to drop the brand, the discounter discarded our brand and then turned to another well-known advertised brand seeking to do the same thing with it.

It has often been said by opponents of the quality stabilization bill that such proposed legislation affords protection for the weak. I distinctly debate this point. I feel that were a manufacturer to fail to price his merchandise realistically he would fail in business today.

In other words, if an item worth 50 cents were offered for sale under the quality stabilization bill at $1, the American consumer would soon put this brand into the graveyard of literally thousands of other brands that also failed to be competitive in product value (price and quality). Consumers today know only too well that it is the relationship of price to quality that constitutes value. A manufacturer overpricing his merchandise has too much competition on all sides to survive.

On the other hand, if a manufacturer affords the consumer quality, at a competitive price, with an honest, legitimate markup to the retailer, then the consumer winds up with an excellent value and the retailer winds up with profit

which allows him to build or increase his business, pay his taxes, and to perform as he should.

The manufacturer sees his own sales increase to the point where he can expand his production thereby creating additional jobs and can contribute to the improved economy of his region and to the Nation.

National brands are needed in this country today. They are not a passing fancy. We have paid too dearly for the confidence in the Hanes name that we have earned among consumers to permit the public to be deluded.

The great strides of merchandising in our lifetime have been built upon the loyalty and respect accorded a maker who identifies his product. This confidence is more important than ever before.

To allow indiscriminate pricing on the part of unscrupulous or unprincipled retailers will result in a loss of volume to branded manufacturers, and this ultimately will result in a higher cost for the product. The American consumer and taxpayer will be hurt.

Enactment of this quality stabilization bill, H.R. 10335, is vital to our country's continued prosperity and existence for at stake here is no less than survival of the brand name system of production and distribution.

STATEMENT OF PAUL C. WILLIAMS, PRESIDENT OF THE O. M. SCOTT & SONS CO.

Mr. Chairman, I am Paul C. Williams, president of the O. M. Scott & Sons Co. of Marysville, Ohio. Scotts has been a nationally recognized name in the lawn and garden industry for many years, and is one of the leaders in its field. This statement is submitted in wholehearted support of the quality stabilization bill.

Our success in business has been achieved only by ourselves assuming the responsibility for consumer satisfaction following the use of our products. A recnt survey by "Home Furnishing Daily" establishes again that which we have known for many years, that in our industry consumers are confused and uninformed both as to the appropriate products to use and how to use the products they purchase.

About 34 years ago we solved these problems by ourselves assuming full responsibility for the satisfaction of the consumer. We formerly distributed, via the U.S. mail, quality products to consumers all over the Nation, taking infinite pains to assure ourselves that the consumer used the right product and in the right manner.

We now distribute our products entirely through retail outlets. Our present solution to the problems of consumer satisfaction is achieved by limiting our distribution through select retail outlets that will share with us our mutual responsibility to the consumer, on which our business future depends. Scotts shares this responsibility with its dealers in many ways. For example, we extend to every consumer of Scotts products an unconditional guarantee of satisfaction, which takes the form of a promise to refund the full purchase price on request.

We are now witnessing the erosion and perhaps eventual destruction of the retailing community on which we have traditionally depended to deliver consumer satisfaction. From time to time, our products are diverted into discount channels and are put on sale at the stores of the mass merchandisers. Therefore, we speak from painful experience when we say that our products cannot be used successfully by consumers, in the vast majority of cases, without the assumption of responsibility for consumer satisfaction by the retailer at the point of sale. Discount houses, large volume, low markup, minimum service merchants are simply not equipped to give this kind of consumer service.

We are informed that our practice of limiting our distribution to quality-conscious and responsible, service-minded retailers is in jeopardy under the present state of the law. We believe that our products are simply not suitable for a vending machine or self-service retail operation, and that this measure will enable Scotts and its retailers to continue to do business in a manner that is most beneficial to the consumer.

Therefore, we urge Members of Congress to support the quality stabilization bill so as to preserve, for responsible producers and retailers alike, the opportunity to serve consumers in the only manner that will create a maximum of consumer satisfaction. From our point of view this legislation is essential as consumer protecting—since it will keep the door of opportunity open for those who strive to keep faith with the customer.

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STATEMENT OF HAMILTON COSCO, INC., COLUMBUS, IND.

Hamilton Cosco, Inc., of Columbus, Ind., is a manufacturer of high-quality, nationally advertised metal furniture and housewares products that are manufactured and distributed under the trademark of COSCO.

We believe in the principle of quality stabilization and we believe that the Quality Stabilization Act, Senate Joint Resolution 159, will—

(1) Protect our trademark and goodwill against predatory, and often discriminatory, price cutting;

(2) Protect those who sell our products; and

(3) Protect the buying public.

We began marketing our present-day products in 1946. Since then, we have spent a great deal of effort and money on research and development to create and produce high-quality products. We have also spent a great deal of effort and money to nationally advertise our products. The result of our efforts and expenditures is the confidence that the public has in products bearing the trademark "COSCO"; this is our most important investment. We protect this investment, as best we can, by continuing to produce high-quality products and by continuing our national advertising. But in addition to this, we need quality stabilization legislation to protect the investment in our trademark from the bad effects of "loss leader" and cutrate sales methods.

The opponents of the Quality Stabilization Act describe it, and think of it, only as price-maintenance legislation that will stifle competition. From our point of view, it is legislation designed primarily to protect the recognized property rights in time-honored trademarks. We know that if we are to stay in business we must successfully compete with every other manufacturer of products similar to ours, but we desire to do so in an orderly market that lends itself to some form of effective policing instead of in a disorderly market that makes it possible for merchants who are both powerful and without scruples to engage in merchandising practices that drive the smaller and more scrupulous merchants from the marketplace, and force manufacturers to produce inferior products that cheapen their trademarks.

Those who see quality stabilization as a threat to free and open competition have, in our opinion, confused freedom with license and consequently are quite willing to permit and even encourage the most unscrupulous and destructive behavior in the name of freedom. We believe that true freedom must be accompanied by certain responsibilities and that one of those responsibilities is respect for the rights of others, including in this case the property rights of the manufacturer in his trademark.

The majority of the retail establishments that sell our products have, through their trade associations, indicated that they favor quality stabilization. Many of these are small retailers that cannot afford such competitive tools as exclusive supply contracts and private brands; therefore, they must compete with the large retailers, including discount stores and mail-order houses, in the name brands field or perish. The small retailers are aware of this, and therefore, favor the Quality Stabilization Act.

It is our opinion, that, in the present merchandising revolution, the only alternative to quality stabilization is the already existing trend toward quality deterioration; and the victim of this trend is the buying public.

STATEMENT OF OSCAR KOLIN, VICE PRESIDENT OF HELENA RUBINSTEIN, INC.

This statement is presented to the subcommittee of the House Committee on Interstate and Foreign Commerce in support of the quality stabilization bill. I ask that it be included in the record of the hearings held by your subcommittee.

I am a vice president and a director of Helena Rubinstein, Inc. (which I shall hereafter call Rubinstein). Rubinstein and its predecessor or predecessors in interest have been engaged in the manufacture, distribution, and sale of cosmetics, toiletries, and related products in the United States for almost 50 years.

My statement is devoted to the importance of the passage of this bill to the cosmetic manufacturer and distributor, as well as to all manufacturers of branded products. I am a firm proponent of resale price maintenance. I am in absolute opposition to discount house predatory marketing practices. It

is my firm conviction that the gradual rise of the discount house will eventually result in the ruination of American business and economy as we know it today. This trend, if it continues, may involve the disappearance of nationally advertised branded, quality, consumer commodities. To date fair trade laws have been our only useful means of combating these practices. I firmly believe that the only answer to the problem lies in the quality stabilization bill and I sincerely hope that it will soon become law.

Let me tell you why. To answer the problem, I must discuss the impact of the discount house on the three categories of persons directly affected—(1) the manufacturer, (2) the retailer and, most important of all, (3) the consumer.

Today we are faced with two types of cutrate discount stores. The first is typically parasitic in that it feeds upon the hard-earned contributions of established business communities and it makes no contribution of its own. It is usually a small store located in the large town or city in the middle of the busiest commercial center among many long-established retailers. This small cutrate store usually limits its sales to very well known branded merchandise and it sells this merchandise at reduced prices. Recently, however, a second type of cutrate operation has appeared on the scene. Very often this establishment may be a large chain or department store. It handles two types of merchandise; (*a*) Quality branded goods which it sells at reduced prices as bait to induce the customer to enter the store and (*b*) many varieties of obscure, very often inferior, merchandise, to which it attempts to switch the customer as allegedly superior products, and which it sells at prices calculated to bring the highest profit. These deceptive and misleading merchandising practices must, in the long run, prove harmful to the consumer.

1. *The manufacturer.*—A manufacturer of a trademarked or branded product, in open competition with similar products, has an accepted right to fix the retail resale price of his branded product either through unilateral policy or under fair trade statutes. This right has been recognized as a legitimate method of safeguarding the manufacturer's proprietary interest in the good will of his product, and of protecting that valuable property from destruction and impairment through predatory price cutting, loss-leader selling, and other destructive marketing tactics—techniques employed by those who have no interest in this property.

A manufacturer of a branded product must first of all, frequently after much research, create a product of quality. After years of hard work and heavy investment, he eventually builds up a good will for the brand he has created and a backlog of loyal customers. Through careful cost calculations—the cost of the product itself, of its packaging, and of distribution (advertising, public relations, sales promotion, sales representatives, etc.), the manufacturer establishes the price for these quality products. The price must be realistic and competitive with the prices of other manufacturers of cosmetic brand products—and the cosmetic industry is an extremely competitive one. Let me assure you that today the profit margin of a manufacturer of a cosmetic quality product is very narrow—with not one penny remaining for additional expenses.

Our traditional American system of distribution has been based upon free, open and fair competition. Different manufacturers can and do produce the same or similar products for resale at various selected retail prices in accordance with their established patterns of doing business. These prices also vary on the basis of each manufacturer's basic investment in product research and promotional development. For example, we can find colognes on the market for $0.50 and for $10; we can find lipsticks for $0.25 and $5.

A few years ago our company introduced a device involving an entirely new and more simple and efficient method of applying mascara and sold it under the trademark "Mascaramatic," at the retail price of $2. This applicator was one of the greatest innovations in the makeup segment of the cosmetic industry and its influence was such as to revolutionize the entire method of mascara application and the expansion of the entire eye makeup market. The product was copied by competition and today a similar item can be found on the U.S. market at prices ranging from $0.79 all the way up to $5. These areas of research and risk investment could not be maintained without a fair trade price structure. As long as we have free and open competition, why must there be recourse to the cut pricing of branded goods?

2. *The retailer.*—In order to make ends meet, the legitimate retailer, whether it be a department store, chain store or drug store, must obtain its regular dis-

count. What happens when a discount house begins to cut the fair traded or suggested retail resale price? The retailer has several choices:

(*a*) To maintain prices and thereby lose a certain trade to the discounter.

(*b*) To meet the cut prices and thereby lose money on its branded products.

(*c*) To drop the line of the brand manufacturer.

It is apparent that the very existence of the small retailing units which comprise such an important part of this country's merchandising system will thus become prejudiced, with the possibility of the complete elimination of hundreds of thousands of these small retailers. We must not forget that it was the depression of the 1930's which caused numerous States to pass legislation legalizing fair trade agreements. Many of you will probably recall the situation that existed during these depression years. When a retailer started to meet cut prices, he had to turn to the manufacturer to obtain additional discounts. The manufacturer had a choice—either to acquiesce in the demands of the retailers, lose money and subsequently face bankruptcy, or if the manufacturer would not meet the demands of the retailer, he was out of business anyway.

I would like to mention an amusing incident which occurred only a few weeks ago. A small retailer from the Middle West wrote something like this:

"DEAR MADAM RUBINSTEIN: I like your products. I like to do business with you but for the past several months there has been a discount house in my community. In order to stay in business, I have to meet the discounter's prices. By doing so, I am losing money selling Helena Rubinstein products. Will you kindly give me an additional 20 discount?"

I don't need to tell you what our answer was.

And this pattern, reminiscent of the depression years can repeat itself. Let us suppose that all retailers in the same community cut their prices to meet the competition of the cutrate house. With each price cut, a new community retail price for the same branded commodity will be established. Thus every retailer without exception will be losing money selling branded merchandise. This is obviously a literal point of no return.

