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QUALITY STABILIZATION—1963

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HEARINGS

BEFORE A

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

EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

H.R. 3669

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, 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 IDENTICAL BILLS

APRIL 23, 24, 25, 26; MAY 14 AND 15, 1963

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Committee on Interstate and Foreign Commerce

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QUALITY STABILIZATION—1963

TUESDAY, APRIL 23, 1963

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

The subcommittee met, pursuant to call, at 10 a.m., in room 1334, Longworth House Office Building, Hon. Harley O. Staggers (chairman of the subcomittee) presiding.

Mr. STAGGERS. The committee will come to order.

The Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce will begin hearings this morning on several bills to promote price and quality stabilization. These bills are H.R. 3669, introduced by the distinguished chairman of our committee, Mr. Harris, of Arkansas, and 22 identical bills.

The bills are:

H.R. 3670, by Mr. Madden, of Indiana.
H.R. 3690, by Mr. Horan, of Washington.
H.R. 3701, by Mr. Nelsen, of Minnesota, a member of this committee.
H.R. 3743, by Mr. Tollefson, of Washington.
H.R. 3745, by Mrs. May, of Washington.
H.R. 3790, by Mr. Pelly, of Washington.
H.R. 3797, by Mr. Toll, of Pennsylvania.
H.R. 3849, by Mr. Cederberg, of Michigan.
H.R. 3863, by Mr. Holifield, of California.
H.R. 3929, by Mr. Dent, of Pennsylvania.
H.R. 3943, by Mr. Friedel, of Maryland, a member of this committee.
H.R. 3983, by Mr. Roudebush, of Indiana.
H.R. 3998, by Mr. Stinson, of Washington.
H.R. 4184, by Mr. O'Konski, of Wisconsin.
H.R. 4221, by Mr. Bray, of Indiana.
H.R. 4312, by Mr. Glenn, of New Jersey, a member of this committee.
H.R. 4477, by Mr. Stubblefield, of Kentucky.
H.R. 4541, by Mr. Nygaard, of North Dakota.
H.R. 4626, by Mr. Clark, of Pennsylvania.
H.R. 4703, by Mr. Jarman, of Oklahoma, a member of this committee.
H.R. 4930, by Mr. Battin, of Montana.
H.R. 5032, by Mr. Harvey of Indiana.

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.

The Committee on Interstate and Foreign Commerce has dealt with this subject in the 85th, 86th, and 87th Congresses. In fact, a bill was reported in the 86th Congress and in the 87th Congress. The bills being considered today, H.R. 3669, and others, follow very closely the provisions of the bill, H.J. Res. 636, reported in the 87th Congress.

A copy of H.R. 3669 and all departmental and agency reports thereon will be inserted in the record at this point.

(H.R. 3669, together with the agency reports, follows:)

[H.R. 3669, 88th Cong., 1st sess.]

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, 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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) this Act may be cited as the "Quality Stabilization Act".

(b) Section 5(a) of the Federal Trade Commission Act, as amended, is hereby amended by adding at the end thereof the following new paragraphs:

"(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.

"(8) Any person who resells goods identified by a distinguishing brand, name, or trademark, either on the label, container, or dispenser thereof, may rightfully employ such brand, name, or trademark, but only in effecting the resale of such goods and subject to the following provisions of this paragraph. If 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 are in free and open competition therewith, the right of any person to employ such band, name, or trademark in effecting resale of goods so identified may be revoked by the owner of such brand, name, or trademark, subject to the provisions of paragraph (10) of this subsection, on written and dated notice of revocation, if, within ninety days prior to the date of the written notice of revocation—

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

"(B) such person, after written notice given by such owner of such owner's currently established resale price or price range, has advertised, offered for sale, or sold any such goods, acquired by such person after he has been given such notice, at a price other than such currently established resale price or at a price not within such currently established resale price range; or

"(C) such person, with intent to deceive purchasers, has published a misrepresentation or misrepresentations concerning such goods.

The owner of a brand, name, or trademark who avails himself of the provisions of paragraphs (7) to (17) of this subsection for the purpose of establishing a resale price or price range shall thereby subject himself, without respect to the amount in controversy, to the jurisdiction of the district court of the United States for any district in which goods identified by such brand, name, or trademark are offered for sale, but such jurisdiction shall apply (i) only for the adjudication of issues involving a complaint, by a bona fide purchaser at retail of

goods so identified, that the owner of such brand, name, or trademark had published, in an offer of such goods for sale, misrepresentation as to the size, capacity, quality, condition, model, or age of such goods, upon which misrepresentation such purchaser had relied with resultant unfair damage and loss to him, and (ii) only if the owner of such brand, name, or trademark is not subject to process in the courts of the State in which such purchaser acquired such goods.

"(9) Notwithstanding revocation pursuant to paragraph (8) of this subsection of the right of a person, in reselling goods, to employ the brand, name, or trademark which identifies such goods—

"(A) such person may, in the regular course of his business and within a reasonable time after the date of such revocation, 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 subparagraphs (A), (B), and (C) of such paragraph (8); or

"(B) if such person, promptly upon such revocation, shall have supplied to the owner of such brand, name, or trademark a correct itemized listing of the inventory of such goods with a statement of the price paid per item and the total price (including transportation costs) paid therefor, together with a firm offer to sell and deliver all such inventory to such owner at any time within ten days thereafter upon payment of such total price plus the cost of transportation to the owner in the manner directed by such owner, then such person, upon expiration of the ten-day term of such offer without acceptance, may so sell such goods in such 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 paragraph (8) of this subsection, and who thereafter, except as authorized by paragraph (9) of this subsection, resells goods identified by such brand, name, or trademark, or who otherwise employs such brand, name, or trademark in effecting resale of such goods or any other goods, 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 paragraphs (7) to (17), inclusive, of this subsection. 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 shall be entitled to (i) recover the amount of any damages sustained, (ii) injunctive relief to prevent and restrain further violations of paragraphs (7) to (17), inclusive, of this subsection, whether or not specific money damages are established, and (iii) recover the cost of suit including reasonable attorneys' fees. Any injunction granted under clause (ii) of this paragraph shall remain in effect for one year from the date it is granted unless it is the second or a subsequent such injunction issued against the same defendant in favor of the same plaintiff in which case it shall be a permanent injunction; except that any such injunction, upon petition of such plaintiff, may be vacated unconditionally by the court granting it.

"(11) In any proceeding under paragraph (10) it shall be a defense for the defendant (A) to establish that the plaintiff has not used due diligence to effectuate observance or enforcement of plaintiff's rights under paragraphs (7) to (17), inclusive, of this subsection against other persons who are in substantial competition with the defendant and who are known to plaintiff to be violating the same subparagraph of paragraph (8) of this subsection on which revocation of the defendant's right to employ the brand, name, or trademark was based or (B) to establish that the plaintiff has sold the same kind of goods of like grade and quality as the goods involved in such proceeding to another person similarly situated under terms more favorable or at lower prices than those under which the plaintiff sold such goods to the defendant.

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

"(13) Paragraphs (7) to (17), inclusive, of this subsection shall apply to all acts and transactions of the character referred to therein, in or affecting commerce, which Congress may lawfully regulate.

"(14) As used in paragraphs (7) to (17), inclusive, of this subsection—

"(A) The term 'person' means any individual, partnership, association, or corporation.

"(B) The term 'goods' means goods, wares, and merchandise.

"(C) The term 'currently established resale price' means the price for goods identified by a brand, name, or trademark specified by written notice invoking paragraphs (7) to (17), inclusive, of this subsection given by the owner of such brand, name, or trademark to the person reselling such goods.

"(D) The term 'currently established resale price range' means all prices including and between the minimum and maximum resale prices for goods identified by a brand, name, or trademark, specified by written notice invoking paragraphs (7) to (17), inclusive, of this subsection given by the owner of such brand, name, or trademark to the person reselling such goods.

Each such currently established resale price and resale price range shall be uniform at each level of distribution within each marketing area determined by the owner of the brand, name, or trademark. Such owner of the brand, name, or trademark may so establish, for resale of a combination of two or more items of goods, a resale price or price range different from the sum of the currently established resale prices or price ranges for the items when sold individually. Such owner of the brand, name, or trademark may also engage in other promotional activities not made unlawful by any other statute.

"(15) All rights and remedies provided in paragraphs (7) to (17), inclusive, of this subsection, to owners of a brand, name, or trademark, shall be also available to any owner of a brand, name, or trademark who, in the sale of goods identified by such brand, name, or trademark, shall compete, at any level of distribution, with any reseller offering such goods: *Provided*, That, within each marketing area referred to in paragraph (14) of this subsection, such owner shall sell such identified goods, at whatever level of distribution, only at the price or within the price range currently established by such owner for that area and for that level of distribution.

"(16) The following transactions shall be exempt from paragraphs (7) to (15), inclusive, of this subsection—

"(A) Sales of bulk commodities when sold without wrappers or containers.

"(B) Sales by any officer acting under the orders or authority of any duly constituted court; or sales by any person in mitigation of damages or enforcement of a lien or other secured interest in said goods, when such person is not primarily engaged in the distribution of goods for resale.

"(C) Sales of damaged, deteriorated, defaced, or secondhand goods, when plain notice of the condition of the goods is given to the public.

"(D) Sales of drugs, medicines, and devices for which either Federal or State law or regulations requires a prescription from a physician, dentist, or such other persons as the various States may authorize to prescribe such items.

"(E) Sales to or by the Federal, State, or municipal governments or their political subdivisions or agencies.

"(F) Sales to charitable, educational, medical, and religious organizations, for their own use and not for resale.

"(17) If any provision of paragraphs (7) to (17), inclusive, of this subsection or the application of any such provision to any person or circumstance shall be held invalid for any reason it is the intention of the Congress that the remaining provisions thereof shall not be affected but shall remain in full force and effect."

DEPARTMENT OF AGRICULTURE,
Washington, D.C., April 29, 1963.

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 22, 1963, for a report on H. R. 3669, 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 Department recommends against this bill.

The objective of H.R. 3669 is the same as that of H.R. 457, for which we have submitted a report recommending against the bill. The exemption of certain transactions provided for in paragraph 5(a)(16) of the act, as added by H.R. 3669, would reduce, somewhat, the scope of the bill. However, neither this change nor others made, alters our judgment that enactment of either bill would not be in the public interest. We do not think that these bills are an effective way to promote quality of the products of agriculture.

Authorizing owners of brands, names, or trademarks to exercise greater control than they now have over resale prices to the consumer would be against the public interest, particularly for food products. The bill would give added advantage to large-scale, well-financed manufacturers and merchandising organizations capable of engaging in extensive brand advertising and promotion. All merchants would be compelled to abide by minimum resale prices. Those merchants who, by the adoption of more efficient methods, achieved real economies in distribution would not be able to pass on the resulting savings to consumers if they were required to observe the retail prices established by wholesalers or manufacturers. Prices paid by consumers for food and fiber would be higher than otherwise; the sales of some products might be reduced; and higher prices at the retail level would not result in higher prices for farmers.

The proposed legislation does not define "bait merchandising practices" referred to in paragraph (8) (A) on page 2 of the bill. Without further clarification, this could either result in injustice to the vendee or present enforcement problems for the owner of the brand, name, or trademark. Moreover, the statutory remedies which paragraph (10) on page 5 of the bill proposes to make available to an owner of a brand, name, or trademark, whether or not he has an agreement or contract with a vendee prescribing minimum prices, and the consequences imposed upon the vendee by the provisions of the bill, appear to be unwarrantedly harsh.

The Bureau of the Budget advises that there is no objection to 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., April 26, 1963.

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 views of the Bureau of the Budget on H.R. 457 and H.R. 3669, similar 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.

These measures would provide, among other things, that the owner of a brand, name, or trademark would retain his property rights in such brand, name, or trademark in the event of sale or resale of goods bearing his brand, name, or trademark. They would also grant the owner the right to sue in a civil action for both damages and injunctive relief. H.R. 3669 would allow certain exemptions

to the provisions of the bill and thereby reduce, somewhat, the scope of that measure.

The Departments of Agriculture and Commerce have submitted reports to your committee opposing enactment of these bills. The Department of Justice, in its testimony before your committee on April 23, 1963, also strongly opposed enactment of H.R. 3669.

In view of the objections raised by those agencies in their reports, the Bureau of the Budget recommends against enactment of H.R. 457 and H.R. 3669.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D.C., May 3, 1963.

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 H.R. 457 and H.R. 3669, similar 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.