3. And now let's get to the ultimate victim—the consumer. It is beyond dispute that nationally advertised and branded consumer commodities most easily lend themselves to loss-leader and cutrate merchandising. The cutrate price offered to bait a customer would at first look like a big bargain to the consumer, but if a manufacturer is forced to give addditional discounts to resellers, or go out of business, one of the first economies he will have to effect will be on the quality of his product. Or else, and this is what I believe will happen, the manufacturer will have to increase the price in order to allow additional discounts to the retailer. And so finally, it will be the consumer who will pay the penalty, for he will either be purchasing products of inferior quality or paying higher prices as a result of this price pyramiding.

The manufacturer, confronted with the demand for additional discounts, could very well decide that he must preserve the quality of his product at all costs and that he will not be a party to an inflationary spiral by raising prices. However, he would still like to stay in business and thus seeks to find a means of allowing the additional discount. His costs have been calculated with great exactitude and he must, therefore, reduce or eliminate distribution expenses such as advertising, sales promotion, sales representatives, cosmeticians, etc. The total effect of reductions and eliminations of this character upon the very heart of American economy is obvious. Thus, the overall picture is clear. The alternatives are, on the one hand, inflation, pronounced economic displacement, a deceived consumer, the elimination of many retailers and manufacturers, the disappearance of quality commodities or, on the other hand, the means of protecting all segments of the community, quality stabilization.

Only a few weeks ago I read an article in the financial section of the New York Times about discount houses. It stated that the average merchant does not like discount houses but as long as he cannot lick them, he may as well join them. To me such a solution is preposterous. I cannot believe that the American merchant, known for his initiative, creativity and imagination, cannot find other and better ways to improve his business.

There is much talk today about revolutionary new patterns in retailing. If discount houses constitute this revolution, then I am indeed sorry for the U.S. economy.

Our company is firmly in favor of the quality stabilization bill. We believe in it. We know that it is the only way for the cosmetic industry to survive. I therefore respectfully urge its favorable consideration.

STATEMENT BY THE PROPRIETARY ASSOCIATION, WASHINGTON, D.C., PRESENTED BY JAMES D. COPE, SECRETARY

The Proprietary Association, an 81-year-old national association of the manufacturers of proprietary medicines, supports the principles embodied in H.R. 10335 and related bills and urges favorable consideration and passage of these bills.

The Proprietary Association's membership includes the manufacturers of drug products—packaged medecines—which are completely labeled with directions for use and with warnings against misuse, and which are advertised to the public for use in home medication. Such products are known as proprietary medicines.

Proprietary medicines are sold under brand names, many of which are registered in the Trademark Division of the Patent Office. They are nationally advertised and in several instances are internationally advertised. A tremendous amount of good will has been created for these products and their trademarks constitute a very valuable asset to their owners.

One of the important objectives of the Proprietary Association is to preserve and improve the integrity and stability of the trademarks which its members own or control and pursuant to and under which they conduct business.

Because of the importance of trademarks to the business of our members, we believe it is essential to the welfare of our industry and the public we serve to have effective, enforcible laws to protect those trademarks.

Therefore, the Proprietary Association endorses the aims of H.R. 10335 and related bills.

STATEMENT OF THE FOUNTAIN PEN & MECHANICAL PENCIL MANUFACTURERS' ASSOCIATION

The Fountain Pen & Mechanical Pencil Manufacturers' Association, Inc., is a nonprofit association. It has a membership of 60 independent and competing manufacturers of writing instruments located throughout the United States.

The range and diversification of our membership is indicated, in part, by the fact that some are engaged primarily in the manufacture of writing instruments which still retail for 5 cents apiece to those who manufacture fountain pens retailing for as much as $100 apiece and more.

There is healthy diversity and disagreement among our membership in many matters. They are all hard hitting as competitors, not only with each other but, as well, with all who have not joined the association.

I think it is safe to say that if there is one proposition on which our members all agree, it is this: They believe in competition; they support our American free enterprise system; they are opposed to monopoly, to cartels, to restrictive practices and to all forms of unfair competition which preclude the American consumer from receiving the full benefits of competition at every level of our industry. This area of agreement among our membership, belief in competition, underlies our support of H.R. 10335, popularly called the quality stabilization bill.

There is no need for us to duplicate statements and considerations before this subcommittee in support of the measure. All the facts and arguments have been marshaled in presentation to you by scores of witnesses.

In urging your favorable consideration, we wish to be both brief and positive.

Trademarks, brands and names are essential to the vitality of competition. They enable the American consumer to choose. In this way, the producer who thinks well enough of his product to identify it with him, empowers the consumer to reward him by continued patronage for value received or punish him by avoidance of his product if the consumer doesn't like it.

H.R. 10335 protects this freedom of choice by consumer and protects the manufacturer who has courage to let the consumer be the judge of value. It does this with built-in safeguards against monopoly. It does this without compulsion upon any producer.

No trademark owner can avail himself of the benefits of H.R. 10335 unless he is willing to lay his product right out on the competitive line—openly and independently.

H.R. 10335 fills a critical gap in congressional law to foster competition and to protect consumers. It is, in every sense, a quality stabilization bill.

And it is more. It provides the only effective path, in today's American marketplace, by which an independent producer may, if he wishes, find un-

blocked access to the American consumer. It could well be called an equality of business opportunity bill because it provides the independent manufacturer with the opportunity to enjoy the marketplace freedom now available only to those who have resources to own a chain of retail outlets or to meet the tax and financial burdens entailed in retaining title to their product from factory floor to the consumer's door.

Opposition to the measure, as we see it, comes either from those who do not understand it or from those who would deny to others the independence of action they claim exclusively for themselves.

STATEMENT OF R. LEE WATERMAN, VICE PRESIDENT-MANAGER, CONSUMER PRODUCTS DIVISION, CORNING GLASS WORKS, CORNING, N.Y.

Corning Glass Works manufactures and sells glass and glass ceramic cooking ware under the brand names "Pyrex Ware" and "Corning Ware."

I shall present the views of a manufacturing company which has built its business and reputation on the development of new and improved materials and products through extensive research. We constantly strive to improve the quality and usefulness of the products which carry our brand names.

Our type of product is purchased relatively infrequently by any one family unit. We must, therefore, depend on wide distribution in all parts of the country to obtain sufficient volume on which to base efficient manufacturing methods. It is a fact that the price a consumer must pay for our products is determined primarily by differences in volume of production rather than by differences in distribution costs.

As an example, I cite a 9-inch Pyrex pie plate. This product was introduced in 1916, and has not changed in any essential particular since, excepting for improved glass quality. A recent survey indicated that there is at least one glass pie plate in 70 percent of the homes in this country.

In 1916 and during the early 1920's it was made on handpresses and sold in retail stores for $1.

In the late 1920's because of the introduction of semiautomatic machinery the price dropped to 90 cents.

In the 1930's a sufficient volume had been obtained to justify automatic forming machines which dropped the price to 45 cents.

Today, a constantly increasing volume has justified larger and faster forming equipment and handling machinery; and the retail price is 39 cents.

Our pie plates and related products are now purcahsed in sufficient volume to make possible a glass melting furnace costing over $1 million, forming presses costing approximately $250,000 each, and annealing ovens costing $80,000 each—all to produce articles which retail at from 10 cents to $2.

The distribution which has made this possible has been based on the acceptance of our products by consumers, and on the cooperation of more than 300 wholesalers and 45,000 retailers in making these products available to consumers in all parts of the country. Such a relationship has also made possible the pioneering of many new products which required initially substantial investments in tools and facilities. We have concentrated our efforts over the years on furnishing the neighborhood retailer with products which his customers will buy and which are made available to him through nearby wholesale distributors.

From a retail point of view, housewares is not a low-cost line to handle if the retailer accepts his responsibility to stock and sell the things which his customers want and need. Using "Pyrex Ware" as an example, a minimum assortment would include at least 26 different sizes and shapes. To these must be added replacement covers, handles, percolator pumps, etc. Such an assortment necessarily includes some items which would be rather slow turnover items, but the neighborhood retailer carries them because he is responsive to the needs of his customers, and has built his business on rendering a complete service.

As a result of the efforts of these many thousands of retailers, backed by a substantial investment in national advertising, our brand names have become well known and well accepted. They are among our most valued assets.

We are now faced with a situation in which certain retailers have asserted that it is their right to appropriate these brand names for their own publicity purposes, regardless of the interests and desires of either the manufacturer who created the brand names or the retailers who built their acceptance. These

retailers select a few of the best known and fastest selling items from the line and advertise that they can sell these at from 20 to 50 percent below prices charged by the neighborhood retailer. They do not accept responsibility for service in terms of assortment and will abandon a line when it has served their publicity purposes.

The point with which we are concerned is whether a manufacturer who has built up a valuable trade name, and who believes that his ability to serve the public efficiently can be best promoted by choosing a particular plan of distribution, may take the necessary steps to control it. There is no question raised when this control is exercised by such means as private brands, consignment selling, or a manufacturer selling direct. It is only where the traditional channels through independent wholesaler to retailer are used that it is challenged.

There seem to be two common misconceptions regarding manufacturer's interest in the distribution of their products:

(1) That manufacturers are seeking protection from competition by setting the conditions under which their products are resold. Nothing could be further from reality; controlling distribution can be successful only when a manufacturer is on completely sound ground as to the real value offered to consumers by his product. He is still in direct competition not only with products made from an identical material, but from all other materials offering similar utility. In our case this includes a wide range of metals, ceramics, and plastics.

(2) That giving manufacturers the right to control the distribution of branded lines would result in most of them doing so. This has not happened in States which now have fair trade laws and would not happen if the right were available broadly. This is so because a manufacturer incurs a great risk in establishing resale prices. He must be sure that he will gain more volume from broad distribution in neighborhood stores than he will lose in promotional selling through competitive cut-price advertising, and that this volume can be translated into manufacturing efficiency. If he miscalculates, he will pay the penalty.

We urge your favorable consideration of H.R. 10335 on the basis that it will enable us as a manufacturer, and others who are similarly situated, to more efficiently and economically produce and distribute products which the American consumer has demonstrated that she wishes to buy and use.

CHAMPION SPARK PLUG CO.,
Toledo, Ohio, June 20, 1962.

Re quality stabilization bill, Senate Joint Resolution 159.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: We are attaching a statement as a proponent of the subject bill, which we request be entered into the record of the Special Subcommittee on Quality Stabilization.

Thank you for your attention to this matter.

Yours very truly,

H. B. SPEYER.

STATEMENT OF CHAMPION SPARK PLUG CO., TOLEDO, OHIO

We, as manufacturers of a trademarked quality product; namely Champion spark plugs, are very much interested in seeing that subject legislation is passed. One of the main reasons, of course, is to preserve the traditional American system of distribution which is being rapidly destroyed by the evils of predatory cut pricing.

Operating under the act will be entirely optional with the manufacturers, and the product can be sold at whatever price may please the dealer. Thus, the bill would encourage competition in trademarked values between stabilized products and products salable at any retail price. This is in direct contrast to the testimony of opponents of the bill.

Finally, this bill solves the problem of "jungle pricing" and permits the manufacturer to name the retail price at which his trademarked quality product must be sold. The manufacturer has the responsibility and must account to the public for the value received in product according to the price.

HANES HOSIERY MILLS CO.,
Winston-Salem, N.C., June 19, 1962.

MR. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: It has occurred to me that the enclosed statement may be helpful to the House committee now holding hearings on the Capehart-Madden bill, H.R. 10335. With this in mind, I am forwarding it to you for inclusion in the records of the House committee.

Very truly yours,

GORDON HANES, *President.*

Hanes Hosiery Mills Co. has produced quality hosiery since 1901. By delivering promptly the best possible product and advertising it widely, we have established a name which is important in our industry. Our name is an important factor in the hosiery department of such stores as Woodward & Lothrop, Garfinckel's, and Jelleff's. It is equally important to the fashion stores across the country and in Canada.

Just as our name is important to the hosiery department of a fine store, so it is equally true that the fine store name is important to us in each community. This is a matter of mutual benefit. Therefore, when a supermarket or other such outlet secures a few dozen of the Hanes brand from sources unknown to us, it is a matter of grave concern both to the stores who carry our brand and to the brand name itself. Just as we must be free to advertise in and associate the Hanes name with such magazines as Vogue and Harper's, so we must be protected from the bootlegging of our name by outlets whose public image is not in keeping with our distributive planning.