If enacted, this bill would add various 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, etc., 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 carries 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, etc., in the U.S. court for damages and injunctive relief. H.R. 3669 would allow certain exemptions to the provisions of the bill, including sales of bulk commodities not in wrappers or containers; sales of commodities pursuant to court authority; sales of damaged, deteriorated, and secondhand goods; sales of precription drugs; sales by or to governmental agencies; and sales to charitable, educational, medical, and religious organizations for their own use.

The Department of Commerce recommends against enactment of this legislation.

Under the terms of the proposed bills, price competition at the retail level, based on local conditions, and on costs of management at the individual store, would be illegal for price-maintained items of the same brand. 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. Retail firms marketing under a brand-owner controlled pricing system would have substantially less incentive to hold down their costs. The more efficient firms in a position to pass on some cost savings to consumers would be foreclosed from competing pricewise.

Moreover, the spread of resale price maintenance would substantially facilitate price leadership and uniform pricing in the marketing of similar or substitutable products by competing manufacturers. Such manufacturers, in order to maximize their profits by volume sales, would endeavor to set the price or price range high enough to cover the operating costs and a profit to most of their customer retailing firms. It could be expected that the fixed retail price would be geared not to the profit needs of the most efficient or even the average efficient retail firm, but to the profit needs of the less efficient or marginal firm.

Independent distributors probably would be seriously disadvantaged in a volatile market condition. Under a system of owner pricing, those purchasing for resale would not be free to adjust quickly 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.

Competition is the mechanism in a free enterprise system which directs the employment of manpower and investment toward the maximum output and efficiency which in turn contributes both to lower prices and growth in the volume of goods and services produced. 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.

As a result of the higher prices and price rigidities that would result from a new and more affirmative national resale price maintenance law, consumers would be penalized. Price competition is essential for pricing which is responsive to the play of market forces. Such competition maximizes consumer purchasing power and permits consumers to enjoy higher levels of living.

In purchases in the retail market, the consumer buys not only the physical product itself, but a varying amount of other associated utilities and added values such as those made available to him by location and decor of the establishment, credit, delivery, personal service, etc. When a consumer chooses among the many outlets that may sell a particular product, he has a right to expect that the retail prices will reflect the cost of the particular combination of these utilities which he prefers. Instead, with the passage of an affirmative national fair trade law, he would be faced with uniform and somewhat higher prices for an increasing number of products, regardless of the comparative services included.

The provisions of this bill would constitute an affirmative endorsement and authorization by the Federal Government of resale price maintenance throughout the entire distributive process, rather than acquiescence by deference to State authority under existing laws in States which authorize fair trade.

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

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,

ROBERT E. GILES.

SMALL BUSINESS ADMINISTRATION,
OFFICE OF THE ADMINISTRATOR,
Washington, D.C., April 24, 1963.

Re H.R. 3669: 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.

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 22 and March 18, 1963, requesting our comments on the above bill.

In substance the purpose of H.R. 3669 is to provide manufacturers of goods sold under a brand, name, or trademark with a measure of control over the

conditions under which the goods are to be resold by jobbers, wholesalers, or retailers. Thus, within prescribed limitations, the right of such a purchaser to resell could be revoked if he resorts to bait merchandising practices or to misleading advertising or if he fails to observe a resale price established by the manufacturer. Appropriate sanctions are embodied in the bill for the enforcement of these provisions.

The outstanding feature of H.R. 3669, of course, is the right of the manufacturer to stipulate the prices to be charged by his customers. At one time such resale price maintenance was permitted by nearly all of the States under statutes enacted by them pursuant to an exemption (Public Law 542, 82d Cong.) from the antitrust laws. In recent years, however, the courts in many of these jurisdictions have invalidated their respective fair trade laws, in whole or in part, on constitutional grounds. Today they are in full force in some 24 States only. The evident plan of the bill is to strengthen the right to practice resale price maintenance by resting it on Federal, rather than State, law.

The demand for such legislation is strong—and we at the Small Business Administration are familiar with the underlying reasons. Small retailers in many lines are being subjected to intensive and relentless pressure from chain organizations. These organizations, with their vast purchasing power and financial resources, can afford to cut prices to levels which their small competitors find impossible or extremely difficult to meet. The magnitude of the resulting problem is not to be underestimated. Many small retailers have already succumbed to the pressure and, unless we can find a remedy for the situation, many more will go under.

Some people take the view that this situation, sad as it is for those whose livelihood depends upon the continuance of small retail shops, is an unavoidable consequence of the free enterprise system. It is said that, to the extent such stores cannot endure the rigors of free and open competition, they must go. I think we should examine that argument carefully.

It is entirely true that our economy was initially characterized by free and open competition. In the early days of our history, when all businesses were small, when all enjoyed equality of opportunity in the market, we actually had such competition. The forces released by it made us the wealthiest nation on earth. Unfortunately we were not diligent in preserving this system. As huge combinations began to form in one industry after another, at an accelerating pace, we were slow to recognize the danger.

By the time we acted, with the institution of the antitrust laws in 1890, much damage had been done. It has not yet been undone. Despite more than 70 years of antitrust prosecution, the giants are more numerous and larger than ever. They are to be found in nearly all industries. It is to be hoped that, if we continue the vigorous enforcement program now being conducted by the Department of Justice, their grip may eventually be broken or at least weakened. But that day lies in the future, probably the distant future.

Meanwhile the small business community must survive. In the conduct of the antitrust program, as in most other matters, an ounce of prevention is worth a pound of cure. The competitive potential of small business is a force in being which must be preserved as one of the most promising means of restoring free enterprise. If the decline of this vital segment of the economy is permitted to continue, the battle we are waging against monopolies and restraints will be lost or at least greatly prolonged.

During the interim period of which I speak we should not expect small concerns to stand up to the giants unassisted. To be sure, an occasional David may step out of their ranks and slay a Goliath. In many respects, however, the small man is at a great disadvantage as regards the large. It is misleading, therefore, to speak of "competition" between the two in the sense that each has an equal chance to prevail.

With these considerations in mind Congress established the various assistance activities now being conducted by the Small Business Administration. This policy of the Government is not to be regarded as an interference with the mechanism of competition but, rather, as a program to counteract the restraints which frequently have been imposed upon that mechanism by big business.

It is against this background that the merits of H.R. 3669 should be evaluated. By virtue of their size alone the chains and other large retail establishments hold overwhelming advantages over the small retailer. As we all know, they buy at quantity discounts which are not available to him. This, together with the volume of their sales, permits cost savings far beyond his reach, regardless of his management abilities. Many of them, not content with these advantages, strengthen their position further by extorting illegal concessions from their

suppliers. Since these latter transactions are conducted under cover, accurate information with respect to them is unavailable. There is reason to believe, however, that such concessions are widespread.

It is not surprising, therefore, that small stores can rarely meet the prices offered by their large competitors. This is a problem they have to live with and, considering the circumstances, they have done well. Except where price differentials assume major proportions, small retailers can be counted upon to attract customers by means of superior services, ingenuity in the display of goods, and other merchandising skills and devices. Their resourcefulness in this respect is attested by the vast numbers of them which have weathered chain competition for many years.

Drastic price slashing is another matter. The leading retail establishments in many industries could, if they wished, price their small competitors out of business. The view has often been voiced that some of them have, in fact, undertaken to do so. We must ask ourselves whether such predatory price cutting promotes competition or destroys competition. I consider it destructive because it leads straight toward monopoly.

If we accept the premise that our primary goal is to devise a method by which predatory price cutting can be eliminated or at least substantially deterred, we must determine the method by which we can best achieve this goal. In this connection I would strongly advise that the committee give consideration to the possibilities of improving existing remedies against so-called loss leaders. This term, as commonly employed, relates to two distinct practices. In the first of these the proprietor of a store will lower his prices on leading brands in order to attract customers. The sacrifices he makes on such brands are more than offset by profits on sales made from the remainder of his inventory. In the second type of loss leader a chain organization will lower prices on certain products in one locality, in order to put pressure on competitors there, and at the same time maintain regular prices on such products elsewhere.

Innumerable complaints have been received from small retailers injured by loss leaders. Under existing law, however, it is extremely difficult to cope with these pernicious devices. Section 3 of the Robinson-Patman Act makes it a crime to sell goods at "unreasonably low prices" but, since conviction cannot be obtained in any case unless Government sustains the burden of proving beyond a reasonable doubt that the sales were made for the purpose of destroying competition or eliminating a competitor, this provision is of little help.

At one time it was supposed that section 5 of the Federal Trade Commission Act, prohibiting unfair trade practices, could be effectively utilized against loss leader sales. However the Federal Trade Commission is of the opinion, based on enforcement experience, that the section cannot be successfully employed except where it can be shown that the sales were made for the purpose and with the intent of injuring or destroying competition. Such proof is, of course, difficult to obtain.

Similar difficulty is involved in utilizing other applicable provisions of the antitrust laws. Their sanctions cannot be imposed without proof in each case that the loss leader sales did, in fact, result in a tendency toward monopoly or that they did, in fact, lessen competition substantially or produce some other forbidden result.

Perhaps the situation could be alleviated by imposing a ban on sales below cost. Admittedly, such legislation would have limited value because there are indications that many loss leader sales, perhaps most, are conducted at prices which, though well below regular levels, are nevertheless above cost. Moreover, I recognize the difficulties entailed in trying to devise a clear and workable statute prescribing all loss leader sales, and it is not my intention at this time to recommend any specific method of dealing with loss leaders or sales below cost. Rather, my purpose is to point out the scope of the problem which these practices present to small retailers and to emphasize its importance. With respect to the form which loss leader action should take, I would be guided by the views of the Federal Trade Commission.

I trust that you will find the foregoing comments helpful in your consideration of H.R. 3669 and related bills.

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. STAGGERS. The first witness at this time will be our colleague from Indiana, Congressman Ray J. Madden, who has asked to appear first because he has other matters he must attend to.

Mr. Madden?

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

Mr. MADDEN. Thank you.

Mr. Chairman and members of the subcommittee, your cooperation in holding these hearings 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.

This bill last year obtained, after lengthy hearings, a favorable report from both the House Interstate and Foreign Commerce Committee and from the Rules Committee. It also obtained a favorable report from a special subcommittee of the Senate Commerce Committee when our Congress adjourned.

Although the leadership was willing to bring it up on the floor of the House, but, on account of the fact that the subcommittee of the Senate had reported it out, but the full Senate committee, on account of the rush pending adjournment, did not report it out, and that is the reason why we were unable to consummate the legislation last year.

Obviously thorough study has been given this measure. I respect the judgment of my colleagues who have given this bill their approval. It is a question of life or death for hundreds of thousands of small businessmen. Let us do our duty to them by moving quickly and effectively to make the quality stabilization bill the law of the land.

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 for sale. The consumer will be guarded against the unscrupulous 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.

This legislation will call for no Government bureaucracy or department to supervise or enforce it.

The law will be 100 percent optional with the manufacturer, retailer, wholesaler, and consumer.

It will provide incentives for quality products to be distributed through quality-conserving resellers.

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 demand action by this Congress.

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.

The quality stabilization bill 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, et cetera;

(2) Bait and switch merchandising tactics; or

(3) Deviation from the established price.

The manufacturer who elects to use the quality stabilization law will publish the retail price or resale price range governing the sale of his product. He is given this right so that he may protect the quality of the product, the goodwill of his brand name, the ethical reseller, and the consumer. Competition will be promoted—not restricted—by the quality stabilization law, 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 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, 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. Specific provisions insure that equity be practiced by the manufacturer in his relations with his resellers and in the enforcement of the act.

Under the Quality Stabilization Act both the reseller and the public will know where each manufacturer stands as to policy and quality consistency. The manufacturer no longer will have the convenient excuse that the cannot protect good resellers against unfair competition.

Essentially this bill is only 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)) which held that the manufacturer possesses property rights in the goodwill symbolized by his trademark. This bill implements that decision by charting a specific route the manufacturer may use to protect his trademark as it moves along the channels of distribution.

CONSTRUCTIVE COMPETITION INSURED

The Quality Stabilization Act would leave the antiprice-fixing provisions of the Sherman Act intact. Any group of manufacturers or wholesalers or retailers who effect collusive price fixing between themselves would be courting prosecution under the Sherman Act.

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. However before he can use the Quality Stabilization Act, there must be goods usable for the same general purpose available to the public from other sources. The brand name owner's product must be in free and open competition.

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, or age, by bait and switch merchandising techniques, or by selling that brand name product at other than the manufacturer's established price.

THE CONSUMER'S INTEREST

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 by inferior products or junk merchandise at the regular or higher price.