Nor are we trying to keep any outlet from selling a good hosiery product. If a store which does not fit into our concept of distribution wants to buy hosiery from us under their own name and sell it for 10 cents a pair, or give it away with every purchase of vitamin pills, that's entirely up to them. If their type of merchandising injures their good name, the injury is a direct result of their own decision.

We heartily agree with William Shakespeare when he says:

> "Who steals my purse steals trash; * * *
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed."

We believe that the Capehart-Madden bill, H.R. 10335, will protect the good name of the manufacturer and the retailer without restricting competition in any way. This being true, we feel it works to the ultimate good of the consumer.

GORDON HANES,
President, Hanes Hosiery Mills Co.

ROYAL OAK, MICH., *July 2, 1962.*

HON. J. ARTHUR YOUNGER,
House Office Building, Washington, D.C.:

As the national trade association of the service station industry, we support the stated objective of the quality stabilization bill, namely, preventing destructive practices that lead to "monopoly of retail distribution, contrary to public interest." But specific provisions of this bill and also proposed amendments thwart this stated purpose and would lead to increased monopoly control of retail distribution by manufacturers in such industries as gasoline where retailers can purchase from only one supplier. Section 8 allowing manufacturers to fix both minimum and maximum retail prices and thus to absolutely control retailers' margins should be made inapplicable in industries where retailers purchase their entire requirements of a major commodity from a single manufacturer. Present language would nullify hard won gains for service station operators to secure economic independence under antitrust laws. Even worse are the proposed amendments permitting supplying companies to fix prices even where selling in competition with their own wholesalers and retailers. Such price fixing by suppliers engaged in dual distribution practices should be affirmatively prohibited, not permitted.

JOHN W. NERLINGER, Jr.,
Executive Secretary, National Congress of Petroleum Retailers, Detroit, Mich.

MICHIGAN FARM BUREAU,
Lansing, Mich., June 15, 1962.

Hon. JOHN D. DINGELL, Jr.,
House Office Building, Washington, D.C.

DEAR JOHN: Perhaps you will remember that when I was in your office a month or so ago we mentioned briefly the issue of fair trade legislation as one in which we had a common interest.

I understand that the House Committee on Interstate and Foreign Commerce is about to begin, or has begun, hearings on House Joint Resolution 636 which, as I understand it, is actually nothing more than a new approach to fair trade price fixing. The new title—"quality stabilization bill"—does not in any way change the leopard's spots.

As long ago as 1952, and perhaps earlier, Michigan Farm Bureau members in our State convention recognized the effect of such legislation and adopted the following resolution:

"So-called fair trade price legislation tends to eliminate competition on the retail level. It can force all dealers to maintain high prices on a commodity when any one dealer in the State signs an agreement with the producer. This monopolistic type of legislation maintains artificially high prices. We favor repeal of both Federal and State fair trade laws."

This resolution became Michigan Farm Bureau's recommendation to the American Farm Bureau Federation and found expression in Farm Bureau policy in the following language, which was reaffirmed at the last annual meeting held at Chicago in December 1961. The statement reads:

"So-called fair trade pricing practices are inconsistent with the principles of a competitive econoomic system. We oppose Federal resale price maintenance legislation."

Fair-trade pricing is a dead-end street and the retail druggists and others seeking this legislation should be able to see it clearly. Without the impetus of what amounts to fair trade pricing in many instances we would not have seen the establishment of drug counters in almost every type of business operation from gas stations to department stores and grocery stores. Even bars and taverns stock a supply of medicines for immediate use. (I recognize that this may have another purpose, however.)

The fact remains that the fair-trade pricing philosophy is a return to isolationism and the dependence on a type of trade barrier which is not good for any of us in the long run.

While I still recognize that you do not have a large farm constituency in your district, I do appreciate this opportunity to reassure you of our continued concern regarding this issue.

Sincerely,

DAN E. REED,
Associate Legislative Counsel.

KRUMS PHOTOGRAPHIC,
Battle Creek, Mich., June 12, 1962.

Hon. PETER MACK,
House Office Building,
Washington, D.C.

DEAR SIR: As president of Krum's, Inc., which deals only in photography and photographic equipment, I am extremely interested in the passing of the quality stabilization bill. We have been established in this community for nearly 30 years, stressing service and top quality merchandise and top quality results. There are two main reasons why we are for this bill.

1. We are interested in selling photography, creating photography as a hobby, and educating people further in the field of photography. To be successful in doing this, quality is of the utmost importance, for if people are not satisfied with the results, they lose interest and drop photography as a hobby. The final result is obvious.

2. We are interested in maintaining a reasonable profit margin so that we may continue in business and meet the payrolls for people to service customers as they should be serviced.

To go further with these reasons, I would like to testify that we are the only photographic dealer in this area which does not resort to tricky selling methods. Our competitors are using brand names as loss leaders and in many cases we know that the loss leaders are sold on a very limited basis. What is their purpose?

To switch customers to a substitute brand for the same price which carries a substantial markup which is often more than fair. We do not and will not use these tactics to fool customers. I am sure you would not want to be tricked or deceived in this or a similar manner.

It wasn't long ago that a factory salesman for low-quality merchandise attempted to set us up as a dealer for their products. He said, "You can sell our merchandise for 25 percent off and still maintain your usual markup." This salesman was shown the door, but our discounting competitors welcome him. Dishonest retailing is the only description for distributors of their brand.

Every day people enter our store to have us explain the use of equipment purchased in discount stores, or to explain the poor results of their purchase. We help them in every way possible, but time is money and servicing our customers who buy at a reasonable markup is all we can afford. Unfortunately, our customers are dwindling as they succumb to the trickery of our competitors. Our choice is to change our selling by using trickery and misrepresenting ourselves, or to maintain quality and eventually file bankruptcy. We choose the latter.

We as retailers are not the only ones who will feel the final results. Manfacturers of quality products will have the same choice as we do. The results are inevitable. The entire economy will suffer a decline in business activity.

The bill as proposed will not jeopardize competition. We believe in good, honest competition, not dishonest competition. Only the latter will be jeopardized. We have confidence that you believe the same. The bill will not bar discount houses from selling any quality brand of their choice, but it will prevent them from destructive, dishonest tactics which are destroying brand-name products.

We urge your favorable consideration.

Very truly yours,

KERMIT C. KRUM, *President.*

EAGLE CLOTHES, INC.,
New York, N.Y., June 19, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of Mr. W. E. Williamson, Clerk,
New House Office Building, Washington, D.C.

GENTLEMEN: We strongly urge passage of the quality stabilization bill which is presently before your committee. It is imperative for the protection of branded merchandise that favorable action be taken on this bill at the earliest possible moment. We believe this bill would be in the best interest of retailers and consumers interested in quality merchandise.

We further request that this letter be incorporated into the record of the hearings on this bill.

Very truly yours,

STANLEY GOLDMAN, *President.*

INDEPENDENT GARAGE OWNERS OF AMERICA, INC.,
Tulsa, Okla., June 18, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: Please be advised that the members of our National Association (10,000 members plus 30,000 employees) have asked me to write you and ask you to include our feelings on the quality stabilization bill (S.J. Res. 159) in the testimony presented to the committee hearing this bill.

The 10,000 members and 30,000 employees of our association, the Independent Garage Owners of America sincerely hope that the quality stabilization bill (S.J. Res. 159, was S.J. Res. 121), will be enacted into law at this session of Congress.

This bill is desperately needed to provide protection to the retailer and public who want to handle quality products and not products built to price alone.

This bill will protect quality of products and yet at the same time provide those who so wish, to build, buy, and sell price-built products.

There will be many independent automotive service shops close their doors in the next 12 months throwing more people into unemployment unless this bill is passed.

There must be protection provided to the people who wish to pursue quality instead of price. Without this protection the public will suffer greatly.

In today's markets there are those who will, because of selfish interests, prostitute quality name brand products until it becomes impossible for the quality to be maintained by the manufacturer.

The quality stabilization bill (S.J. Res. 159), would halt such acts. We sincerely hope it becomes law.

Sincerely yours,

HAROLD GRINDLE, *Legislative Observer.*

MEIER'S WINE CELLARS,
Silverton (Cincinnati), Ohio, June 18, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: We are a small, independent, quality producer of native American grape juices and wines. Our products are sold in most of the States here, and are handled by distributors and retailers at the local level.

We have been in business since 1895, and know from bitter experience that it is necessary for each segment of the distribution channel to make a profit, if we are to maintain a healthy and successful business. We are happy that in all of these years we have maintained this policy, we have enabled our distributors and our retailers to become a part of the economic structure of the United States.

The passage of the quality stabilization bill will greatly add to the economy of the United States as it will enable each segment of distribution to be able to perform its proper segment of services under a healthy profit system. With the coming of the Common Market, the American distribution system will be faced with great problems, and it is mandatory that we preserve our native American U.S. custom as we have established it over the past years.

Sincerely yours,

HENRY O. SONNEMAN, *Managing Director.*

PAINT & WALLPAPER ASSOCIATION OF AMERICA, INC.,
St. Louis, Mo., June 18, 1962.

Mr. W. E. WILLIAMSON,
Clerk, New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: On behalf of the Paint & Wallpaper Association of America, Inc., I submit the following statement and request that you incorporate same into the records of the hearings in re the quality stabilization bill, H.R. 10335.

In an orderly society no form of anarchy should prevail. Marketing in our present economy has rapidly retrograded to a state of unprincipled disorder and confusion. The normal ebb and flow of the tide of competition is unable to launder this blot on American life. The only effective bar to this unbridled barbarism is the quality stabilization bill. Honest paint merchants are placed in a precarious condition of survival by reason of unhampered competition that is allowed to prostitute quality products for the purposes of selling "The Big Lie."

Our industry has vainly tried to improve this intolerable condition. Moral suasion and education have been tried with only minimal success. We need a stronger force. The principle and strength of the quality stabilization bill should provide the vehicle that will put our economy on the straight and narrow road of economic stability.

Sincerely,

WILLIAM R. SECTER,
Chairman, Legislation Committee.

NATIONAL RETAIL HARDWARE ASSOCIATION,
Indianapolis, Ind., June 18, 1962.

Mr. W. E. WILLIAMSON,
Clerk, Committee on Interstate and Foreign Commerce,
House of Representatives,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: Would you please call to the attention of the committee our feeling of urgency about the critical need for enactment of the quality stabilization bill during the current session of Congress.

We strongly believe this legislation will strengthen the marketing capabilities of our 22,000 member stores across the Nation, at a most critical time.

These independent businessmen, in more than 10,000 communities, are capable of growing in marketing capabilities if manufacturers of quality, brand name goods are guaranteed the rights and privileges incorporated in the quality stabilization bill.

Please take appropriate action to incorporate this letter in the record of hearings on this legislation being conducted by your committee.

Anything done to bring the bill before Congress in this session would be greatly appreciated.

Respectfully yours,

RUSSELL R. MUELLER, *Managing Director.*

COOPER'S, INC.,
Kenosha, Wis., June 18, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: We wish to go on record as favoring the quality stabilization bill now in your committee.

In our opinion this bill will serve to protect the equity that a manufacturer develops in his brand and will provide a service to the consumer in that it provides quality merchandise of ever-increasing value and services at a reasonable price.

Yours very truly,

J. H. WYSS, *Vice President.*

CHRISTIAN BOOKSELLERS ASSOCIATION, INC.,
Chicago, Ill., June 18, 1962.

INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of W. E. Williamson, Clerk,
New House Office Building, Washington, D.C.

GENTLEMEN: The members of our association come from almost every State in the United States. More than 90 percent of our stores do less than $100,000 a year in annual volume. More than 60 percent do less than $50,000 a year in annual sales.

This puts almost the entire membership of our association in the category of small business.

Your favorable consideration of the quality stabilization bill becomes a life-and-death matter for our member stores.

We urge you to act favorably in the enactment of this bill this year to give definite economic aid to our members at a time when small businessmen are so concerned about being small in a big economy.

Please incorporate this letter into the record of the hearings.

Sincerely yours,

WILLIAM F. MOORE, *Executive Secretary.*

AUTOMOTIVE JOBBERS ASSOCIATION OF GREATER DETROIT,
Rochester, Mich., June 16, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
New House Office Building, Washington, D.C.

GENTLEMEN: It is with extreme urgency that the enactment of the Capehart-Madden bill take place this year as a matter of economic life or death for the members of the Automotive Jobbers Association of Greater Detroit.

Will you please incorporate this letter into the record of the hearing.