It does not take long for that honored product to lose customers. Soon the loss-leader advertiser drops the brand name product and picks up another quality product to pack temporarily 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 retailman.

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.

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 discount 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.

This bill will help sustain, in a positive way, our brand name system of distribution that has in the past enabled legitimate retailers and manufacturers to build a successful marketing economy second to none in the world.

Opponents of quality stabilization legislation attack it by smear propaganda, identifying it with fair trade and price fixing. Anyone who reads and studies this bill can easily determine for himself that no provision in the bill identifies it with fair trade or even remotely with price fixing.

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 reputation.

HELP EMPLOYMENT

In urging speedy consideration of this bill by this committee I direct your attention to the fact that unrestrained price slashing disables labor, industry, resellers, and the public. Unless the quality stabilization bill is enacted, our entire economy will deteriorate at a time when our President is asking for economic growth to strengthen our Nation for survival.

I represent the great industrial Calumet region of Indiana. In recent years consumers 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 before this 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 hurst most. Congressman John Dent, our colleague, will testify as to pressures upon our production economy resulting from the jungle merchandising prevalent today.

In conclusion I call to your attention that almost 70 national trade and professional organizations have endorsed the quality stabilization bill. These include:

National Retail Hardware Association.
National Office Machine Dealers Association.
Independent Garage Owners of America.
National Association of House to House Installment Companies, Inc.
National Sporting Goods Association.
National Association of Retail Clothiers & 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 & Office Equipment Association.
Wholesale Stationers' Association.
Toy Wholesalers' Association of America.
Billiard and Bowling Institute of America.

Gift and Decorative Accessories Association of America.
Marine Manufacturers Safety Equipment Association.
National Association of Sporting Goods Wholesalers.
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.
National Industrial Distributors Association.
Christian Booksellers Association.
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 & Equipment Manufacturers Association.
North American 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.
National Marine Products Association.
National Association of Retail Druggists.
Paint and 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.
Manufacturing Jewelers & Silversmiths of America.
Laundry and Cleaners Allied Trades Association.
Luggage and Leather Goods Manufacturers Association.

I call further to your attention that this is strictly nonpartisan legislation. Eleven U.S. Senators of both parties have cosponsored the quality stabilization bill, and approximately 25 Members—from both parties—have introduced the identical bill in the House of Representatives.

I remind you again of the approval given this measure last year by your committee, by the Rules Committee, and the special subcommittee of the Senate.

And I urge you to think of the purposes of the bill and its goals not in terms of theory, not in terms of statistics, but as a measure affecting people of flesh and blood with a real problem of survival or failure in

a business that is perhaps small, yet still a precious thing to them. It is not coincidental that the thousands upon thousands of members of these 70 national associations view the quality stabilization bill as the one essential piece of legislation before this Congress.

I thank you, Mr. Chairman.

Mr. STAGGERS. The Chairman appreciates our colleague taking this time to appear before us. I might state that Mr. Madden is also the author of the bill H.R. 3670. Do you have any questions, Mr. Dingell?

Mr. DINGELL. Yes, I want to welcome our old friend back to the committee. I am rather distressed, however, over your statement:

> Opponents of quality stabilization legislation attack it by smear propaganda, identifying it with fair trade and price fixing.

I am sure the gentleman knows many in the House of Representatives who are more opposed to this legislation than I. I was wondering if he was accusing me in this statement of "smear propaganda"?

Mr. MADDEN. No, I am not accusing my distinguished friend of that, but I do know——

Mr. DINGELL. I find it very distressing to be accused of smearing.

Mr. MADDEN. I would like to answer your question, if I may. I found out that some of the opponents of this legislation have——

Mr. DINGELL. Do you refer to me?

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

Mr. DINGELL. Do you refer to me, first of all?

Mr. MADDEN. No, no, no. I am excluding you 100 percent.

Mr. DINGELL. Then I have not smeared by calling it fair trade and price fixing.

Mr. MADDEN. I say they may not consider it a smear, but I was against fair trade, as you know, and am against it today, but I am very much in favor of this legislation because it is not fair trade or it is not price fixing, but I do know that opponents of this legislation through publicity and otherwise are using that term against the legislation and I call it a smear against this bill.

I think it is a smear because it should not be applied to this bill.

Mr. DINGELL. I am going to make the statement, then, that this legislation is price fixing. Am I smearing it?

Mr. MADDEN. Well, yes, you are smearing it.

Mr. DINGELL. I am smearing it?

Mr. MADDEN. Yes, when you say it is price fixing, because it is voluntary. Mr. Chairman, it is voluntary.

Mr. DINGELL. Now, just a minute.

This bill authorizes the manufacturer to fix the price, is that not right?

Mr. MADDEN. It is a——

Mr. DINGELL. Yes, or no? It authorizes——

Mr. MADDEN. He can set a price on a stabilized product that he wants to protect so he can continue to maintain quality.

Mr. DINGELL. That is right. He fixes the price?

Mr. MADDEN. That is right. He sets the price but under the bill if there is no similar product on the market in the area he cannot.

Mr. DINGELL. When he fixes the price, that is price fixing, is it not?

Mr. MADDEN. Well, he fixes price on that particular article, but he can have——

Mr. DINGELL. Just a moment. When he fixes price——

Mr. MADDEN. On that particular article, yes.

Mr. DINGELL. Right, that is price fixing. Now, fair trade is also price fixing, is it not?

Mr. MADDEN. Yes.

Mr. DINGELL. Fair trade is also price fixing?

Mr. MADDEN. Yes.

Mr. DINGELL. So this bill is price fixing; fair trade is price fixing.

Mr. MADDEN. Fair trade was mandatory.

Mr. STAGGERS. Just a moment. I do not believe that two of you can talk at one time, and I believe that one must have the floor. Now, John, go ahead. If you have a question to ask, ask it.

Mr. DINGELL. Now, this bill is price fixing. You have already conceded that. Fair trade is price fixing. You have conceded that. Therefore, this bill and price fixing are one and the same, are they not?

Mr. MADDEN. No, no. Under this bill it is 100 percent optional. Under fair trade it was price fixing because it was a blanket price fix. A manufacturer can put out several articles, but if he wants to protect his brand name, he has an option to say that that must be sold at a certain price, so he can maintain the quality, and labor that is involved in making the article. He can then protect his brand name and his product by stating that a certain price must be maintained if the retailer exercises the option and sells the product. The manufacturer can manufacture a similar article and put it on the market without placing the product under quality stabilization.

Mr. DINGELL. You concede that this bill is price fixing?

Mr. MADDEN. No; I do not. I concede that a manufacturer has a right to fix a price on a quality article that he elects—optional—to put under this law.

Mr. DINGELL. Is that not true under fair trade?

Mr. MADDEN. No; not under fair trade.

Mr. DINGELL. Is that not true under fair trade?

Mr. MADDEN. It is a straight proposition under——

Mr. STAGGERS. I did not get that statement.

Mr. MADDEN. Under fair trade it is more or less of a straitjacket proposition.

Mr. STAGGERS. Are you interpreting the bill that is up before us that there is an option?

Mr. MADDEN. What?

Mr. STAGGERS. Does he not have an option under fair trade?

Mr. MADDEN. In certain areas; yes.

Mr. STAGGERS. I just wanted to keep the record straight. Do you have any further questions?

Mr. DINGELL. No further questions.

Mr. STAGGERS. Mr. Glenn?

Mr. GLENN. Mr. Chairman, just let me compliment our colleague. I think this is a very fine statement. It think it is very logical, and I think it covers the subject very well.

Mr. MADDEN. In closing, let me say, and I would like to invite my good friend, John Dingell, some time to come with me to Gary, Ind. I would like to take him up and down Broadway and Washington

Street and see dozens and dozens of stores that are closed just on account of what we are complaining about here today, and, no doubt, maybe this same thing exists in his district. I do not know, but it does in mine. This legislation will help the small manufacturer, retailer, and consumer.

Thank you.

Mr. STAGGERS. Mr. Van Deerlin?

Mr. VAN DEERLIN. No questions, thank you.

Mr. STAGGERS. Mr. Keith?

Mr. KEITH. No questions.

Mr. STAGGERS. Mr. Curtin?

Mr. CURTIN. No questions.

Mr. STAGGERS. I thank you very kindly for this dissertation, Ray.

Mr. MADDEN. Thank you.

Mr. STAGGERS. The next witness will be our colleague from the Senate, the Honorable William Proxmire, Senator from the State of Wisconsin.

Senator, you are welcome to the committee.

STATEMENT OF HON. WILLIAM PROXMIRE, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator PROXMIRE. Thank you very, very much, Mr. Chairman. I appreciate your letting me appear. I apologize for not having copies of my statement. Unfortunately, we had to put this together in a brief period, and I have one copy for the reporter.

In the first place, I have a short statement; it is only four pages, double spaced; but I would like to say, if I might, in reply to the distinguished Member of the House, Mr. Dingell, that I would agree with Mr. Madden wholeheartedly. Mr. Madden has been a great champion of this bill. I think he has done a marvelous job. I feel that in a real sense this is not price fixing, because page 2, lines 12 to 15, in the bill——

Mr. STAGGERS. I would rather you give your statement, if you would, and then we will propound questions.

Senator PROXMIRE. All right, sir.

No measure before the Congress this year, or last year, or in the past 20 years will do more for the benefit of more small businesses than the quality stabilization bill which I support today.

This is a bill 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.

Of all the areas of American business, the retail stores have been the most characteristically small business. These retail stores are in trouble, and I mean serious trouble, today, as I am going to indicate. 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.

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 Ameri-

can 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 small 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 or big discount house, even if less efficient, can engage in price-cutting operations until the little business is driven out.

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. Unfair practices increase the rate of failure 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 drugstores 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.

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 these 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 photo dealer—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 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.

Competition is much more than price competition. There is competition for location, competition for service, competition in all kinds of ways. But price competition can destroy other kinds of competition. This bill's purpose is to continue competition on the basis of availability to the consumer of our honored brand-name products in the broadest possible, yet fair, way.

The New York Times, in its August 19 issue last year, reported that the New York metropolitan area, some 10 years ago, in 1950, had 153,000 shopkeepers; that is, 153,000 people who were classified as managers, corporate officials, and proprietors in retail trade. By 1960, 10 years later, although the population had increased substantially, and although sales had enormously increased, the number of retail merchants had dropped from 153,763 to only 66,474. In other words, there are now fewer than half as many small business retail operators in New York as there were 10 years ago. This is perhaps our greatest retailing area in the country.

It seems to me that this startling, stubborn fact—that small business simply is not surviving in the retail area—should be brought home to the American people and to the Congress.

This quality stabilization bill is not only designed to help eliminate pricing practices that so damage both the brand name owner and the ethical retailer, this bill is also designed for protection of the consumer.

Paragraph 8 is the heart and soul of this bill. Paragraph 8(A) deals with bait-merchandising practices and (C) deals with misrepresentation. Thus, two-thirds of the practices at which this bill is aimed are designed primarily to protect the consumer.

Add to this the further provision of paragraph 8, giving the consumer a right of action where he has been injured as the result of misrepresentations by the manufacturer as to the size, capacity, quality, condition, model, or age of the goods, and it should leave no doubt in anyone's mind that this quality stabilization bill is indeed consumer oriented.

I assure you I intend to work hard for the passage of this quality stabilization bill. I urge you to give it favorable consideration in your subcommittee at the earliest possible date.

I might say, Mr. Chairman, that last year the Senate subcommittee reported this bill to the overall committee by a unanimous vote, 4 to 0. It is my understanding that, as Mr. Madden said, Senate floor action was not taken because it was late in the session, and the bill never did reach the Senate floor. It never did come out of the committee.

Now, if I could be permitted to, I would like to make just one brief statement in answer to our distinguished colleague, Mr. Dingell, for whom I have the greatest respect. He is an outstandingly fine Congressman.

I want to call to your attention, Mr. Dingell, page 2, lines 12 to 15, which say:

> If 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 are in free and open competition therewith—

then the price may be established.

Now, what this means, it seems to me, is this is not price fixing in the sense that any manufacturer is able to fix the price of all toothpaste or fix the price of one toothbrush or anything of that kind. He can establish his own price, but he can only do that when his commodity is in competition with other goods, and when he does that, it is at his own risk, and he recognizes that if he prices it too high, he is not going to have the market.

I want to thank you, Mr. Chairman, for this opportunity to appear. I appreciate it very much.

Mr. STAGGERS. Thank you, Senator.

I will ask you this:

Did you introduce a bill on the Senate side?

Senator PROXMIRE. I was a cosponsor; yes, sir.

Mr. STAGGERS. You are a cosponsor?

Senator PROXMIRE. I think Senator Humphrey is the principal sponsor. I have introduced this bill, or a similar bill, in the last three sessions, along with Senator Humphrey and Senator Capehart, Senator Scott, and others.

Mr. STAGGERS. I notice that you say the chainstores are the ones who are driving small businesses out of business.

Senator PROXMIRE. Well I feel that in recent years it has been the huge discount houses that are, perhaps, responsible to some extent, although you cannot blame them. I think that they are doing a perfectly understandable job and a good job, and, after all, a business enterprise exists under our laws and people can go in and make honest money by competitive action—that is legal, they have every right to do it.

But I feel that in some cases these methods have been very deceptive and people have been lured into these stores with the notion that they are getting a bargain, and if they do very careful, responsible price comparison, they will find that the prices they pay are no lower in many cases than they pay elsewhere.

But you know the old system. There will be an item that is sold at $50 with $88 crossed off, the feeling that you get a big reduction in price, but actually a misunderstanding on the part of the purchaser.

Mr. STAGGERS. I would like to clear this up. In your direct pre-

sentation you maintain that the chainstores and now you say, "the discount houses." We do not have any discount houses in our area. We, however, have chainstores operating there. Yet we have a lot of small groups that are going out of business. Could we attribute that to the activities of the chainstores?

Senator PROXMIRE. I think that there are many reasons for it. I think that one of the principal reasons, however, is the fact that the manufacturer is not able to establish a price for his competitive product that will enable the little businessman to have an adequate margin so that he can live, so that he can continue to exist.

Mr. STAGGERS. Do not some of the chainstores do this: buy from the big producers and then resell under their own name many of these products, such as, for instance, Sears buys from one of the tire companies and sells the tire, then, under their own name?

Senator PROXMIRE. I have absolutely no objection to that. Under this bill they would be free, as long as they put their own name on merchandise, they can make any price they want to. But it is my understanding that, by and large, when this is done, usually—if you study these very carefully—I am not an expert in this field, but I understand the price advantage is not great, the price advantage to the consumer, if there is any at all, indeed.

What I am talking about is when they sell under the established brand name, and they sell a few commodities, and usually they are very few, for less in some cases than the ordinary retailer can pay for them. But they sell enough to get people into the store.

Then, when they come into the store, it appears that everything is a bargain, because they have it marked down in a way that I do not think is responsible and in some cases not honest.

Mr. STAGGERS. I might say to you, Senator, I will listen to this committee, as other members will, and then make up my mind.

Senator PROXMIRE. Thank you very much, Mr. Chairman.

Mr. STAGGERS. When you say the chainstores, the big producers of this Nation sell to the large retailers, and the chainstores have a far-reduced price as compared with the small businesses.

Is that not the practice—that they are sold to them at a greatly reduced price?

Senator PROXMIRE. Yes. I think this is a difficult area to make a completely fair judgment. I think that you can make a justification for their selling at a lower price if there is real economy in the quantity which they sell, but I think that there are many cases where this is because of the economic power of the particular chain operation.

In other words they drive a very hard bargain, so that some manufacturers might sell to the chain at a price which cannot be justified on an economic basis, but it is justified on the basis of simply the negotiating power of the chain.

Now, I do not say that this bill would solve all these problems. It would not.

Mr. STAGGERS. No.

Senator PROXMIRE. But it seems to me it would permit an opportunity for the small businessman to have a somewhat better chance to have a fair and honest break.

Mr. STAGGERS. There has to be something following this bill in order to make some adjustments, probably.

Senator PROXMIRE. Yes, indeed. This is not the final——

Mr. STAGGERS. Thank you again for appearing.

Mr. Dingell?

Mr. DINGELL. Senator, I want to pay tribute to you, too. You are a very capable and dedicated Member of the other body, and I have long admired you.

You say that when goods usable for the same general purpose, if available to the public from sources other than the owner, have their prices fixed by the owner of the brand name or trademark, it is not price fixing. Do I understand that correctly from your statement this morning?

Senator PROXMIRE. I think it is fair to say it is not price fixing in the usual sense.

Mr. DINGELL. Then if a manufacturer fixes prices under those circumstances, he is not fixing prices?

Senator PROXMIRE. What I say to you, Mr. Dingell, is that everything you have bought as long as you have lived, everything that I have bought in a store as long as I have lived, has been fixed in price.

You cannot sell anything unless you fix a price on it. You and I do not go in and bargain with the retailer who is selling. He says: "If you want to buy my toothpaste, you pay 59 cents for it," and he will say that no matter what legislation we have, and he says that in the discount house. They fix the price.

Mr. DINGELL. Then this bill is price fixing after all?

Senator PROXMIRE. No, no, no. I think that this bill has nothing to do with price fixing.

Mr. DINGELL. All right, it is price fixing by the manufacturer?

Senator PROXMIRE. No. What I say this bill does is that it permits the manufacturer to establish his price, provided that price has to be established in a competitive atmosphere, and therefore it cannot really be fixed. It does not fix prices of all toothbrushes or all toothpastes or all TV sets.

Mr. DINGELL. But he can fix the prices of what he makes?

Senator PROXMIRE. Yes.

Mr. DINGELL. So it is price-fixing legislation?

Senator PROXMIRE. Well, I think we are free to call it anything we want.

Mr. DINGELL. But it is price-fixing legislation?

Senator PROXMIRE. I would say it is not because the usual understanding of "price fixing" is you fix the price of a commodity right across the board and everything that is in competition with it, just as you might fix the price of milk or wheat.

Mr. DINGELL. Then if you fix prices you are not fixing prices?

Senator PROXMIRE. He certainly is not fixing the price for that whole spectrum of commodities, no. He is establishing his own prices.

Mr. DINGELL. But he fixes prices for what he manufacturers, and this is, therefore, price-fixing legislation. That is what it amounts to.

Senator PROXMIRE. I think our positions are clear. I understand your position, and I think you are entitled to it. I disagree.

Mr. DINGELL. All right.

Now, let us get down to cases. You say goods are usable for the same general purposes if they are available to the public from sources other than the owner. Then you go on to say, "other than the owner of such brand name or trademark in free and open competition therewith." Now, what does this mean? For example, Kodak has been marketing somewhere between 85 and 95 percent of the film throughout the whole United States. Is Kodak going to be able to fix prices under this bill?

Senator PROXMIRE. Well, I think this is the kind of administrative judgment or determination that has to be made by the administrative branch and by the courts in determining where you have actual free and open competition. So people would say, where you have 85 or 90 percent of the market, it is not real free and open competition. I think you could make a strong case that way. I would be inclined to subscribe to it.

On the other hand, if you have 10 percent of the market or 5 percent of the market, in most cases you might say this is vigorous competition.

Mr. DINGELL. I see. If you have 25 percent, is that free and open competition?

Senator PROXMIRE. As I say, you cannot draw a line and say 26 is and 24 is not, or vice versa.

Mr. DINGELL. You see, you are the author of the bill. Now, we are construing the bill, and we are creating the legislative history as to what this bill means. If this legislation should become law, the courts are going to be called upon to construe this particular section to find out what it is.

Senator PROXMIRE. Yes, indeed.

Mr. DINGELL. As the author, I think you have the responsibility to tell this committee this morning what free and open competition is. That is one of the reasons you are here to testify before this committee.

Senator PROXMIRE. I understand.

Mr. DINGELL. Now, what I am trying to find out is when does it cease to be free and open competition. Is 25 percent free and open competition; 35 percent free and open competition; 45, 50 percent free and open competition, so that we know just how far price fixing under this legislation is going to be able to go?

Senator PROXMIRE. In the first place, I do not think it is price fixing, Mr. Dingell.

In the second place, I think it would be extremely unwise, improper, and incompetent for me to say that it is any particular percentage. It depends on the industry; it depends on the pattern in the industry; it depends on the history of pricing in the industry; it depends on many, many things. In some industries I think you could say a relatively small amount, 20 or 25 percent, would be monopolistic. Most of us feel that the automobile industry is very competitive, although one company has more than 50 percent of the manufacturing and sales.

So I think you cannot lay down the law and stick to it, and I think an offhand remark by me would be unwise and improper.

Mr. DINGELL. Would you say, then, that the courts should be extremely careful in construing this section, that they should construe most strictly and rigorously this section, for the protection of the small

businessman so that he cannot have the prices fixed by someone who has an unduly dominant position in the industry or who markets an unduly large percentage?

Senator PROXMIRE. I would be very much inclined to agree with that statement. I think it is a good one. I would like to see rigorous enforcement of this to see that competition is encouraged in every possible way.

Mr. DINGELL. In other words, you would try to see that this right of fixing prices under this particular section were limited only to those who are in real fact in free and open competition with a fairly large number of others equally situated. Am I correct?

Senator PROXMIRE. Yes, indeed.

Mr. DINGELL. That is very helpful.

Thank you very much, Senator.

Senator PROXMIRE. Thank you.

Mr. STAGGERS. Mr. Glenn?

Mr. GLENN. No questions.

Mr. STAGGERS. Mr. Van Deerlin?

Mr. VAN DEERLIN. No questions.

Mr. STAGGERS. Mr. Curtin?

Mr. CURTIN. No questions.

Mr. STAGGERS. Thank you very kindly.

Senator PROXMIRE. Thank you, Mr. Chairman, very much.

Mr. STAGGERS. Our next witness will be a colleague of ours from Maryland, Congressman Samuel N. Friedel. Mr. Friedel is also a member of the full committee and certainly is a very respected and highly valuable member.

STATEMENT OF HON. SAMUEL N. FRIEDEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. FRIEDEL. Mr. Chairman, I appreciate this opportunity to testify before you today in support of my bill, H.R. 3943, a companion bill to H.R. 3669, introduced by the Chairman of our full committee, to promote quality and price stabilization.

As a member of the Interstate and Foreign Commerce Committee, I listened to some of the testimony last year on quality stabilization legislation, and I am more convinced than ever that such a bill must be enacted into law to protect the consumer, as well as the small businessman, from unfair practices. It is for this reason that I introduced H.R. 3943.

There is no doubt that loss-leader advertising is one of the worst forms of unfair competition encountered by the small retailer. All kinds of small businessmen in Baltimore City have been affected by the destructive practices of loss-leader operators, and I am sure the same is true in other cities. I am convinced that their only salvation lies in the enactment of a national quality stabilization law to permit them to compete fairly in the marketplaces.

The legislation you are considering today is simply designed to strengthen our antitrust laws by stopping certain unfair methods of competition. I think we all agree that the owner of a product which bears his trademark or brand name is entitled to protect his investment in his product. My bill would permit him to do this by re-

fusing to sell to a retailer who is involved in any scheme of misrepresentation or bait advertising which lowers the price and prestige of his product. A manufacturer has a tremendous amount of work and money invested in his products before they are known, recognized, and respected as quality items by the consumer. Only after this has been accomplished does the manufacturer create a demand for his product and realize a fair return on his investment. It is wrong to permit unscrupulous operators to recoup their losses by selling these name brands at reduced prices to get the consumer into his store so he can influence him to buy unknown, higher profit goods, of questionable quality.

It is also important to note that this legislation will not require the manufacturer, the retailer, or the consumer to do anything he does not wish to do. There is no obligation upon the brand-name owner to take advantage of the rights given him under this legislation. It is inconceivable to me that the owner of a trademarked or brand-name product would not want to protect his investment as provided in my bill, but if he does not wish to do so, that is his privilege. I think it is important to remember this permissive provision of my bill.

There is no doubt that the small business people are the backbone of every community in our country. They are the citizens who provide leadership and responsibility in civic affairs. Yet cutthroat competition for the small businessman is increasing and there were more than 17,000 business failures in 1961.

I think it is time we offered these small business concerns some protection against the pricing policies of discount houses and large chainstores. Through enactment of a quality stabilization law, we will afford these small business retailers an opportunity to compete fairly in the marketplace.

There has been some discussion about the value of such legislation to the consumer, but there is no question in my mind that the housewife will be the ultimate beneficiary of quality stabilization. I recently read about a survey conducted in every congressional district in the United States to obtain consumer reaction of this type of legislation. The survey revealed that an average of 80 percent of American housewives interviewed approved of quality stabilization. This indicates to me that the consumers realize that, in the long run, there is no substitute for the reputation of the manufacturer and the quality of his product, and the dependable service rendered by the small retailer is almost as important to the consumer as a trustworthy product. Such service is usually not available from the discount house or the chainstore, which is inclined to sell the product and then forget about it.