Yours very truly,

WILLIAM P. SLAVIN, *President.*

WATCH MATERIAL DISTRIBUTORS ASSOCIATION OF AMERICA,
Washington, D.C., June 18, 1962.

W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: This letter is in reference to the quality stabilization bill currently before the House Interstate and Foreign Commerce Committee.

We of the Watch Material Distributors Association of America strongly urge enactment of this bill in 1962 as a matter of economic survival for our customers, some 25,000 independent retail jewelers, and our member wholesalers.

At its 16th annual convention in Chicago earlier this month, members of WMDAA declared their emphatic approval and endorsement of the quality stabilization bill—namely, to provide a major step in stopping price-cutting and dishonest practices that are destroying our distributive economy. A resolution to this effect was unanimously passed by the convention assembly.

We hope and trust that all efforts to pass the quality stabilization bill are successful. To further emphasize our strong position for passage of this bill, we would greatly appreciate the incorporation of this letter into the record of hearings on the quality stabilization bill.

Sincerely yours,

STANLEY G. HOUSE, *Executive Director.*

LAKE COUNTY PHARMACISTS ASSOCIATION,
Gary, Ind., June 16, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: Speaking for my organization, I sincerely and extremely beg of you to enact the quality stabilization bill and that you see to it that this committee enacts it soon. I represent 350 pharmacist and store owners of small business and we well know the need for this bill to prevent the total and complete collapse of small business. The big people and the mammoth giants of commerce will soon swallow us up with unfair business and bait advertising unless this bill is enacted. These people have no desire to remain small giants, they want all the business and make no bones about it. I wish to compete with these so-called giants but I must maintain quality plus service which they don't care about. I feel and my members feel, they are downgrading what the true essence of what business means. Please give back to us via this bill what the backbone of this country was founded on, the small business of America. Small business employs and supports more families than these large businesses. Don't take away these jobs for these people.

Thank you sincerely,

MEL LICHTENFELD, *President.*

P.S.—Please have this letter incorporated into the record of the hearings. It should be a point of record on how we small people feel. Thank you.

DELAWARE VALLEY PHOTO DEALERS ASSOCIATION,
Philadelphia, Pa.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
New House Office Building, Washington, D.C.

GENTLEMEN: Please be advised that it is highly important that the quality stabilization bill be enacted into law this year. Many thousands of retailers throughout the country are looking to this act to get them out of a perilous financial position.

In many cases it is also a mental condition; the years past the methods of business operations has ruined the ethical business man. Misleading and bait advertising and inferior merchandise has not only cheated the average customer but also the honest retailer.

Our organization consists of 54 such retailers in the Delaware Valley area. We are committed to the support of the quality stabilization bill and for what it represents.

We ask that this letter be made a part of the record of hearings and hope that we will receive a confirmation of same.

Thank you.

Sincerely yours,

ALEXANDER S. LAYMAN, *Secretary.*

THE GREEN SHOE MANUFACTURING CO.,
Boston, Mass., June 15, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
New House Office Building, Washington, D.C.

GENTLEMEN: We refer to the quality stabilization bill which the House Subcommittee is now considering.

This company endorses and supports the objectives of the bill most strongly. We represent 1,600 employees, and we feel that we should have the right to protect the value of the brand under which our product has been sold for almost 40 years to the consumers of the United States.

We have felt the harmful effects of price-cutting and unethical merchandising practices, which have been hurtful to the value of our brand.

In the interest of fairness to the consumers, so that we may continue to supply an article of top value to them, and in fairness to ourselves as producers of such merchandise, we urge favorable consideration by your committee.

Sincerely,

S. L. SLOSBERG.

PENNSYLVANIA ASSOCIATION OF INDEPENDENT BUSINESS,
Devon, Pa., June 16, 1962.

Mr. W. E. WILLIAMSON,
House Interstate and Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: We understand that the House Interstate and Foreign Commerce Committee is now considering H.R. 10335, known as the quality stabilization bill.

Over the past 10 years, small business has been up against predatory price cutting, bait advertising, and fictitious markups. We note with some dismay the rapid expansion of discount houses, which use these means of advertising as their sole method of attracting customers. We have many authentic instances in our files which we would be very glad to submit to you.

We urge the committee's approval of the above House resolution and trust that you will incorporate this letter in the committee's files.

Yours very truly,

E. LYNN CARTER, *Executive Secretary.*

OHIO AUTOMOTIVE WHOLESALERS ASSOCIATION,
Columbus, Ohio, June 16, 1962.

Mr. W. E. WILLIAMSON,
House Interstate and Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

GENTLEMEN: We respectfully ask that the House Interstate and Foreign Commerce Committee give immediate favorable consideration to the quality stabilization bill.

Price-cutting and price-leader practices are having a profound detrimental effect on the automotive parts business. We feel sure that the quality stabilization bill will be a major step in checking price-cutting and many dishonest practices that are tending to destroy our distributive system.

The quality stabilization bill seems to us to be the perfect answer for a manufacturer to protect his trademarked products. He can take advantage of or ignore the provisions of the bill, as he sees fit.

It is obvious that if the present trend toward price-cutting and dishonest distributive practices continues unchecked, the quality of the products manufactured will necessarily deteriorate which will be of vital concern to the consumer.

The quality stabilization bill must pass this year if we are to continue to have a sane, quality-conscious distributive system.

We ask that this letter be made a part of the hearings of your committee on the quality stabilization bill.

Sincerely,

WM. L. WODICKA, *Executive Secretary.*

NATIONAL ASSOCIATION OF HOUSE TO HOUSE
INSTALLMENT COMPANIES, INC.,
New York, N.Y., June 18, 1962.

INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of W. E. Williamson,
House of Representatives,
Washington, D.C.

GENTLEMEN: We understand that the Madden quality stabilization bill is now being considered by you. I have been instructed to write to you on this matter in behalf of the members of our association.

It is the opinion of our membership that the quality stabilization bill is a matter of urgency as far as the direct selling credit industry is concerned and that it is of vital importance to this industry that it be enacted this year.

I trust that this opinion will be incorporated into the record of your hearings on this bill.

Sincerely yours,

EDWARD L. SARD, *Executive Director.*

AMERICAN BOOKSELLERS ASSOCIATION, INC.,
New York, N.Y., June 18, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of W. E. Williamson, Clerk,
New House Office Building,
Washington, D.C.

GENTLEMEN: On behalf of the booksellers of America, we wish to call your attention to the dire necessity for legislation so admirably embodied in the quality stabilization bill, now up for your consideration.

The booksellers of America are, by and large, small businessmen devoted to an extremely complex calling which, if carried out with professional competence, constitutes a major contribution to the cultural life of the United States.

The very nature of bookselling makes it unduly vulnerable to the onslaughts of price cutting as practiced by the discount houses of America. If price competition is allowed to continue, it is not unlikely that competent bookselling will disappear from the scene. This is not merely an economic matter—it is of educational importance as well.

We urge you strongly to bring about the passage of the quality stabilization bill.

May we ask that this letter be incorporated into the record of your hearings. Many thanks for your consideration.

Sincerely yours,

JOSEPH A. DUFFY, *Executive Director.*

SANDURA CO.,
Jenkintown, Pa., June 18, 1962.

Re quality stabilization bill.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate & Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: We should appreciate it if you would present this letter, for the record, before the committee in conjunction with hearings on the above bill.

In our industry, we are very much concerned about the financial and business stability of the retail stores through which we must market our products. This has been traditionally a highly competitive industry. Our opinion is that inadequate and declining margins for both retailers and wholesalers threaten to make it impossible for manufacturers to present their products to the consumer attractively and to supply the installation service that is a part of the sale to the consumer.

The absence of strong retailers makes it more difficult than would otherwise be the case for a medium size smooth surface floor covering manufacturer, such as ourselves, to compete with much larger factors in our industry.

This bill would give manufacturers such as ourselves an opportunity to legally carry on his business under sound quality and pricing principles. Operation under the bill would be voluntary and would not require anyone to utilize the bill's permissive practices. He could protect his brand name or not, as he wished.

The consumer would have free choice in making her purchase but unless the manufacturer offers her a quality product at a fair competitive price, no law can make him successful.

Very truly yours,

HAROLD H. RUCH, *Vice President.*

THE GUILD OF PHOTOGRAPHIC DEALERS, INC.,
Brooklyn, N.Y., June 18, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of W. D. Williamson, Clerk,
New House Office Building,
Washington, D.C.

HONORABLE SIRS: I am writing to you on behalf of the retail photographic industry in the metropolitan area of New York City and northern New Jersey to urge you to give your full support to the quality stabilization bill upon which your committee is now holding hearings.

Our industry unanimously supports this bill because we feel that unless this legislation is quickly passed by Congress, the death knell of the small businessman will soon be sounded throughout this great country of ours. Cutthroat and loss-leader practices have reached the point where most of the products normally sold in our camera stores can be purchased in mass selling outlets at prices below the wholesale cost to the retailer.

Many of our stores have become bankrupt and others are on the verge of bankruptcy. It has become impossible for us to compete with these cutrate loss-leader discount store methods, because the bulk of our merchandise consists of standard branded and trademarked articles.

We have no furniture, carpets, rugs, soft goods or other unbranded articles to sell at profits up to 500 percent to make up for the loss on the sale of loss-leader merchandise.

The most honored products in the photographic market have become dishonored because of this chaotic price situation.

Our business has become demoralized. Only through the passage of the quality stabilization bill will stability return to the photographic industry.

We trust we will have your wholehearted support for this bill which will prevent the rank and file retailer from going out of business with the resulting increase in unemployment and irreparable damage to our economy.

Please incorporate this letter into the record of your hearings on this bill.

Respectfully yours,

ABRAHAM SARASON, *Executive Secretary.*

AMERICAN WATCH ASSOCIATION, INC.,
New York, June 18, 1962.

INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of W. E. Williamson, Clerk,
New House Office Building,
Washington, D.C.

GENTLEMEN: Enactment into law this year of the quality stabilization bill would be a powerful stimulant to the economic well-being of our members, as it would tend to eliminate many unfair competitive practices that are detrimental to both large and small business. We strongly support this bill and urge its enactment.

We would appreciate this letter being incorporated into the record of the public hearings.

Respectfully,

WILLIAM H. FOX, *Executive Secretary.*

G. & C. MERRIMAN CO.,
Springfield, Mass., June 18, 1962.

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
House of Representatives,
New House Office Building,
Washington, D.C.
(Attention of Mr. W. E. Williamson, Clerk).

GENTLEMEN: We are writing to ask your cooperation in doing everything possible to promote passage of the quality stabilization bill in the current session of Congress.

Small independent retail merchants are in a desperate fight for survival. They need the provisions of this bill in order to stay in business, and serve the public by offering quality merchandise at fair prices against the deceptive and unfair competition of some distributors who grossly overcharge the consumers on many items after having lured them into buying as a result of cut-price offers on well-known quality merchandise.

We believe the quality stabilization bill is in the public interest. It gives manufacturers the opportunity to protect the quality of their products, and thus assure consumers that they are getting what they pay for.

We urge, therefore, that you support the quality stabilization bill, and we suggest that this letter be incorporated into the record of hearings on this bill.

Sincerely yours,

GORDON J. GALLAN, *President.*

RUST-OLEUM CORP.,
Evanston, Ill., June 14, 1962.

HOUSE INTERSTATE and FOREIGN COMMERCE COMMITTEE,
Care of Mr. W. E. Williamson, Clerk,
New House Office Building, Washington, D.C.

GENTLEMEN: We are writing regarding the quality stabilization bill and we wish to urge your consideration so far as enactment and passage of this bill is concerned.

We believe the bill is vital to the best interests of our company and for the protection of our brand name. Ours is a top-quality product which requires substantial service at the point of sale and very frequently after the sale—and in order to properly assure the selling of material so that the consumer gets the full maximum benefit, we need to put our product in properly qualified establishments.

We would appreciate your incorporating this letter into the record of hearings.

Very truly yours,

ROBERT A. FERGUSSON, *President.*

SHWAYDER BROS., INC.,
SAMSONITE LUGGAGE DIVISION,
Denver, Colo., June 18, 1962.

Re quality stabilization bill.

HOUSE SUBCOMMITTEE:

As manufacturers of Samsonite luggage, known the world over, Shwayder Bros., urges you to vigorously support the quality stabilization bill.

For half a century, Shwayder Bros. has spent millions of dollars on advertising, setting up and servicing outlets, and publicizing and backing up this publicity to establish a brand name and reputation which insures the consumer qualty and value as represented.

It is our firm desire to maintain this reputation and to continue to produce finer and finer products. The task of maintaining quality and reputation would be facilitated by the quality stabilization bill, which will enable us to retain the property rights to our brand name and will allow us to sell and promote our products in a manner consistent with the best interest of the consumer, the retailer, and the manufacturer.

Experience has proved conclusively that present laws have been ineffective, since they have left too much up to the State, and have no effect in interstate transactions. With a uniform law in each State, a bill of this type will function smoothly and benefit all phases of business and consumers.

Much of our business comes from small, independent merchants who depend completely on reputable brands for their business and strongly favor the kind of legislation presented in the quality stabilization bill. The small merchant is unable to reduce to an unprofitable level the price of commodities in his store for an extended period of time and stay in business. No store can operate this way without making up the difference on other items or being willing to suffer losses for a certain period of time in order to force out competition.

The small merchant is not willing to resort to misleading off-price promotions, nor is he adequately financed to weather a period of selling at cost to meet this unfair merchandising. Consequently, unless his brand names are protected he is doomed to failure.

It becomes clear that until the chaotic pricing situation which exists today is straightened out, many innocent dealers will be ruined. The number of business failures bears this out.

We urge you to give 100 percent support to the quality stabilization bill, to protect the American public from misleading and unethical use of nationally known brand names, which have taken years of toil and money to build.

Cordially,

D. D. MCKENDRY, *Director of Sales.*

THE A. S. HARRISON CO.,
South Norwalk, Conn., June 19, 1962.

Mr. W. E. WILLIAMSON,
Clerk; House Interstate and Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: For the manufacturers who attempt to supply the consuming public with a product of quality, fairly packaged, fairly priced, it is of the utmost concern to see the passage of quality stabilization legislation.

We certainly hope, therefore, that your committee will do all possible to have quality stabilization legislation enacted during this session, for each month of delay adds to the trouble and confusion in the marketplace.

We request that you enter this statement into the record of the special Subcommittee on Quality Stabilization.

Very truly yours,

C. WALTER BUHLER, *President.*

PHILLIPS-VAN HEUSEN CORP.
New York, N.Y., June 19, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of Mr. W. E. Williamson, Clerk,
New House Office Building
Washington, D.C.

GENTLEMEN: The purpose of this letter is to assure you of our intense and vital interest in the quality stabilization bill and the urgency that we attach to its passage.

Almost without exception, everyone of our 7,000 customers who represent the typical independent retailer of the United States are vitally interested in the protection of the brand name Van Heusen and the other brand names that are the backbone of their operations. The brands and the stability of the brands that these independent retailers carry are their main weapon of survival in their violent jungle of competition with the retailing giants and the unscrupulous merchants.

We ask that the opinions expressed in this letter be incorporated into the record of hearings. Thank you.

Very truly yours,

LAWRENCE S. PHILLIPS, *Executive Vice President.*

HASPEL BROS., INC.,
New Orleans, U.S.A., June 18, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
In care of Mr. W. E. Williamson, Clerk,
New House Office Building, Washington, D.C.

GENTLEMEN: As sellers of branded merchandise, we feel that any bill that Congress can pass to protect owners of brand names, would not only be to the best interest of the consumer, but would also keep brand names from being used as leaders to entire the consuming public into a store particularly where the number of units with the brand name would be insufficient to supply even the smallest proportion of those consumers attracted by whatever medium of advertising is used.

We ask that you use whatever influence your committee has to see that such a bill is enacted.

Kindly incorporate this letter into the record of hearings.

Thank you for your attention.

Yours very truly,

LEO A. HASPEL, *President.*

UNION UNDERWEAR CO., INC.,
New York, N.Y., June 19, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
In care of Mr. W. E. Williamson, Clerk,
New House Office Building, Washington, D.C.

GENTLEMEN: We are manufacturers of the Friut of the Loom brand of underwear and sweat shirts for men and boys, and have, through the years established a reputation amongst retailers and consumers, of outstanding value for the merchandise so manufactured.

It is only by means of this method of merchandising that we are able to enjoy substantial sales volume, thereby enabling us to engage in mass production on an economic basis and give the consumer and the retailer the benefits of such savings.

More than that, this enables us to provide all-year-round employment to many thousands of employees.

The quality stabilization bill is designed to protect our trademark, and assures the manufacture of our merchandise on an extremely high quality and at a fair realistic price, giving the greatest value at the lowest possible price.

It is vital to our resellers, to the consuming public, to our employees and to us, that the quality stabilization bill be enacted, and we urge you to approve the enactment of the quality stabilization bill. We respectfully ask that this letter be incorporated in the record of hearings pertaining to this proposed legislation.

Very truly yours,

HYMAN ROTHBART.

INDEPENDENT SHOEMEN,
Philadelphia, Pa., June 19, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: It is of extreme importance that the Capehart-Madden quality stabilization bill be enacted this year.

Members of Independent Shoemen are counting on this piece of legislation to protect the name brands they have built up over a period of years.

Please incorporate this letter into the record of the hearings.

Sincerely yours,

BENJAMIN L. FINN, *Executive Director.*

LINCOLN METAL PRODUCTS CORP.,
Brooklyn, N.Y., June 19, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: I wish to go on record as favoring immediate passage of the quality stabilization bill now before the House subcommittee.

As a manufacturer whose merchandise is sold by thousands of small dealers, the protection of the quality stabilization bill is necessary to keep the small dealers in business and our manufacturing facilities operating.

For the sake of the consumer who needs protection against loss-leader advertising and harmful comparatives, the quality stabilization bill should be passed at this session as a needed impetus to our economy and the welfare of all honest, hard-working legitimate dealers.

Yours very truly,

HARRY SCHWARTZ, *Vice President.*

JUNE 18, 1962.

Re H.R. 8830 and related bills.

Hon. HALE BOGGS,
Congressman in Louisiana,
House of Representatives,
Washington, D.C.

DEAR HALE: I speak for our 25 people in the advertising business in our New Orleans office.

We would like to go on record as opposing the provisions of the above-proposed legislation.

We particularly do not approve the idea of authorizing the Federal Trade Commission to issue a temporary cease-and-desist order to be in effect pending completion of proceedings.

We believe that injunctive power of this nature should remain in the courts.

Cordially yours,

JOSEPH L. KILLEEN,
Chairman, Executive Committee.

NATIONAL OFFICE MACHINE DEALERS ASSOCIATION,
Los Angeles, Calif., June 19, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of Mr. W. E. Williamson, Clerk,
New House Office Building,
Washington, D.C.

GENTLEMEN: Our association was one of the very first to recognize in the quality stabilization bill the proper ingredients that would lead to restoring sanity to the marketplace.

We realize that this bill could halt the skid from high-quality to low-quality merchandise. A manufacturer at the mercy of the discount houses must cut corners in nearly every direction if he is to satisfy the ever-increasing demand for lower and lower prices.

That a trademark suffers degradation at the hands of those whose only philosophy is to slash and cut prices to the bone goes without saying.

Walk up and down Main Street in any American community and it is a thrill to see small independent businessmen with their lighted shops providing quality merchandise to their customers. These independent merchants are the backbone of American business and must never be permitted to disappear from the scene. Inroads are being made daily by price cutters who render no service after sale and this condition, if permitted to continue, could sound the death knell of the small independent merchant.

We urge that this letter be incorporated into the record of hearings. The quality stabilization bill must be labeled "Urgent."

Thank you very much for your splendid cooperation.

Very truly yours,

HAROLD MANN, *Executive Secretary.*

SPORTING GOODS JOBBERS ASSOCIATION,
Chicago, Ill., June 19, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
New House Office Building, Washington, D.C.
(Attention of W. E. Williamson, clerk).

DEAR MR. WILLIAMSON: We would like the record of hearings concerning quality stabilization, being conducted by your committee, to show that the Sporting Goods Jobbers Association is very much in favor of the basic principle of quality stabilization, as embodied in the bill and our members urge its passage strongly. Our members who buy for resale such items as fishing tackle, hunting arms and ammunition, and other outdoor recreation equipment firmly believe that a manufacturer has a vested interest in the goodwill represented by his name and trademark and that some legal recourse should be provided whereby he can protect this interest.

Nonsigner clauses and principles of "fair trade" as generally defined, are not in our opinion, related to the principles we are endorsing.

Thank you for your consideration.

Sincerely,

ELLIS MURPHY, *Executive Secretary.*

NATIONAL ART MATERIALS TRADE ASSOCIATION,
Chicago, Ill., June 19, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of W. E. Williamson, Clerk, New House Office Building,
Washington, D.C.

GENTLEMEN: Several hundred members of the National Art Materials Trade Association have been working hard all winter in support of the quality stabilization bill which they feel is literally a matter of economic life or death for their continued prosperity.

One behalf of these members we wish to express to you our deepest interest in this legislation and our strong recommendation that it be enacted at this session of the Congress.

We hope that you will incorporate this letter into the records of the hearings.

Thank you for your kind consideration.

Sincerely yours,

LAURIN H. HEALY, *Executive Secretary.*

THE H. A. SEINSHEIMER CO.,
Cincinnati, Ohio, June 19, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of Mr. W. E. Williamson, Clerk,
New House Building,
Washington, D.C.

GENTLEMEN: It is extremely urgent that favorable action is taken on the quality stabilization bill this year.

The unauthorized use of brand names by disreputable retailers is dangerously on the ascendancy.

The consumer is being dishonestly attracted to these stores so for the protection of the fine retailers of the country, brand names must be protected.

We urgently request that our letter be incorporated into the record of the hearings.

Cordially yours,

ARTHUR L. BOWMAN, Jr.,
Executive Vice President.

GEORGIA AUTOMOTIVE WHOLESALERS ASSOCIATION, INC.,
Atlanta, Ga., June 19, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of W. E. Williamson, Clerk,
New House Office Building,
Washington, D.C.

GENTLEMEN: As executive secretary of the 115-member-strong Georgia Automotive Wholesalers Association, and speaking for this group by authority of a unanimous resolution dated October 12, 1961, may I urge that you pass the Capehart-Madden quality stabilization bill, H.R. 116.

I quote as follows from the aforementioned resolution:

"Whereas we, the members of the Georgia Automotive Wholesalers Association, at a board of directors meeting held October 12, 1961, after due consideration of all concepts of the Capehart-Madden quality stabilization bill, H.R. 116, have found this bill to encompass a long-sought goal: Therefore be it

"*Resolved*, That we, the members of the Georgia Automotive Wholesalers Association, unanimously endorse the Capehart-Madden quality stabilization bill, H.R. 116."

Please include this letter in the records of hearings for your valuable committee.

Yours very truly,

THOMAS A. MOTE, *Executive Secretary.*

AMERICAN ASSOCIATION OF SMALL BUSINESS,
New Orleans, La., June 19, 1962.

Mr. WILLIAM E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: I understand the hearings on the quality stabilization bill are now in the process of being conducted, and I, therefore, respectfully request that you incorporate this letter into the record of the hearings.

During these hectic days in which small businesses are in the midst of a life and death struggle for survival the approval of the quality stabilization bill by the Congress during this session is of vital importance.

The Constitution of the United States guarantees to our citizens the right to own property. Enactment into law of the quality stabilization bill will further guarantee and protect this right of ownership of trademarks or brand names. Brand names and trademarks have indicated the value of the manufacturer or producer's quality items and products in the eyes of the consuming public for many years. These great values must be protected and not be eroded away and virtually stolen from the rightful owners by unscrupulous marauders preying on our free enterprise market, in an effort to scuttle standard brand quality merchandise.

It will be very much appreciated if you will acknowledge this letter at your earliest opportunity.

Yours for keeping small business in business and,
Very sincerely,

J. D. HENDERSON,
National Managing Director.

CHEMICAL RESEARCH & MANUFACTURERS, INC.,
New York, N.Y., June 19, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: I am very glad to learn that the Senate hearings on the proposed quality stabilization bill have met with success and that hearings are now slated before a House subcommittee.

This pending bill is the only proposal that has given any recognition to the weakness of our current trademark legislation.

Would you please be good enough to have our statement entered into the record of the Special Subcommittee on Quality Stabilization.

With best wishes for the committee's success in this important effort, the bill, if passed, would give new heart to many manufacturers and retailers.

Sincerely yours,

DR. W. LANGER, *President.*

NATIONAL SHOE RETAILERS ASSOCIATION,
New York, N.Y., June 19, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
New House Office Building, Washington, D.C.