The manufacturer of quality products, the independent retail businessman, and the American consumer are all urgently in need of an effective remedy against the predatory, unethical, and deceptive practices used by some discount and mass merchandisers. These quality stabilization bills provide the legal means to deal with this ever-increasing problem.

There is no question in my mind that quality stabilization is clearly in the national interest since its purpose is the protection, preservation, and advancement of independent retailing as we know it in

America. Such legislation will enable the small businessman to compete effectively against giant retail corporations in the sale of national brands and the consumer will be guarded against the practices of loss-leader operators who use the brand name to fool the public.

For these reasons, I urgently request that the subcommittee give favorable consideration to quality stabilization legislation so that it may be enacted into law at the earliest possible time.

I thank you, Mr. Chairman.

Mr. STAGGERS. Thank you very kindly.

I notice you refer to the retail groups of the country using this as a method of bringing in groups. Are you saying that the large chainstores are the ones who are guilty of this as a general rule?

Mr. FRIEDEL. All the large chainstores are not.

Mr. STAGGERS. You said the giant retailers?

Mr. FRIEDEL. Well, the giant discount houses.

Mr. STAGGERS. Where do you find those?

Mr. FRIEDEL. That advertise a certain product, a brand name. When the consumer goes into the store, he finds out that this product has already been sold out, and then they say, "Well, we have another product here that is much better. It is a little cheaper, a nonbrand name." Such advertising is used to bait them into the store.

Mr. STAGGERS. I understand now. That intrigues me, though. I notice that you and Mr. Proxmire use almost the same language in referring to the large groups that are driving the small businesses out of operation.

Now, where they do not have the discount houses—you have them in Baltimore and in Washington, but a lot of small communities across the land do not have discount houses. Now, we do have the chainstores. Are they the ones who are doing this, or what?

Mr. FRIEDEL. In certain instances, yes. I could cite a certain neighborhood drugstore. Now, he sells certain articles. When he buys the articles, it costs him more than the big giant retailers sell it for, and that is unfair competition. He just cannot buy it as cheap as the large chain. He cannot buy it by carload lots and get it at great discount.

Mr. STAGGERS. Some of these—I am just trying to establish this—some of these small businesses, perhaps, are inefficient for one reason or another. Are you saying, then, they should be protected in the sale of these articles up to a certain point, or what?

Mr. FRIEDEL. Competition will bring everything into line.

Mr. STAGGERS. Competition?

Mr. FRIEDEL. Competition on nationally advertised products. Now, this bill would not affect any name brands or products that are not nationally advertised, but competition will bring all the others in line that are nationally advertised.

Brand name products are the ones that are generally advertised much cheaper than the usual price to bring people into the store to sell them other products than just that one particular item.

When they advertise one well-known item at a very reduced rate, they have hundreds and hundreds of other articles that the consumer might purchase.

Mr. STAGGERS. I want to thank my colleague. Mr. Dingell, do you have any questions?

Mr. DINGELL. I am delighted to see my old friend present here before the subcommittee. I am always sorry to see him on the other side of a piece of legislation.

The gentleman expressed a great deal of concern about the little businessman. I was wondering if he wanted to endorse a section of the bill that authorizes the manufacturer or wholesaler to fix the prices at the wholesale and retail level in competition with little businessmen, rather on the little businessman with whom that manufacturer is in competition?

Mr. FRIEDEL. Where do you read that into the bill?

Mr. DINGELL. Pages 8, line 14:

All rights and remedies provided in paragraphs (7) to (17), inclusive, of this subsection, to owners of a brand, name, or trademark, shall be also available to any owner of a brand, name, or trademark who, in the sale of goods identified by such brand, name, or trademark, shall compete, at any level of distribution, with any reseller offering such goods.

Now, I was wondering if you happen to think it is a good idea that a manufacturer should have the power to fix the prices of his little wholesalers and retailers and at the same time compete with them. Do you endorse that practice?

Mr. FRIEDEL. I cannot follow your thought.

Mr. DINGELL. I know you are familiar with your bill, and I just wanted to decided whether you endorsed this particular section in your bill.

Mr. FRIEDEL. I endorse the whole bill, but I have a different interpretation than you have. I do not think this affects the small businessman. This will protect him and benefit him.

Mr. DINGELL. I see. It protects him and benefits him to have the manufacturer who competes with him fix his price. That benefits him?

Mr. FRIEDEL. What do you mean by the manufacturer competing with the small businessman? That I do not read.

Mr. DINGELL. Here it says—maybe you would like to construe this section, because it is your bill. It says here that he will have the right to fix prices.

Mr. FRIEDEL. Where do you see that?

Mr. DINGELL. It is on line 14, page 8, of the bill.

Mr. FRIEDEL. Line 14?

Mr. DINGELL. Page 8.

Mr. FRIEDEL. I want to see the word "fix."

Mr. DINGELL. It says "all rights and remedies provided in paragraphs (7) to (17)." That means fixing prices.

Mr. FRIEDEL. That is your interpretation.

Mr. DINGELL. That means recalling goods.

Mr. FRIEDEL. That is your interpretation. It does not say in the bill "fix prices."

Mr. DINGELL. Let me read this again:

All rights and remedies provided in paragraphs (7) to (17).

That is the right to recall goods, to sue, to inflict upon the small businessman a permanent injunction for violating prices and so forth

fixed by the manufacturer, to extract from him court costs and attorney's fees, will belong—

to owners of a brand, name, or trademark, shall be also available to any owner of a brand, name, or trademark who, in the sale of goods identified by such brand, name, or trademark, shall compete, at any level of distribution, with any reseller offering such goods.

Now, this means that he can compete with the man and can still fix the prices. I wonder if you endorse that.

Mr. FRIEDEL. I told you earlier I endorse the bill in its entirety. I do not say it is price fixing. You say it. I am not saying that.

Now, you just keep adding in words that are not in my bill. John, I respect you——

Mr. DINGELL. I am not referring to the fact——

Mr. FRIEDEL. I respect your thoughts and your views.

Mr. DINGELL. I am asking you whether you feel that the little man ought to find his prices fixed on the retail and the wholesale level by a manufacturer who is also competing with him at the same level, at the wholesale or the retail level?

Mr. FRIEDEL. Do you think it is fair for a——

Mr. DINGELL. Do you think it is fair?

Mr. FRIEDEL. I cannot answer you the way you want me to say it yes or no. I am saying, Do you think it is fair for a big chain store to sell a product cheaper than this little retailer can buy it for?

Mr. DINGELL. I am not talking about that.

Mr. FRIEDEL. Are you in favor of that? That is what we are trying to stop.

Mr. DINGELL. This is not the point I am discussing now.

Mr. FRIEDEL. I thought that is what you were trying to discuss.

Mr. DINGELL. Let us take a situation where you and I are in business and I am a manufacturer and you are a wholesaler, and I say to you that I am going to have a wholesale store and my wholesale operation is going to be headed by my friend, Mr. Staggers, right here, and I am going to fix all your prices under this, and I am going to determine the level of profit, markup, and so forth, that you get in your wholesale operation, and I am going to be competing with you.

Now, I am asking, Do you think that is fair? This language of the bill on page 8, lines 14 through 20, provides for exactly that.

Mr. FRIEDEL. Would you just explain? I do not know of one little county, city, or any place in the whole United States that could have a manufacturer say to a wholesaler—evidently, you are speaking of one outlet—"I am going to fix all your prices." I do not know of any place in the whole United States where that could be done.

Mr. DINGELL. Then you do not think that that is proper?

Mr. FRIEDEL. Absolutely not.

Mr. DINGELL. I see. You do not think that it is proper that a manufacturer should fix the prices of wholesalers and retailers with whom he is in open competition, do you?

Mr. FRIEDEL. Do not forget there are four or five different——

Mr. DINGELL. I am asking a different question.

Mr. FRIEDEL. It is permissive legislation.

Mr. DINGELL. I know it is permissive.

Mr. FRIEDEL. Right, and that is the only way I can answer that.

Mr. DINGELL. Do you think it is proper that it should be permissive that a manufacturer can fix the prices of his wholesaler and retailer when he competes with him? Do you think that is proper?

Mr. FRIEDEL. He is competing with his other——

Mr. DINGELL. Wait a minute. Let us not talk about whether he is doing it now or whether he is going to do it. Do you think it is fair that he should be able to do so?

Mr. FRIEDEL. Do I think it is fair for what?

Mr. DINGELL. Do you think it is fair for a manufacturer to be able to compete with wholesale and retail outlets handling his goods when he, at the same time, markets through his own distribution system that exact same item?

Mr. FRIEDEL. I think the manufacturer is entitled to a fair profit.

Mr. DINGELL. Yes, but you are not answering my question.

Mr. FRIEDEL. That is the only way I can answer it. I am not going to say what you want me to say, and you are trying to get me to say that this bill authorizes price fixing—and I am not——

Mr. DINGELL. I am not saying price fixing at all.

Mr. STAGGERS. Mr. Friedel, the question is—and I do not know whether there is any real case of it in America, but what he is saying is this: If a manufacturer——

Mr. FRIEDEL. If a manufacturer?

Mr. STAGGERS. One manufacturer has an outlet of his own, do you think, then, it is fair that he sets the price of all other outlets around the country that sell his product?

Mr. FRIEDEL. Is that the only product of its kind in the United States or does he have competition?

Mr. STAGGERS. He has a name brand.

Mr. FRIEDEL. Does he have competition?

Mr. STAGGERS. We will assume there is.

Mr. FRIEDEL. If there is only one manufacturer of the item I can see how the rights granted him under this bill could be abused. But if he has competition, there are four or five other electric razors, or whatever it might be, do you think this manufacturer is going to price himself out of business?

Mr. STAGGERS. I am not answering questions. I am only trying to interpret the question.

Mr. FRIEDEL. I cannot picture, unless there is only one product, but if there is more than one, each manufacturer is in competition, and they want to stay in business, and they are not going to price themselves out of business.

Mr. DINGELL. I would like to thank my friend. I have a great deal of personal affection and high regard for the gentleman, and I do appreciate his statement.

Mr. FRIEDEL. I wish to say the same for my colleague from Michigan. The only thing is that we just see the bill differently. We have different views and anything I say will not convince you and anything you say is not going to convince me.

Mr. STAGGERS. Mr. Glenn, do you have any questions?

Mr. GLENN. No questions of our very capable colleague.

Mr. STAGGERS. Mr. Van Deerlin?

Mr. VAN DEERLIN. I would be interested, Mr. Friedel, in having more information on this housewife survey that you mentioned. Who

conducted it and the form of the questioning and so forth. If 80 percent of the housewives of America are for this, why, there is no point in further discussion.

Mr. STAGGERS. Mr. Keith?

Mr. KEITH. No questions.

Mr. FRIEDEL. The survey I quoted from earlier in the hearing was a so-called homemakers survey conducted by the firm of Ernst & Ernst in May 1961. I have not yet been able to get a copy of the questions as Mr. Van Deerlin asked but I am still trying and will submit them to the committee if I can get them.

Mr. STAGGERS. Mr. Curtin?

Mr. CURTIN. No questions.

Mr. STAGGERS. Thank you very kindly.

Mr. CURTIN. Thank you very much.

Mr. STAGGERS. At this time I would like to call on our colleague, Mr. Glenn from New Jersey, who is a member of this subcommittee. He also has introduced a bill now being considered by the committee. I would like him to give his views on the bill..

STATEMENT OF HON. MILTON W. GLENN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Mr. GLENN. Mr. Chairman, for the sake of expediency and perhaps propriety, I would like permission to introduce my statement into the record without reading it.

Mr. STAGGERS. Thank you very kindly, and the record will so show.

(Mr. Glenn's complete prepared statement follows:)

STATEMENT OF HON. MILTON W. GLENN, REPUBLICAN, OF NEW JERSEY

Mr. Chairman and members of the subcommittee, before this subcommittee is H.R. 3669, sponsored by the Honorable Oren Harris, the chairman of the House Interstate and Foreign Commerce Committee, and perhaps 25 additional identical bills, including my own.

For the purposes of the record, I submit, in capsule form, reasons why I think this bill should be given priority and quickly enacted by this Congress.

Independent retailing in all fields is being relentlessly liquidated as the result of selective, monopoly producing price cutting known as customer bait pricing.

There may be, and probably are, other 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.

The quality stabilization bill won't cure customer bait pricing entirely, but its enactment will help curb it.

In urging approval of this legislation, 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.