GENTLEMEN: The directors and members of the National Shoe Retailers Association are in full support of the quality stabilization bill for we are unalterably opposed to bait merchandising and any unfair and deceptive practices in the advertising, promotion, or merchandising of shoes to the consumer.

We believe in the right of brand name manufacturers to protect the quality and reputation of their products and further believe that the provisions of the quality stabilization bill will improve the climate of business for traditional retailers through the elimination of unfair and unethical practices and will, therefore, produce greater economic security for the future.

Ninety percent of the members of the National Shoe Retailers Association consists of the independent shoe operator dealing in brand name merchandise. The independent, or small businessman has been the backbone of the economy for many, many years. He is fighting a life and death struggle today against the forces of cutrate competition.

If the economy is to remain strong, the so-called small businessman must be encouraged to continue and expand his operation for the future. The NSRA stresses the importance of enacting the provisions of the quality stabilization bill this year as a matter of fair and just protection as well as encouragement for brand name retailers.

Sincererly,

EDWARD J. MCDONALD, *Executive Vice President.*

PALM BEACH CO.,
Cincinnati, Ohio, June 20, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of Mr. W. Williamson, Clerk,
New House Office Building, Washington, D.C.

DEAR SIRS: Our board of directors urges that you give the worthy manufacturers who think enough of a product to give it a name and a price that will stand up in a competitive industry the protection that the quality stabilization bill provides.

Our company distributes Palm Beach suits and sportswear through 3,000 men's wear stores throughout the country, and employs approximately 3,500 people in 7 clothing plants.

We wholeheartedly support the bill. We feel the need of the protection of the various provisions in the bill. We are seriously concerned about the future of our position in the industry if the predatory price cutters and schemers who use brand names as a means of attracting people to their stores and then switching them to inferior merchandise not worthy of a trade name and certainly not representing the value that they exaggerate so much and so often, are permitted to operate at will.

The board of directors of Palm Beach Co. would be very grateful if you would incorporate this letter into the record of hearings on the quality stabilization bill being held by the House Interstate and Foreign Commerce Committee.

Respectfully yours,

ELMER L. WARD,
Chairman of the Board and President.

PENNSYLVANIA AUTOMOTIVE WHOLESALERS ASSOCIATION,
Harrisburg, Pa., June 22, 1962.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
New House Office Building,
Washington, D.C.

GENTLEMEN: Our association of independent automotive wholesalers endorsed the quality stabilization bill at its annual membership meeting last October.

We consider this an essential piece of legislation which we are most anxious to see become law as soon as possible, to provide the means for relief and protection from unwarranted and destructive price cutting on long-established, reputable branded merchandise, many of which our members have handled for years.

We urge your most favorable consideration and we would appreciate it if you would make this letter part of the record of your hearings.

Thank you very much.

Cordially yours,

WALTER KIRKPATRICK,
Executive Secretary.

EVYAN PERFUMES, INC.,
New York, N.Y., June 19, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: The news of the success of the Senate hearings on the proposed quality stabilization bill was a source of great pleasure to me and my employees. That hearings are now slated before a House subcommittee is encouraging news.

The suggested bill is the only proposal that has given any recognition to the weakness of our current trademark legislation.

Please enter this statement into the record of the Special Subcommittee on Quality Stabilization.

With every good wish for the success of your committee in this important effort. The bill, if passed, will give much needed encouragement to manufacturers and retailers throughout the country.

Sincerely yours,

EVELYN WESTALL, *President.*

ELECTRIC APPLIANCE DEALERS ASSOCIATION,
Minneapolis, Minn., June 18, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR SIR: As a matter of economic life or death of the electric appliance dealers in this area, we sincerely urge the enactment, this year, of the quality stabilization bill. We ask that this letter be incorporated into record of hearings.

Yours truly,

O. A. GLASOW, *Executive Secretary.*

JUNE 13, 1962.

HON. PETER MACK
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN: This letter is to urge you, most strongly, to support the quality stabilization bill, Senate Joint Resolution 159. As you already know, price cutting and dishonest practices have been prevalent for some years, to the

detriment of the small independent businesses which have always been a true American way of life. The discount houses and chainstores are becoming monopolies which have all but eliminated the honest small business.

Anyone who sells at a cut price cannot afford to service what he sells, and therefore, a warranty that includes parts and labor is no good to the customer. The misleading advertising of today, such as "quality at a cut price" is making us a nation of sheep. You know, and we know, that there is no such thing as "quality at a cut price," but our bargain-minded public does not know it.

We shall not attempt to criticize the buying public, for they seem to have been educated, in recent years, to feel that "something for nothing" is their rightful due. The fact that they are misled and cheated does not seem to have the desired effect. Therefore, we do need some good and immediate legislation on the matter.

We realize that we are writing from the small retailer's point of view, but we do feel that the quality stabilization bill would be a protection for all.

Thanking you for your kind consideration, we remain,

HATCH ELECTRIC CENTER,
By PHILIP J. HATCH.

THE INTERNATIONAL SILVER CO.,
Meriden, Conn., June 20, 1962.

Hon. PETER F. MACK, Jr.,
Chairman, Special Subcommittee on Quality Stabilization,
House Interstate and Foreign Commerce Committee,
Washington, D.C.

DEAR CONGRESSMAN: Throughout the years our company has recognized that one of the most valuable factors in maintaining its position in business has been the establishment in the mind of the public of confidence with respect to goods bearing our trademarks. Much time, money and manufacturing skill have been devoted to assuring that products carrying these trademarks are of a kind and quality which will result in the consumers getting fine merchandise fairly priced.

We believe we have been successful and that the trademarks have acquired great good will in the mind of the public.

Again, our experience shows that when our products are used by resellers in a way that results in the public associating them with unfair business practices, that good will is damaged.

H.R. 10335 which permits the trademark owner to revoke the right of the reseller to use the trademark affords a manufacturer a weapon not previously available to combat damage being done to the good will associated with the trademark. Because this bill is directed toward protection of trademark rights, it is believed to be good legislation.

Very truly yours,

M. TAYLOR MAYES, *Secretary.*

BILLIARD & BOWLING INSTITUTE OF AMERICA,
Chicago, Ill., June 20, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: On behalf of the members of the Billiard & Bowling Institute of America, a nonprofit organization of leading independent distributors and manufacturers of billiard and bowling equipment, I would like to take this opportunity to express to you our sense of extreme urgency concerning the need for the enactment this year of the quality stabilization bill.

This bill would solve many of the seriously distressing problems facing our members in marketing their products, and relief is urgently necessary.

I would appreciate it very much if you would incorporate this letter into the record of your hearings.

Thank you in advance for your cooperation.

Sincerely yours,

ROBERT J. YOUNGBLOOD,
Executive Secretary.

BILLMEYER'S, INC.,
Pocatello, Idaho, June 5, 1962.

Mr. JOHN W. ANDERSON,
President, Quality Brands Association of America, Inc.
Gary, Ind.

DEAR MR. ANDERSON: Thanks for your letter of May 23 with which you enclosed copy of reprint of the Evening Star of Washington, D.C., re Federal price fixing.

As for the reaction of Mr. Loevinger, I am not at all surprised for I have lived long enough to recognize that many of those feeding at the public trough soon forget how the other half live. Mr. Loevinger by his remarks clearly proves he does not know what is going on in this country, businesswise, and apparently has made no effort to find out. In our city of 40,000 I can show him the great number of business houses, retail independents, that have closed their doors the past year or so. I can point out to him the second largest department store, closing its doors this week, after 60 years of operation. If Mr. Loevinger has eyes and ears, I think I could prove to him (provided he wants this) that business for the small merchants is not good and that things are worsening daily. Mr. Loevinger should be reminded that all small merchants are not dummies, although I will admit very few of us are as smart in handling some politicians as were Messrs. Goldfine and Billie Sol Estes.

As for the reaction of the Washington newspaper, this is also understandable. Just pick up any city newspaper and see the great amount of advertising by the chains, all featuring the best price. I am one who no longer feels we have a free press in this country and can site many instances to prove my point. I feel the newspaper people should look ahead, as bright businessmen, and perhaps they might come to the conclusion that when all small business is eliminated the big chains will not have to spend so much on their price advertising. Then too, perhaps some day the Government will check and learn that even the big chains are not being treated equally fairly by some of their suppliers, for some get better prices, under the table or in the form of more advertising (free)—sales helps, etc., all of which is supposed to be illegal.

What the newspaper people are overlooking is this. If some manufacturers decide to protect their quality and pricing, together with their wholesale and retail customers, they, the manufacturers would spend much more advertising why their products are worth more in the marketplace. I wonder too, if the newspapers know, or care, that much of the advertising they carry is untruthful, mispresentation, and just outright lies.

When, as a businessman, I see the quality of the junk being pushed on the gullible public today, with the buyer getting nothing but price, I wonder just how long this system of manufacturing and selling will last. For instance, I just saw an electric range—brand new, made by one of the largest manufacturers in the country, so light and flimsy that it was practically worthless when it left the factory and before the poor housewife was forced to use it. The gage steel and the very limited amount of insulation, etc., used is beyond belief.

As a wholesaler, more and more lines we have carried for many years are being closed out of our stock and we will discontinue handling them. For an example, in our automotive department, we just cannot afford to advertise and push a line such as Prestone, when anyone can buy the product retail in drugs, groceries, etc., at 5 cents a gallon over the price we, as a warehouse distributor, obtain from the manufacturer and stock in our warehouse from spring until fall. Of course, the service station and garage men are refusing to buy the product, and of necessity the manufacturers of Prestone, Zerex, etc., will now advertise less. The chainstores advertise only the price and use it as bait to push another line they buy at a better price. In our small business for instance, last season we sold close to 25,000 gallons of the no-name, nonadvertised brand of antifreeze, on price, that formerly would have gone to Prestone—so the manufacturers on many lines are being hurt—and things are getting worse along this line for all concerned.

In our electrical department, we find we are really getting hurt. Under present conditions we cannot afford to advertise, stock, and push electric shavers (of any make) due to the fact this is one of the best bait items the chains have, advertising them at dealers cost or even lower. No, they do not in many instances bring out the fact that some of the shavers are old models or

discontinued, all they advertise is the make and their 40- or 50-percent discount off regular list prices.

On small radios the chains show prices at a point where we cannot afford to stock and push U.S. made and most of our business is now on Japanese makes. Here, too, it hurts to have to admit that in many cases Japanese radios, selling for considerably less, are even superior to those made by highly paid U.S. employees.

I wish someone would tell me how the quality stabilization bill will force anyone to buy the goods with the higher price, made by a reputable manufacturer, who proudly puts his name, price, and guarantee on his goods and sells same in the free market in competition with the junk or price merchandise. If President Kennedy can fix the price of steel, labor can set wage scales, working conditions, etc., why should any manufacturer be deprived of his right to upgrade his merchandise, protect his patents, good name, etc.?

Sincerely,

C. G. BILLMEYER, *President.*

FLOORCOVERING DISTRIBUTORS, INC.,
Portland, Oreg., June 25, 1962.

Re quality stabilization bill.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: We are greatly concerned about the anemic condition of the floorcovering industry and especially the plight of the small distributors like ourselves and the retail stores through which we must market our products.

It is our conviction, however, that if the quality stabilization bill were enacted into law that it would not only give us a chance to survive but the small manufacturers from whom we buy our supplies as well. As it now is the hard surface floorcovering industry is practically controlled by one enormous company.

We would consider it a great favor if you would present this letter to the committee when they have their hearings on the above bill.

Cordially yours,

G. J. MEYER, *President.*

REILLY ATKINSON & CO.,
Boise, Idaho, June 26,1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.:

In our industry, we are very much concerned about the financial and business stability of the retail stores through which we must market our products. This has been traditionally a highly competitive industry. Our opinion is that inadequate and declining margins for both retailers and wholesalers threaten to make it impossible for manufacturers to present their products to the consumer attractively and to supply the installation service that is a part of the sale to the consumer.

The absence of strong retailers make it more difficult than would otherwise be the case for a medium-size smooth surface floor-covering manufacturer, such as we represent, to compete with much larger factors in the floor-covering manufacturing industry.

This bill would give small manufacturers an opportunity to legally carry on his business under sound quality and pricing principles. Operation under the bill would be voluntary and would not require anyone to utilize the bill's permissive practices. He could protect his brand name or not, as he wishes.