And it would cost neither the Government nor consumers a single penny.

Mr. STAGGERS. The next witness is our colleague on the full committee, the Honorable John Jarman. Mr. Jarman, we will be glad to hear you at this time.

STATEMENT OF HON. JOHN JARMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. JARMAN. Mr. Chairman and members of the subcommittee, I want to thank you for extending me the opportunity of testifying in behalf of the quality stabilization bills now pending before you. As you perhaps know, I introduced one of these bills, H.R. 4703, as did many of our colleagues, including our distinguished committee chairman, Hon. Oren Harris. Let me explain briefly my position with respect to the legislation now before you.

We have seen of late, Mr. Chairman, that more and more independent, locally owned businesses are 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 drastically discounted brand-named items then are used as bait merchandise to attract the public. Followup sales of other merchandise, often of shoddy and inferior unbranded variety, are then made to the buyer who has been attracted.

In order to correct this serious situation, the bills before you would empower 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 mispresentation, bait merchandising, or 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 this light, this legislation 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, then we must accept the objective of quality stabilization—protection of valuable investments in trademarks, brand names, and goodwill from ruinous marketing tactics.

Another aspect of this bill relates 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" merchant 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 and his relationship with them is not one that is based on the profit motive alone. In these days when cheapness abounds in our society, any effort toward excellence needs to be preserved. The relationship between the main street retailer and his customer approaches a level of excellence. These measures before you would seek to maintain this valued element, along with encouraging manufacturers to strive for superiority of product and technique.

Further, Mr. Chairman, this legislation, if passed, would be permissive in its nature. 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 wholesaler 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.

Finally, quality stabilization does not seek to protect the interests of the consumer and the merchant alone. It seems to me that, in a sense, it strives to preserve an institution, a way of life, if you please. The merchant and his customer are integral parts of the American community, and when we move to preserve the structure of our communities' main street, we are seeking to maintain smalltown U.S.A. It is this heritage that has made us great; it can be protected and enhanced by the enactment of the legislation before you. Therefore, Mr. Chairman, I respectfully urge that this committee favorably report a national quality stabilization bill.

Mr. STAGGERS. Thank you, Mr. Jarman. We appreciate your appearance and testimony.

Mr. JARMAN. Thank you, Mr. Chairman.

Mr. STAGGERS. The next witness is the gentleman from Minnesota, also a member of the full committee, the Honorable Ancher Nelsen.

Mr. Nelsen, we will be happy to hear you at this time.

STATEMENT OF HON. ANCHER NELSEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. NELSEN. Mr. Chairman and members of the Subcommittee on Commerce and Finance, over a period of years, this committee has addressed itself to the competitive problems which vex the small businessman. Hearings on legislation in this area have been held in 1958, 1959, 1962, and the problem is still with us.

Now your committee resumes hearings on H.R. 3669, the quality stabilization bill, and its companion measures, including one introduced by me. I sincerely believe the quality stabilization bill is

the most practical solution yet proposed, and I urge that each of us give the necessary leadership so that it may quickly become law. There are a number of reasons for my support of this bill.

It is, to my mind, of great importance to the small businesses of this country, and particularly to the independent retailers along the main streets of thousands of smaller communities in America.

Small business is suffering today from no want of sympathy, but what seems to be lacking is understanding—realistic comprehension and honest facing up to the nature of the real challenge—a challenge resulting from a breakdown in the fundamentals of our system. As a consequence, the small businessman, merely because he is small, no longer is able to compete as he must compete if he is to survive.

This is not a question of ability, of capital, of store location, or parking facilities. It is simply a fact that the workings of the marketplace today more and more exclude the small retailer as a competitor and, hence, eliminate him as a participant in our Nation's pattern of enterprise and as a social and cultural contributor to the life of his community.

Before a businessman, large or small, can have a business and be a businessman, he must have a product to sell. What we see in the marketplace today is a purposeful and deliberate effort to take from the small independent retailer the only products which he can sell. These are the best-selling products in the marketplace, identifiable, honored, and famous brand names and trademarks.

The quality stabilization bill will equalize rights in the distribution of identified articles. It will give the small businessman—the hardware dealer, the jeweler, the druggist, the electrical appliance dealer, the book dealer, and others—the opportunity to compete, to succeed, even to flourish.

The quality stabilization bill would give nobody a subsidy. It would cost the Government nothing. It would protect the independent retailer, add dynamic incentive to the selling power of America's independent distributors, and prevent retail monopolies.

What is more, the quality stabilization bill would give certain rights to brand owners who do not own or control their own distribution system but who distribute through the hundreds of thousands of independent retailers. These rights are already enjoyed by brand owners—such as the multimillionaire and even billionaire retail chains—who own their own distribution outlets and price control their private brands.

Only last year, the Department of Commerce said, "Some 398,000 companies went out of business, 14,000 more than in 1960."

With the enactment of the quality stabilization law, more than 4 million small businessmen will have a better chance of staying alive as businessmen, and this Congress will have demonstrated to the Communist world that in America there is room for small business as well as big.

Mr. STAGGERS. Are there any questions? If not, we thank you for your appearance, Mr. Nelsen.

Mr. NELSEN. Thank you, Mr. Chairman.

Mr. STAGGERS. The next witness is our colleague from Michigan, the Hon. Elford A. Cederberg. Mr. Cederberg, we welcome you to the committee.

STATEMENT OF HON. ELFORD A. CEDERBERG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. CEDERBERG. Mr. Chairman and members of the committee, I am the sponsor of one of the quality stabilization bills on which you are now holding hearings. I support unequivocally the principle involved in these quality stabilization bills.

I do this because I am convinced that it promotes the free, competitive enterprise system. I sincerely believe that it will help make possible the restoration and maintenance of competition on a fair basis between small and large manufacturers and between small and large retailers, so far as brand-name goods are concerned.

The market for such goods is created largely by the brand-name owner, through the competitive value his brand-name product gives to the consumer.

This bill gives the brand-name owner the right to protect the market for his own brand name so that his resellers may be able to compete on even terms, one with another. The brand-name owner may elect to use the Quality Stabilization Act in the marketing of his goods, or he may ignore it.

This bill provides a simple means for protecting property rights in a brand, name, or trademark. It merely permits the owner of the brand to deny any further use of the brand to resellers who abuse and injure his good will in the brand name.

There are set out in the bill three specific grounds that permit the owner of the brand name to invoke the remedy of revocation as to practices affecting his brand: (1) bait merchandising practices; (2) selling at other than the price established for the branded product; or (3) publishing misrepresentation of the product. Resellers who utilize the product for any of these three damaging purposes may be denied their right to use the brand.

This bill applies only to competitive products that are sold under a brand name.

It would not prevent anyone from selling merchandise in whatever way and at whatever price he chooses, so long as he does not abuse the brand name and good will of another. This bill is aimed at unfair practices with respect to the use of an honored brand name. It is not directed at any particular class of reseller.

This bill will enable the retailer to sink or swim on his own competitive merits, rather than be destroyed by unfair competition. He will be given the right to fight on an honest—but unsubsidized—basis for his survival.

This bill will help eliminate confusion and loss of confidence now confronting the consumer. It will help the consumer avoid being trapped by the "come-ons" of deceptive merchandising.

And this bill will give the consumers a right of action against the manufacturer where they have been injured because of misrepresentations by the manufacturer as to the size, capacity, quality, condition, model, or age of his brand-name product.

This quality stabilization bill has my endorsement, my sponsorship, and my unreserved support. I urge speed in your consideration of it, approval of it in your report. I hope that you will soon give me the opportunity to cast my affirmative vote for it on the floor of the House.

Mr. STAGGERS. Mr. Cederberg, we appreciate your appearance before the committee.

Mr. CEDERBERG. Thank you for the opportunity, Mr. Chairman.

Mr. STAGGERS. The next witness is our colleague from the State of North Dakota, the Honorable Hjalmar C. Nygaard. Mr. Nygaard, we will be glad to receive your testimony at this time.

STATEMENT OF HON. HJALMAR C. NYGAARD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH DAKOTA

Mr. NYGAARD. I am honored to have the opportunity to appear before this committee on behalf of H.R. 3669 (which is identical to H.R. 4541, a bill I introduced covering the same subject, commonly known as quality stabilization).

Having spent a great portion of my life in operating a small retail business, I am fully aware of the benefit that this type of legislation could be to small businesses throughout the United States. Though the effects of this bill would differ from that of the Fair Trade Act which was in existence in many States a few years ago, it will provide a few similar benefits for small business, particularly those in small communities. It is to be noted that the provisions of this bill are in the main not mandatory but are meant to promote the needed stabilization.

Having been in business at the time that all protection for the small businessman was eliminated, and realizing the impact that it had upon our volume and income in small communities, I am very firmly of the belief that a bill of this nature is essential—that is, if ever again the small community is to have any encouragement in its continued existence and render the service it did for so many years to its contiguous population and that of the surrounding communities.

It is very difficult today for anyone to continue in a competitive business if the cost of acquiring merchandise from the manufacturer is not afforded to all competitors in a similar manner.

It has become increasingly apparent that since the repeal of certain legislation some products have not shown suitable proportional and qualitative improvement, as their price increase would indicate. However the manufacturer who is attempting to provide to the dealer, and in turn the customer, a high quality product that will continue to perform its intended service for an appropriate number of years, should be protected. Both he and the customer should have the type of legislation which is proposed by this bill to protect them from being drawn into the cut-throat pricing system that has developed over the years. In its turn this pricing market has caused not only the closing of the small retail business and its attendant ruination of the small community, but also the cheapening of the product by the manufacturer to meet the price competition.

Mr. STAGGERS. Thank you for your appearance and testimony, Mr. Nygaard.

Mr. NYGAARD. Thank you, Mr. Chairman.

Mr. STAGGERS. We will now hear from our colleague from the State of Washington, the Honorable Thomas M. Pelly. Mr. Pelly, you may proceed.

STATEMENT OF HON. THOMAS M. PELLY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. PELLY. The lifeblood of any nation or society is formulated by its economy.

The Constitution of the United States of America is, in fact, a formula that provides the richest lifeblood to each of the persons who make up this great country.

There is constant change. But whatever the change—of Government, of freedoms, of opportunities—whatever the philosophy or ideology that takes control, the existence of the citizen must fundamentally depend always on the flow of economic blood through the Nation's veins.

To avoid a clot or stoppage of the flow, the consumer must have a standard of value by which to purchase; the retailer must have protection to compete and the safeguard of his own integrity by the maintenance of the quality of the merchandise he handles; the distributive system must be kept clear of obstructions; and the heart of the system—the manufacturer—must has the right—yes, the incentive—to create, produce, and distribute an ever better product of highest quality.

A simple, precise bill stands today before Congress. Its sole purpose is to furnish a freedom, a right to compete by giving the manufacturer the means of controlling the use of his reputation, his brand name and its goodwill, and by giving the reseller and the consumer the privilege of making his own purchasing choice.

It is called the quality stabilization bill.

It is bipartisan.

It has my sincere support.

Mr. STAGGERS. Thank you for your testimony, Mr. Pelly.

Mr. PELLY. Thank you, Mr. Chairman.

Mr. STAGGERS. We will now hear the gentleman from Indiana, the Honorable Ralph Harvey.

STATEMENT OF HON. RALPH HARVEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. HARVEY. Mr. Chairman, I appreciate this opportunity to file a statement indicating my strong support for the quality stabilization bill, which many of us from both sides of the aisle felt justified in introducing.

The importance of this legislation cannot be minimized and I commend the House Interstate and Foreign Commerce Committee for the consideration given this bill.

In my opinion, enactment of this proposal will have a clear-cut effect on our economy, and I urge your support.

For the manufacturers of brand-name products, passage of this bill will prevent trademarked merchandise from being sold at discount prices for promotional purposes. For the legitimate merchant, it will protect the profit margin which is so vital to the success of any business enterprise. Last, but certainly not least, favorable consideration of this measure will help to restore and maintain consumer confidence in the quality of the products we buy.

Mr. STAGGERS. Thank you for your appearance, Mr. Harvey.

Mr. HARVEY. Thank you, Mr. Chairman.

Mr. STAGGERS. The next witness is our colleague from Kentucky, the Honorable Frank A. Stubblefield.

STATEMENT OF HON. FRANK A. STUBBLEFIELD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY

Mr. STUBBLEFIELD. Mr. Chairman and members of the subcommittee, I do not want any doubt in anyone's mind about where I stand on the quality stabilization bill. I am for it. I want to vote for it on the floor of the House this year. Help give me that opportunity.