The consumer would have free choice in making his or her purchases but unless the manufacturer offers a quality product at a fair competitive price, no law can make him successful.

We should appreciate it if you would present this letter, for the record, before the committee in conjunction with hearings on the above bill.

Respectfully,

HAWLEY ATKINSON, *President.*

DANVILLE WHOLESALERS ASSOCIATION, INC.,
Danville, Va., June 11, 1962.

HON. PETER MACK,
Chairman, Special Subcommittee of the House Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

DEAR CONGRESSMAN MACK: The Danville Wholesalers Association is a group consisting of 21 wholesale firms located in the city of Danville, Va. Ninety-nine percent of our business dealings are with the small independent retail merchant. In short, we are dependent on this merchant for our livelihood.

The independent retail merchant of whom I speak does not have a large enough operation to buy merchandise directly from the manufacturer. We feel, however, as do many other trade associations, and manufacturers, that the independent merchant is the backbone of our economic system.

We agree that no one has the right to limit a manufacturer's sales. That right rests solely and exclusively with the manufacturers. But, by the same token, no one has the right to tell this manufacturer to whom he must sell his merchandise. This also is a right which the courts have granted manufacturing firms in a number of important court cases. If a factory wants to sell directly to the discount house, or the independent merchant, or to sell them on a distributor basis, he has the right to make that decision. But the manufacturer who decides to limit his sales to certain types of customers and to establish other conditions for the sale of his products to consumers also has the right to do this. This right seems to have been overlooked in recent years. It is time that this right be restated in the form of Federal legislation if necessary.

For these and other reasons, we of the Danville Wholesalers Association wish to go on record in support of the quality stabilization bill. We feel very strongly that the manufacturer has the right to protect his trademark on which he has spent considerable money advertising to establish an image in the mind of the consuming public. They should have the right to establish for themselves their marketing methods so long as these methods are not in violation of existing laws.

Thank you for your favorable consideration of this important matter.

Sincerely,

C. B. MARSHALL, *Secretary-Treasurer.*

PREAKNESS PHARMACY,
Preakness, N.J., June 11, 1962.

Hon. Congressman PETER MACK,
House Interstate and Foreign Commerce Committee,
House of Representatives,
Washington, D.C.

DEAR MR. MACK: I am a pharmacist and conduct a pharmacy at the above address. I am also engaged in conducting some other retail establishments in my area. I have been in business for about 10 years. These 10 years have seen the growth of the discount house not only in my area but nearly everywhere in the country. They have surrounded me to a point where they are driving one another into bankruptcy. The situation has degenerated to a point where the words "competition" or "honest competitor" are a lie. The advertising and "price promotions" are so misleading as to quality, brand, and price, that any semblance of moral decency or honest measure have disappeared almost completely.

The man being hurt is the small businessman, the small retailer. I have watched many of my contemporaries being slowly but surely pushed to the wall; pushed by misleading advertising and subsequent degeneration of the value of brand name merchandise. The embattled small retailer is being forced to hedge on quality and service, and, no doubt, soon will be forced further to live by his wits alone. This harassment has come from the well-known "loss leader" type of advertising, where the well-known brand is given away at a loss to promote the "junk" and high profit lines. The unsuspecting consumer is being clipped (without his knowledge), and the small retailer is made to appear as though he is making tremendous profit on his merchandise. A storekeeper maintaining the long hours required is giving his time and money, and indeed his life, to a cause which is surely lost unless he receives legitimate help and receives it soon.

I realize that small businessmen represent a very small minority, but the small businesses annd free competitive enterprises are the cornerstones of our economy. If the retailer is forced to sacrifice quality to maintain profit margin, then the danger, and loss is passed to the consumer by way of inferior quality and hidden charges. The consumer thus will pay more in the long run.

I feel the quality stabilization bill is the beginning of an answer, and I strongly support it. I strongly urge your support because I feel that this legislation must be passed. It is not desirable, in my opinion, to have the small retailer degenerate to the point where dishonesty will be the only prerequisite to his success.

Respectfully,

ROBERT T. RATCLIFFE.

PRINCE GARDNER,
St. Louis, Mo., June 18, 1962.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: The quality stabilization bill, I understand, is now before the House subcommittee for hearing. Will you please enter into the record of the special subcommittee our statement as follows:

"We have spent a lifetime in Prince Gardner building an image of our name that is now in jeopardy because of the change in merchandising that the country is now going through and we have no recourse in the courts to protect that name unless this bill is passed and gives us such protection."

Yours very truly,

H. W. WHITEAKER.

THE FORWARD AMERICA PUBLISHING GUILD, INC.,
Cincinnati, Ohio, June 13, 1962.

Hon. PETER MACK, Jr.,
House Interstate and Foreign Commerce Committee,
Washington, D.C.

MY DEAR CONGRESSMAN: I would appreciate your cooperation in having the following thoughts and quotations included in the record of the hearings on House Joint Resolution 636, better known as the Quality Stabilization Act.

In speaking before all types of audiences in all parts of the United States, I have found in the average American a desire for fairplay in all human relations, not merely in sports. That desire has not been nurtured, but has instead been submerged in an avalanche of gimmicks and giveaways, which has all but destroyed the sobriety of understanding that keeps society from breaking apart—like atoms under a tremendous force.

Everyone is talking about the "uncertainty" that permeates the national economy, but how many enterprising men of business can you find who are willing to put your finger on the real causes of this "uncertainty"?

One of these causes so widely overlooked today is that our vaunted "profit system" is having the profit wrung out of the movement of billions of dollars worth of consumer goods sold over the retail counter at bait prices, depriving the honest retailer of his just returns, and leaving scores of national brand manufacturers with an abortive distribution system.

Thorsten Veblen has said that "popular welfare" is bound up in the conduct of business; that "modern, civilized institutions rest in great part, on business principles." He also said that a "persistent defection of profits calls for an increased, unproductive consumption of goods * * * leading to real trouble, or, an elimination of that cutthroat competition that keeps profits below a reasonable level."

This brings up the question that we face in the conflict over the Quality Stabilization Act. The question of whether we go on sterilizing the economy with unfair trade practices, or, fertilize it with fair, honorable and productive practices.

Consider, for example, the racketeering mail-order misleader and general use of the term, "Regular Price and Our Price"—used more often where the manufacturer supplies a "list price" suggestion. In other words, this suggested price is not a protected price and in most cases does not exist at all.

Consumers, however, are led to believe that "our price" and "list price" are both real, there being created in the mind of a purchaser both a false price

and false statement of savings. Passage of the Quality Stabilization Act would virtually end this practice for the reason that a "list price" would in most cases become the "protected" price established by the manufacturer.

Services of all kinds, including advertising, selling, brokerage, wholesaling, etc., must constitute a way of life for an increasing number of our people, if mass production and automation benefits are to be passed around. This means fairly expensive distribution of goods and services, if you will, but what happens to human opportunity in this country if we put the same emphasis on mass distribution and cutthroat competition that we have put on mass production?

Congressman Wright Patman has made the blunt assertion that if we destroy our small businesses by letting the blood letters run rough and tough over the community, that the only alternative will be "Federal Government providing the funds to pick up the pieces." I liked the statement of Dick West, columnist for the Dallas Morning News, inserted in the Record by Congressman Bruce Alger. Said Mr. West:

"What is needed most, is public understanding that profits are the lifeblood of business. Unless business makes a profit—and keeps a certain percentage of it for a rainy day—jobs are in jeopardy. It can't hire, it can't provide for security."

Paul Fisher, Fisher Pen Co., says competition must be "fair" in order to be "free," and I recall that when Senator Strom Thurmond spoke before the auto dealers convention he put heavy emphasis on this point by warning the dealers that a continuation of their practices would lead to supermarketing of cars, destroying the "most successful distribution system in history." The Senator continued:

"One dealer told us that the factory expected their dealers to make their money from finance and insurance pacts, and all other antipublic practices which go with false advertising." He quoted George Romney, of American Motors, as describing the methods as something like taking narcotics—"one shot this year and two the next."

How better can one describe the trading stamp device; the loss leader lure; the movement of losses on trade name merchandise to the unknown, lesser quality brand? How better could one say that pretty soon we will be so doped up on false bargains that we won't know a real bargin—the product that is fairly priced and quality guaranteed?

I say that the Congress needs to look more closely than ever in our history at any proposal that promises to lend some protection to future opportunities for our youth—the most important objective of all—and in the Quality Stabilization Act we have such protection.

Furthermore, if business principles do not win, business will be pushed against the wall of desperation, turning from one device after another, until there will be no place to go.

Sincerely,

ED WIMMER, *President.*

NATIONAL AUDIO-VISUAL ASSOCIATION, INC.,
Fairfax, Va., June 7, 1962.

Mr. W. E. WILLIAMSON,
Clerk, Committee on Interstate and Foreign Commerce,
New House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: The National Audio-Visual Association is the national organization of over 600 companies in the audiovisual business, including most of the major manufacturers, producers, and distributors of visual and auditory equipment and materials used in the Nation's schools, churches, and business and industrial training programs.

It is our understanding that the House Committee on Interstate and Foreign Commerce, under the able chairmanship of the Honorable Peter Mack, Democrat, of Illinois, is about to hold hearings on the quality stabilization bill.

In connection with your consideration of this important measure we would like to advise you that our association has placed itself on record as fully supporting the passage of this legislation. We feel that this bill, if enacted, will substantially improve the economic climate within which our industry operates,

while remaining completely consistent with the principles of our competitive free enterprise system.

We hope that it will be possible for your committee and the Congress to take favorable action on this measure.

Sincerely,

JAMES W. HULFISH, Jr.,
Director of Information.

PATTERSON DRUG CO.,
Danville, Va., June 11, 1962.

Re House Joint Resolution 636, quality stabilization bill.
Hon. PETER F. MACK, Jr.
Chairman, House Subcommittee, Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

DEAR REPRESENTATIVE MACK: I am writing you in connection with the quality stabilization bill, House Joint Resolution 636. Should you think it worthwhile in bringing out some of the points in this legislation I would like it brought out as a statement in the record of the hearings on this bill. I apologize for the length of this letter but to bring out certain points it is necessary.

I consider this legislation of paramount importance to our country, our American way of life, free enterprise, and the survival of small independent retail business as such in diversified fields. In my opinion, hearings and facts have already shown the plight of the small retailer in this field in his efforts to survive the onslaught of predatory price cutting and deceptive merchandising of branded, trademarked goods.

I am writing you as a representative of small, independent business, as an individual pharmacist, who has been in the retail drug business since 1909, 53 years, as a past president of the Virginia Pharmaceutical Association (1959), who has observed the trend and change in retailing particularly during the past 5 or 10 years during which the change has been very rapid. Also as one interested in the future of all small, independent business and its importance to our Nation and to our economy. In particular, I am writing you about the independent pharmacy which has played a very important part in the life of every citizen in our American way of life, and it should continue to do so. It is now definitely threatened as such by inroads being made by discount houses, cutthroat prices of name brand "bait" trademarked merchandise, the growing competition from large operators installing complete drug departments with prescription service not identified as pharmacies, some such chains or groups even absorbing or introducing "discount" outlets. The trend toward monopoly in the retail field is growing daily, and with a "cash and carry policy." The age of "chiselry" seems to be upon us and an unknown definition given to the word "discount."

A study of the growth of large chains, discount houses, and developing of pharmacies in large chains is alarming. An orderly distribution of our products is essential to our economy. I believe also that a reasonable profit based upon sound business practices is essential if business of any kind is to survive, pay reasonable wages, and other benefits to employees, maintain quality merchandise and services, and pay legitimate taxes. I also believe that the American people are willing to patronize such a business. Particularly should this be true of the independent pharmacy. However, the misleading, unfair, cutthroat policies of these outlets in the marketplaces by advertising trademarked articles at so-called "discount" prices, in many cases below cost, as bait to sell long-profit merchandise, which is not advertised by them, is unfair to the customer, the independent retailer, and the manufacturer.

The independent retailer can take care of himself in a free and open fair market. It seems to me that we have reached a point in our distributive retail system that shows signs of bordering on monopoly unless checked to some extent. Buying power by the "bigs," of course, allows them to meet or better the prices even of the discount houses and cause further chaos in the marketplace even among themselves. The recent stock market recession is going to make this competition even worse in their struggle for volume at all costs.