I've long been committed to the principles of this bill. It restores sanity to the marketplace. It will help keep merchants in business. It will help the small towns and the communities of my district.

I think it high time that we stop discriminating against the small man.

I believe we should have some of this "equal protection of the laws" for the small businessman.

If you have adequate capital, you can already do everything lawfully that the quality stabilization bill will permit when it is enacted.

Go into one of the giant chainstores in Washington, D.C. You'll find one product after another that has the store's own label on it. Then go across the country to that chain's other stores. The prices are identical for those products.

Gentlemen, they control the price because it's their own trademark in their own stores.

But the manufacture of the famous name product who wants mass distribution through the Nation's independent merchants can't protect his retail outlets by insuring them an adequate profit. If he tries to do it, if he tries to stop the use of his product as "loss leaders," if he tries to stop the predatory merchants from getting the product, he gets hit by the Department of Justice or the Federal Trade Commission. He's committed an act of unfair competition.

And there are several other ways that lawfully the manufacturer or retailer can do what the quality stabilization bill will permit. For example, the well-financed manufacturer can consign his products through retail outlets. Or he can set up exclusive franchises. Or he can sell door to door.

This Quality Stabilization Act can't be used unless there is free and open competition. There's no price fixing under it. Every manufacturer using it has to face the tough realities of the marketplace. He'll survive or fail depending on how much he gives for how little. He's not shielded against anything.

Neither is the small merchant. He'll have to take his chances too. Many will fail despite the enactment of this bill. That's deplorable, but Congress cannot in good conscience subsidize anyone.

This Nation is great because it fights hard. But you need in every battle fair ground rules of competition. The quality stabilization bill will provide those ground rules.

Mr. STAGGERS. Are there any questions? If not, we thank you, Mr. Stubblefield.

Mr. STUBBLEFIELD. Thank you, Mr. Chairman.

Mr. STAGGERS. The next witness is our colleague from Montana, the Honorable James F. Battin. Mr. Battin, you may proceed.

STATEMENT OF HON. JAMES F. BATTIN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MONTANA

Mr. BATTIN. Mr. Chairman, I am for the quality stabilization bill. I have joined about 25 of my colleagues in the House in introducing this much-needed measure.

Enactment of the quality stabilization bill will serve the consumer. He may select, under this act, products of top value, which is the quality of the product as related to its price. Or he may select those products made strictly to sell "at a price." This act can't be used unless there is free and open competition. That guarantee under our free competitive enterprise system will benefit, as always, the consumer. It gives the people of our Nation the highest standard of living ever enjoyed by any nation or any people at any time.

Enactment of the quality stabilization bill will help the American wage earner. It will help stabilize employment and give the wage earner more in the marketplace for the dollars he earns. It will help the wage earner because it, too, will help the employer, and the health and prosperity of the wage earner and the employer are interdependent.

Enactment of the quality stabilization bill will help the small businessman. The small merchant with limited dollars will be able to compete with the giant. The predatory merchant and the bait advertiser will be checked by this bill.

Enactment of the quality stabilization bill will help the manufacturer safeguard his property rights in his brand name. This bill, in providing the incentives of our free enterprise system, will promote the making of the best possible products because under the Quality Stabilization Act the reputation earner thereby can be protected.

I urge your quick and favorable consideration of the Quality stabilization bill. It will serve the Nation well.

Mr. STAGGERS. Mr. Battin, we are glad to have your testimony on this legislation.

Mr. BATTIN. Thank you for the opportunity, Mr. Chairman.

Mr. STAGGERS. The next witness is our collague from Indiana, the Honorable Richard L. Roudebush. Mr. Roudebush, you man proceed.

STATEMENT OF HON. RICHARD L. ROUDEBUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. ROUDEBUSH. I am glad to be one of the many sponsors of the quality stabilization bill. I support it because I see what is happening to the small stores, and the good people that run them, back in the Sixth District of Indiana.

I don't believe there is anyone that knows how long the small independent merchants will be able to survive in what are appropriately called the Hometowns of America. Because they're dying awfully fast. These small merchants, these honest people, are confronted by giants.

Mass merchandiser, they call these giants. Turnover is their gospel, but service to the community is rarely in their handbook of operations. The loss leader is their formula; but service on the faulty product is usually someone else's responsibility. Huge capital is only one more of their weapons of assault; but credit to the consumer who is in hard luck is not permitted.

Perhaps the Quality Stabilization Act will not save even one independent merchant. Even so it still should be enacted. Because we owe it to these fine people who have helped build this country and given the leadership that built its communities to at least be given, in turn, a fighting chance of survival. I sincerely believe it will help the small businessman survive because most of them are efficient merchants.

This quality stabilization bill contains not one penny of subsidy to the small man. It gives him only a chance to compete on a fair basis by eliminating unfair competition.

The discount move toward monopoly has mushroomed to mammoth proportions. Discount store enthusiasts say they will take over, lock stock and barrel, before 1970, 80 percent of the retail business of the country.

E. B. Weiss, vice president of Doyle, Dane, Bernback, Inc., in his study entitled "Marketing's Stake in the Low-Margin Retail Revolution," predicted that by 1966 about 50 giant retail organizations will control 50 percent of the Nation's total retail volume in practically all major merchandise classifications.

Mike Goldgar, chairman of United Star Cos., Atlanta, Ga., predicted in an article appearing in Home Furnishings Daily of February 13, 1962, that—

> the discount field in 1972 will consist of 500 stores, averaging 200,000 square feet. They will operate on a flat gross margin of about 25 percent. Groceries, run as a subsidy department, will account for 30 percent of total volume, while approximately 45 percent of all soft goods, including fashion merchandise, will be produced abroad.

One huge discount chain, Jubilee Cities, lays it right on the line as to its practices. Its president, Lawrence Altman, was interviewed in the December 1961 issue of the Discount Merchandiser, and here is what Mr. Altman says:

> Question. What about traffic appliances? Are you interested in carrying these?
>
> Answer. Yes. As a matter of fact, we plan to own and operate our own traffic appliance departments. It will be simply a loss-leader operation. We are going to take a percentage of the store items that will identify value and use them as giveaways to build an image. When we get to soft goods, we give them a quality image at low prices. If you see our advertising you will understand that we sketch our own fashion ads. We think that will build up our fashion image throughout the store. Our concern is to make a profit through volume.

Thus Mr. Altman confirms the use of two ingredients in their merchandising formula. The first is the low price, oftentimes a loss-leader baiting price, used in part to give the impression that all the store's prices for all its multitude of products are likewise bargains. The second ingredient is the use of a reputable brand name as the bait.

The pricing policies of the discount houses do present deceptive attractiveness to the public. But the long-range result is almost certain to be a reduction in competition—and greater monopolistic concentration in distribution. This clearly is not in the public interest.

Mr. STAGGERS. The committee appreciates your appearance, Mr. Roudebush.

Mr. ROUDEBUSH. Thank you, Mr. Chairman.

Mr. STAGGERS. The next witness is our colleague from the State of Washington, the Honorable Walt Horan.

STATEMENT OF HON. WALT HORAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. HORAN. I want to thank the members of the committee for affording me the opportunity to appear before you on behalf of the legislation you are considering. In these days of "controlled deficits" and managed unbalanced budgets, we are all necessarily concerned with the fiscal situation of our Nation. It is not a good situation.

The legislation before you should aid greatly in strengthening one of the major segments of our country's domestic economy, the small businessman. I have sponsored legislation in the past which is designed to allow a tax break for the small businessman. We in the Congress frequently consider legislation designed to strengthen the economy of the small business community. I feel that the legislation before you today, if passed, will provide a real boost to our Nation's small business economy.

Our trademark system provides incentive to manufacture and distribute products of greatest value and dependability. Under present laws, no adequate provision is made for the protection of goodwill in the manufacturer's trademark. This legislation will benefit the manufacturer, small business retail outlets, and the consuming public.

The manufacturer has a heavy investment in plant, equipment, inventories, and national advertising. He must keep his workers employed and his factory busy.

Trademarked products allow him to protect his investments. But, when a popular trademarked product is used as bait to attract customers, retailers are forced to abandon the product as unprofitable. The loss of public confidence in the trademarked product through sale by nonservice-type retailers, coupled with the loss of support for the product on the part of retail sellers, greatly affects the manufacturer. This legislation will enable the manufacturer to protect his property rights in a trademark.

This bill will also allow small businessmen to compete on a more equitable basis with nationwide, large firms.

Mr. STAGGERS. Thank you for your apperance and testimony, Mr. Horan.

Mr. HORAN. Thank you, Mr. Chairman.

Mr. STAGGERS. The next witness is another colleague from the State of Washington, the Honorable Catherine May. Mrs. May we are glad to welcome you to the committee.

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

Mrs. MAY. Mr. Chairman and members of the subcommittee, I appreciate the opportunity to submit a statement in support of the quality stabilization bill of which I am a cosponsor having introduced H.R. 3745 during the current session of Congress. The provisions of H.R. 3745 are identical to H.R. 3669, the quality stabilization bill introduced by the distinguished chairman of this committee, Mr. Harris.

Perhaps the most significant reason that I am an ardent supporter of the quality stabilization bill is that I am a housewife who demands quality in the products I buy. There is nothing that disturbs me more when I go to the market than to find that I have been tricked into believing I am purchasing a quality product when, in fact, the product is inferior.

It has been my sad experience as a housewife to find a great deal of evidence of dishonest and price-cutting practices that are destroying the goodwill symbolized by brand names and trademarks, and I am seriously concerned to find that parasitic practices are on the increase. Too often we find the emphasis in marketing is shifting to the "price" and the "gimmick" and it is the consumer who is cheated because it is the quality of the product that suffers. Misuse of brand name associations and trademarked products should be of serious concern to the Congress. Resellers who have helped the manufacturers to establish honored brand names and trademarks are today finding that they must shift their emphasis to cope with price and gimmick selling in order to stay in business.

It is not only the consumer who suffers but it is also the resellers who actually would prefer to engage in demand-creating activities that emphasize quality and service at a fair price.

My alarm is also 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.

I feel that the quality stabilization bill provides the remedy and that Congress has the responsibility to act to protect our brand name system of distribution. My mail indicates that my constituents agree. Businessmen in nearly every category have informed me of their support for the quality stabilization bill. They tell me the need is desperate. But these same retailers have a long-range interest in serving the needs of the homemaker.

I am but one of the homemakers of America but I feel that other homemakers like myself want to know more about where they stand when they go to the market. We want assurances that we get the same top quality and price as any other consumer. Our chances are far better when the manufacturer is permitted to stabilize his prices.

As a person formally involved in the field of advertising I know that a very high percentage of demand for commodities is tied to brand names and trademarks. A very important part of the small business commodity is geared to the advertising, promotion, and distribution of brand name and trademarked products. The ability of businessmen to identify themselves with various brand names, with honored trademarks, has helped to establish their business. invest their

savings, build buildings, expand, remodel, increase employment, and embark on long-range plans of operation.

The quality stabilization bill provides an immediate answer to the urgent call from citizens and from businessmen to whom we must look for a thriving and successful business community. I sincerely urge this committee to favorably consider the quality stabilization bill.

Thank you.

Mr. STAGGERS. We appreciate your testimony, Mrs. May.

Mrs. MAY. Thank you, Mr. Chairman.

Mr. STAGGERS. The next witness is our colleague from New York, the Honorable Emanuel Celler. Mr. Celler, you may proceed.

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

Mr. CELLER. H. R. 3669 is the latest version of that hardy perennial, a national "fair" trade bill, to permit, indeed encourage, retail price fixing.

Concealed as usual behind a fog of euphemisms, this consumer price-increase bill is presented to you in this session, as in the last session, dressed up in the seductive sheep's clothing of a "quality stabilization" bill. Last year's "quality stabilization" price-fixing bills contained a large economy-size preamble of "unfair" trade practices the bills purportedly would have prevented. At that time I suggested that the length of the preamble gave rise to the inference that a black-and-white animal resided in the bill.

This year there is no such covert attempt to conceal the price-fixing purpose of this obnoxious legislation. Nevertheless a small dose of Chanel No. 5 has been applied to this black-and-white animal by euphemistically dubbing it a "Quality Stabilization Act."

When a cat would eat her kittens, she calls them mice.

H.R. 3669 is as drastic a "fair" trade price-fixing bill as has ever been proposed.

Before pointing out its particular features, which are the bases of this assertion, I purpose to deal with the main thrust of the bill.

I. IN THEORY AND PRACTICE THESE BILLS ARE AGAINST THE PUBLIC INTEREST

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. This bill would gouge out a large hole in our antitrust laws.