In my opinion this House Joint Resolution 636, quality stabilization bill, will give some measure of protection to all three involved in a fair and equitable way, the customer, the retailer, and the manufacturer. This bill is approved by 62 or more national trade associations and I believe will have the united support of many others who in the past may have disagreed on the proper approach to

this problem. It will also be an effective agent against further inflation, and this fact has been proven when similar legislation was effective. This legislation is endorsed by the Virginia Pharmaceutical Association, the National Association of Retail Druggists, and the American Pharmaceutical Association.

I fully realize that a change in policy must have been adopted by the Commerce Department. This policy has no doubt changed since 1952, when it favored such legislation in the McGuire Act. It seems in doing so that the administration is less friendly to legitimate small business objectives than in 1952. The Congress and Commerce Department at that time must have realized the seriousness of the situation and did something about it before it was too late.

In my humble opinion, in the present instance, the conditions in the retail field are in a more serious situation than in 1952. To illustrate, when one discount house advertises "it will not be undersold," similar to Macy's and Gimbel's in 1952, and they then proceeded to cut prices way below cost, you can well see what happens when this is multiplied manifold. The "bigs" are crossing swords with the "bigs" and the little fellow is being left behind, and in many cases "out." At that time the Commerce Department supported the McGuire bill which was effective for some time.

This situation naturally represents a lot of differences of opinion. However, in time I think not only the small independent retailer will be hurt but big business outlets will also suffer and also the Government by such tactics unless suitable legislation is enacted to help the present situation.

There are a few more points I wish to emphasize. The retail drug business and other lines are highly competitive under normal circumstances. No manufacturer will put a retail price on his product that is not fair to the customer or he would price himself out of business. Also the product with a resale suggested price must be in free and open competition with other similar products, and it is the manufacturer's privilege to adopt or not to adopt a suggested retail selling price. Another important factor is that the manufacturer of a trademarked product is entitled to some protection. Textile brand names, pharmaceutical products, Whitman's candy, for instance, and other trademarked names are something of value, built upon years of advertising, quality, responsibility and standing behind one's product. This valuable asset is being destroyed or materially hurt by such tactics as are being used in the American retail marketplace. The legislation tends to stabilize business and discourage further inflation.

In my estimation the present situation affords the administration an opportunity, following the statement that, "it stands for business," to prove that it also stands for small independent business by its approval of the enactment of such legislation as represented by House Joint Resolution 636.

This stabilization bill is preventive medicine; that is, it will help prevent the "demise" of small, independent business as an important part of our America.

I am not a pessimist and I well know that we have many dangers besetting us from day to day. These dangers (national and international) are apparent in many cases by symptoms. I believe this problem in retailing is a danger symptom which, unless corrected, may lead to economic chaos in the retail distribution field. This will no doubt be reflected in our economic picture from the crude to the finished product.

I hope this legislation will have the support of your subcommittee and the full committee and get to the floor of the House for action. It is needed. It is fair. It will be appreciated by small, independent, retail business everywhere and give them a chance to survive. To my way of thinking, this so-called discount racket, and its offspring, is unfair competition, deceptive, and a growth challenge to the free enterprise system of our country.

Small, independent, retail business in all fields will appreciate the careful consideration of this important legislation.

Thanking you also for consideration of this lengthy letter, I am,

Sincerely,

GLENN B. UPDIKE, *Manager*.

SCUTT AUTO PARTS, INC.,
Lorain, Ohio, June 11, 1962.

Re quality and price stabilization.

Congressman PETER MACK,
New House Office Building,
Washington, D.C.

DEAR CONGRESSMAN MACK: It is the sincere hope of the writer that you will be able to support the above bill, Senate Joint Resolution 159.

Our democratic way of life up to the early 1900's was built by millions of small businessmen such as myself. We are now heading fast toward a way of life that approaches a socialistic condition.

With the recent flood of unethical operators prostituting quality trademarked products, the lifespan of independent businessmen in the thousands, could be very short.

By and large, they are honest, respected citizens, donating their time and money to the best interests of each community. Let's not kill off the hundreds of thousands of this type of citizen.

Your complete support of the quality stabilization bill is of utmost importance and will be appreciated.

Sincerely yours,

G. T. SCUTT.

NATIONAL RETAIL FURNITURE ASSOCIATION,
Washington, D.C., June 12, 1962.

Subject: House Joint Resolution 636, H.R. 10335, the Quality Stabilitation Act.

Hon. PETER MACK,
Chairman, Subcommittee on Commerce and Finance, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The purpose of this letter is to give your committee the position adopted by the directors of the National Retail Furniture Association on House Joint Resolution 636 and H.R. 10335.

It would be appreciated if you would authorize inclusion of this statement in the official record of the hearings.

After a poll of the association's membership in 1959, NRFA directors adopted a policy position which follows the wishes of the majority of members voting; namely, in favor of a Federal resale price maintenance law, provided it has a "two-way street" provision, placing enforcement responsibility on the owner of the trademark, brand, or trade name.

In line with this policy, we recommend that paragraph (11) of the bill be amended to read as follows (new material is italicized):

"(11) In any proceeding under paragraph (10) it shall be a *complete* defense to the charge of unfair competition for the defendant to establish that the plaintiff has not used due diligence in revoking the right of all other persons in substantial competition with the defendant, who are known to plaintiff to be committing any of the acts set forth in subparagraphs (a), (b), and (c) or paragraph (8) hereof, *and in taking civil action for damages and injunctive relief as provided in paragraph (10) to prevent and restrain further violations of this Act.*"

We believe that this supplementary wording will sufficiently protect law-abiding merchants from sharp-practice operators.

Without this supplementary feature, the owner of the trademark, brand, or trade name need only spend a postage stamp to revoke by mail the right of any person to resell his product, and thus remove the protection afforded to a defendant by paragraph (11) as written in the bill.

In our opinion, there is not sufficient responsibility and incentive for adequate enforcement in paragraph (11), and it needs to be amended as we suggest.

The reseller who violates will then know that the trademark owner has a strong incentive to revoke his right to resell and to sue for damages; and the trademark owner who wants to use the act merely for the advantage he can get by establishing terms of sale and then going to sleep or looking the other way when they are violated will then not be able to use as his dupe the merchant who operates in good faith.

Without adequate enforcement, the retailer who lives up to the trademark owner's resale terms can be made a "sitting duck" for the predatory operator

who is quite willing to take the chance of violating if he has little fear of punitive action.

We believe that Federal legislation in this area must incorporate the principle that the privilege granted by Congress to the trademark owner must carry with it the commensurate obligation to enforce the terms established under the protection of the law.

We also respectfully suggest that your committee in its report state what factors are to be considered in determining whether enforcement has been diligent.

We respectfully draw your attention to the factors established in the case of *General Electric Co.* v. *R. H. Macy Co., Inc.*, (103 N.Y.S. 2d 440) where the court stated (see H. Rept. 467, 86th Cong. 1st sess., pp. 3 and 4):

"While this court will not attempt to set forth in detail the requirements of a satisfactory future enforcement program, or a program generally to entitle a plaintiff to the protection of the fair trade law, certain basic essentials are emphasized by the facts of this case. General Electric, as any other manufacturer or producer, should—

"(1) Keep itself informed as to price-cutting activities and other trends generally known in the industry or trade.

"(2) Close scrutiny should be kept over prior violators and appropriate action taken where indicated.

"(3) Investigate and followup complaints vigorously.

"(4) Enforce fair trade prices by repeated legal action if necessary.

"(5) The enforcement program must be a continuing and substained one."

We thank your committee for the opportunity to present these views and urge enactment of House Joint Resolution 636 and H.R. 10335 with the amendments we have proposed.

Yours sincerely,

ROBERT E. CARTER,

NRFA Vice President, and Chairman, Government Affairs Committee (Hub Furniture Co., Baltimore, Md.).

ASSOCIATION OF AMERICAN RAILROADS,
LAW DEPARTMENT,
Washington, D.C., June 11, 1962.

Hon. PETER F. MACK, Jr.,
Chairman, Commerce and Finance Subcommittee of the House Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN MACK: Attached to this letter is a copy of a statement on House Joint Resolution 636 made on behalf of the Association of American Railroads. We should appreciate the privilege of having this statement incorporated in the record of hearings on this bill and its contents considered by the committee along with other testimony presented at the hearings.

As the statement shows, we take no position on the merits of the bill, but merely suggest technical amendments that would eliminate the possibility of unintended inconvenience to common carriers which might otherwise result.

Thirty-five copies of this letter and the attachment are being delivered to the clerk of the committee.

Respectfully yours,

GREGORY S. PRINCE.

STATEMENT OF THE ASSOCIATION OF AMERICAN RAILROADS ON H.J. RES. 636

The railroad industry takes no position on House Joint Resolution 636 because its members are not engaged in the distribution of goods by resale. As an incident to the railroads' business of transportation, however, they regularly find it necessary to sell quantities of merchandise.

This necessity arises in many situations while goods are in railroad possession. This possession ordinarily arises from provisions of the railroads' transportation contracts and tariffs on file with the Interstate Commerce Commission. The principal situations in which railroads must sell goods thus coming into their possession are the following:

1. Sale of goods pursuant to common-law obligations, as where delivery by the railroad is refused by the consignee because of damage, whether or not the carrier is liable therefor, or for any other reason.

2. Sale of goods to enforce liens, such as liens for unpaid freight and storage charges, as required by tariffs on file with the Interstate Commerce Commission.

3. Sales authorized by the Federal Bills of Lading Act, such as those provided for in section 26 thereof including the sale of unclaimed freight and perishable or hazardous goods.

Sales of these kinds are in the interest of shippers, carriers and the public alike, being for the most part required by law. Although sales in these categories occur only when delivery is not made in accordance with the bill of lading, whether or not the failure to deliver was caused by the fault of the railroads, they involve fairly substantial transactions in the aggregate.

Therefore, although we do not take any position on the merits of this bill as such, we wish to suggest that if it is enacted it be clarified so as to exclude from the terms of the new portion of the bill common carriers that are obliged to sell goods for the reasons outlined above. As H.J. Res. 636 now stands, it could be argued that such carriers are forbidden to do the acts therein enumerated.

We recognize that H.J. Res. 636 would amend section 5 of the Federal Trade Commission Act by the addition of new provisions, and that section 5(a)(6) today exempts common carriers subject to the Interstate Commerce Act from its terms. We think that this exemption was probably intended to apply to the provisions that would be added to the law by H.J. Res. 636. We believe, however, that this is not altogether clear under the present language of the bill, since the exemption in existing law refers expressly only to the Commission's power to prevent "unfair methods of competition in commerce, and unfair and deceptive actions or practices in commerce." The new portion of the bill does not in turn relate back to the earlier definitions and limitations, but deals with action that may be taken by the owner of a brand, name, or trademark, as distinguished from action that might be taken by the Commission. We therefore suggest that the intention to exempt common carriers subject to the Act to Regulate Commerce be expressed in the bill with respect to the new provisions.

We notice that H.J. Res. 636 contains no exemptions for certain kinds of sales for which an exemption obviously should be provided. These would include judicial sales, sales in mitigation of damages, and the like. We recommend that the bill be amended by the addition of a new paragraph (12) and by renumbering the following paragraphs as paragraphs (13), (14), and (15). The new paragraph (12) would provide as follows:

"In any proceeding under paragraph (10), it shall be a defense to the charge of unfair competition for a defendant to prove that the goods in question that were sold by him were goods advertised, offered for sale, or sold by any officer acting under the orders of any court, or by any person in mitigation of damages or enforcement of a lien or other secured interest therein, or when the advertising, offering for sale, or sale is made by any person not primarily engaged in the distribution of goods for resale."

We submit that the bill, if recommended by this committee for passage, should include the amendment we have suggested in order to preserve the existing scheme of regulation of unfair competition by the Federal Trade Commission and other agencies of the Government and to avoid what we believe to be the unintended and burdensome result of subjecting railroads and other common carriers to fair trade restrictions in disposing of goods where delivery in accordance with the transportation contract and tariff cannot be made, irrespective of the fault of any party to the contract. Such restrictions would serve no useful purpose and would be burdensome to interstate commerce. The Interstate Commerce Act makes it the duty of common carriers to enforce just and reasonable practices relating to or connected with receiving, handling, transporting, storing and delivering property subject to that act. The uniformity thus effected by the national transportation policy should not be impaired.

Mr. MACK. The Chair will announce that we will allow 5 days to receive additional statements or remarks concerning the subject.

That concludes the hearings.

The committee will stand adjourned.

(Whereupon, at 3:50 p.m., the committee adjourned.)

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