"Fair" trade was spawned by wholesale and retail merchant associations, primarily the National Association of Retail Druggists, to permit vertical price fixing in the depression days, when the Federal Government was sanctioning horizontal price fixing by manufacturers through NRA. 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 early 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 artificially high price.

A. DETRIMENT TO THE CONSUMER

The history of the last two decades has demonstrated that "fair" trade laws work to the detriment of both the consumer and the small businessmen purportedly protected by them. Most impartial commentators have condemned them. In some 24 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 bills, 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 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. On no item did I pay less than 10 percent more in a "fair" trade State than in the District and on some items I paid as much as 53 percent more. My statement to the House 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.

There were 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.

I am told, moreover, that in 1960 there were striking differences between fair trade and nonfair trade prices as follows, in the following nonfair trade States:

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., for example, an invalid 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 $8.75; Orinase for $5.25 instead of $6.75; Unicaps for $2.69 instead of $3.11; Theragran for $8.19 instead of $9.45. At the hearings on H.R. 6245 before the Antitrust Subcommittee last year, Senator Kefauver noted that Merck charged the retail druggist $170 for 1,000 Prednisone tablets whereas the fair trade minimum retail price is $255. Senator Kefauver added that Ciba sells 1,000 Serpasil tablets to the druggist for $39.50, while the fair trade minimum is $65.83.[1] The hearings of the Senate Antitrust and Monopoly Subcommittee on the drug industry, and of the House Antitrust Subcommittee on H.R. 6245 last year, abound with instances of the astronomical profits of drug manufacturers.[2]

As noted below, these very drug manufacturers would be empowered by this bill to soak the invalid by enforcing artificially inflated retail prices over and above the extortionate prices charged to the retail druggist.

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.

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[1] On Apr. 9, 1963, Senator Kefauver, on the floor of the Senate, noted that Ciba, the producer of Serpasil, had a markup of almost 1,500 percent.

[2] While H.R. 3669 would exempt sales of prescription drugs, it would be wholly unrealistic to expect this exemption to survive in view of the sponsorship of this legislation by the NARD. The Senate bill, S. 774, significantly has no such exemption.

In September of last year I engaged in another shopping excursion. What did I find? For 51 cents I was able to buy Coricidin (25's) in the nonfair trade District of Columbia, but I had to pay $1.08 in Maryland (fair trade). I paid $1.77 in the District for 100 Unicaps and $3.11 for the same amount in Maryland. Bayer aspirin cost me 99 cents in Washington, D.C., and $1.48 in Maryland. I paid 54 cents for Phillips milk of magnesia in the District of Columbia and 63 cents in Maryland. The economy size Ipana toothpaste cost me 60 cents in the District, 69 cents in Maryland; 10 cubic centimeter units 40 Protamine Zinc Lilly insulin cost me 99 cents in the District and $1.48 in Maryland.

Finally, I bought something dear to the heart and gullet of many of us. I purchased a pint of Old Crow (only 86 proof, I may add). In the District it cost me $2.30 (including 7 cents tax); in Maryland, $3.07 (including 9 cents tax).

Thus, the same items which could be bought in the nonfair trade District for $7.20 cost $10.89 in the fair trade State of Maryland. This means that if during the year I had paid $70 for these items in the District, in Maryland the cost would have been over $30 more for the same items.

Last year, at hearings on H.R. 6245 before the House Antitrust Subcommittee, there was a great deal of testimony to the adverse effect on ill and elderly persons of the high price of drugs. I think that each of us in Congress should hesitate to add to the burden 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?

We are told that the consumer need not worry since it is effective only when he can buy "goods usable for the same general purpose" as the price-fixed item. But this is small comfort indeed when, as most often happens, both items are price fixed. And the Lord only knows to what extent even this vague limitation applies where a price is fixed on several items sold as a package.

These bills will increase prices to the consumer.

B. DETRIMENT TO THE MERCHANT

And what have these fair trade laws done for the small businessman? 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 his 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. And now the proponents of these bills, in the name of free enterprise, would impose upon businessmen and the public alike socialism in the form of federally supported and enforced price fixing.

Make no mistake, this bill is not only a consumer price increase bill, it is an anti-free-enterprise bill. The retailer cannot set a price on

what he sells based upon his own efficiency, the cost savings that may be available to him because of self-help, long hours, use of cost-savings devices, selling for cash, or what have you. He is instead to become a slave of the manufacturer, and of his competitors, who wish to keep him at their level.

Recently, in *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, the defendant argued (p. 524) that the retailer "is but a 'conduit' for the supplier"—in that case the Sun Oil Co. The Supreme Court replied (p. 529):

> Having consciously chosen not to effect direct distribution through wholly owned and operated stations, Sun cannot now claim for itself the benefits of such a system * * *.

This bill, by giving the big manufacturer carte blanche to engage in vertical price fixing, would indeed confer on the big manufacturer "the benefits of such a system," leaving the burdens to the small retailer who would become a mere "conduit" or "outlet" for his supplier's goods at prices dictated by the supplier. If the retailer should insist on setting his own competitive price, this bill would permit the large supplier to summon the Federal courts to his aid in subjugating the retailer into economic serfdom. I should think small businessmen would be appalled at this prospect.

The Supreme Court of Pennsylvania only last month pointed out how fair trade laws shackle, if indeed they do not strangle, small businessmen. In *Meade Johnson & Co.* v. *Breggar* (CCH 1963 Trade Cases, par. 70, 721), the Pennsylvania Supreme Court said:

> Price fixing is at its best a drastic curtailment of competitive free enterprise, one of the main pillars of support of the entire American economic structure. At its worst, it can become a straitjacket on initiative in business, resulting in monopoly manacling progress so as to serve a possible conspiratorial status quo.
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> * * * * * * *
>
> The very idea that a commercial entity may hold in one fettering price-fixing grasp all businessmen engaged in vending a certain product, just as a herdsman holds lassoed cattle on the plains, offends against the most elementary concept of a free and independent society. The Fair Trade Act is not only in derogation of the common law, it is in defiance of principles which the Federal Government has on countless occasions enunciated in its antitrust legislation and litigation.

Since references are often made to discount houses at these hearings, a few words on that subject may be in order.

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 * * *.[3]

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

Whatever may be said of discount houses as such, they have curbed inflationary prices and afforded 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 point out that price cutting is simply good, old-fashioned free enterprise, so long as it is not predatory. Since when, may I ask, has price competition become "unethical"? Most new types of retailing, including the department store, the mail order firm, and the supermarket, have started as price cutters. Therein lies their appeal to the public. The widespread popularity of discount houses, supermarkets, and department stores today shows that the public—your constituents and mine—is vitally interested in the savings to be achieved through price competition.

Last year, the National Appliance & Radio-TV Dealers' Association went on record as favoring this legislation. 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 leaves the consumer with more money to make additional purchases. Parke, Davis not long ago sent out more than 200 warning letters in the New York area and started 123 suits. Yet in a recent case it was shown that in at least 100 instances 89 retailers had refused to be bound by Parke, Davis' fair trade prices.

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.[4] 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 in the hearings of the Senate Antitrust and Monopoly Subcommittee and of the House

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[4] Compare Wall Street Journal, Mar. 21, 1963, p. 2: "'We have shoppers shopping all our dealers to see if they are selling below the agreed limit,' says one distributor."
See also *Mead Johnson & C.* v. *G–E–X Inc.*, of Albany (N.Y. Sup. Ct., Albany County) 1963 Trade Cases, par. 70,688: "The evidence clearly shows frequent inspection by representatives of plaintiff of the stores of retailers to ascertain if its minimum prices are maintained; if a violation is found it s promptly reported to hgher authority of plaintiff, which sends letters to the offenders, to cease and desist; if such letters do not produce compliance, the matter is referred to local counsel, who employ a private detective agency to shop the offending retailer's store, and if the violation is found to be continuing, actions for injunctions are promptly instituted."

Antitrust Subcommittee to have garnered extortionate profits in many instances. As Senator Kefauver pointed out the other day:

> In the ethical drug industry, the rate of return on investment, after taxes, is higher than that of any other industry. Since 1957 it has averaged around 20 percent as compared with 10 percent for all manufacturing. The net profit on sales has also averaged about double that for all manufacturing.[5]

Nevertheless 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.[6] This case illustrates what the consumer loses by fair trade, the harassment of small business under fair trade, and the unconscionable profiteering which 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 bound volumes of that series covering 1960 through 1962. In most 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., and Darby Sales Co.

Minnesota: Playtime Sporting Goods, Inc.

New Hampshire: Max Dichter Co., Inc., operating a retail store in Manchester, N.H., and 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 Sales Jewelry Store.

Ohio: Norwood Vitamin & Cosmetic Distributors, Inc.

New York: Janel Sales Corp.; Berner's Pharmacy Corp.; Mr. Less; Mr. Falleta; and the Courtesy Drug Store in Hicksville, N.Y.

Pennsylvania: Wright Motor Sales Co., a gasoline dealer, and Mr. Kostak, another gasoline dealer.

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.

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

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[5] 109 Congressional Record 5614 (Apr. 9, 1963).

[6] Last year this company announced it was no longer going to limits 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.

repute despite the absence of any attempt to use resale price maintenance for such purposes. 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 nonfair 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]			Merchants' bankruptcies [2]	
	1957	1958	1959	1961	1962
Missouri	18.6	26.9	23.6	87	69
Texas	32.2	29.8	28.5	119	115
Vermont	19.0	23.0	20.1	11	16
District of Columbia	41.8	32.6	30.2	13	16

[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, and June 30, 1962, table F3.

Now, let us take some comparable fair trade States:

	Failures [1]			Merchants' bankruptcies [2]	
	1957	1958	1959	1961	1962
Illinois	37.3	42.6	45.6	120	306
Maryland	44.6	56.7	41.0	18	18
New Jersey	59.9	81.9	67.5	179	169
New Hampshire	27.6	27.2	23.6	12	7
Wisconsin	37.3	55.0	51.9	139	159
California	123.9	118.9	112.5	286	219
Massachusetts	34.9	42.9	41.5	57	60
New York	111.4	129.3	127.8	424	451
Pennsylvania	43.5	48.1	43.4	307	262

[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, and June 30, 1962, table F3.

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]			Merchants' bankruptcies [2]	
	1957	1958	1959	1961	1962
Colorado (1956)	45.6	20.7	32.8	142	145
Indiana (1957)	20.0	27.0	22.6	42	38
Kansas (1958)	28.2	26.8	20.6	39	41
Kentucky (1958)	13.4	19.9	14.8	54	46
New Mexico (1957)	14.6	8.4	5.1	15	17
Oregon (1956)	198.0	201.5	175.3	51	91
South Carolina (1957)	40.0	44.3	47.4	14	11
West Virginia (1958)	26.5	26.3	35.7	20	23

[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, and June 30, 1962, table F3.

These figures demonstrate, I believe, that there is no visible relation between the survival of small business and fair trade resale price-fixing.

Many retail associations, I am sure, will register in support of this bill. They have been pressured to do so repeatedly by the powerful, untiring National Association of Retail Druggists whose representatives are also much in evidence on Capitol Hill. In almost every instance, I believe, these retail associations have been subjected to a one-sided argument in favor of such bills. I think it highly significant, therefore, that a poll by the National Federation of Independent Business last year, in which arguments both pro and con were summarized, showed a slight majority opposed to those bills.

I am encouraged to note, moreover, that not only have consumer organizations opposed the counterpart of this bill at hearings last year, but also retailers, retail associations, and wholesale associations.

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

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 traded 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 last year:

> 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.

C. WHAT THE FARMER THINKS

Last year, I received a letter from the American Farm Bureau Federation commenting upon H.R. 6245, a bill before the House Antitrust 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 this 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 * * * .

D. HIGH PRICE DOES NOT INSURE HIGH QUALITY

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 dream world 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. In one striking instance after another, the highest priced product was not the highest in quality.

Testifying, last year, before the House Antitrust 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. Indeed, 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.[7]

E. THIS BILL IS OPPOSED TO OUR CURRENT NATIONAL POLICY

Proposed increases in the price of steel products last year and actual price increases in the steel industry this year have been a matter of concern to the Nation and to our Government. Yet the inflationary threat represented by a price increase in one industry, important as the steel industry is, is in no way comparable to the inflationary threat represented by this price-fixing bill which would promote and sanction price fixing—and consequently price increases—throughout all sectors of our economy.

At a time when the administration, with widespread support from all over the country, is seeking tax reductions in order to promote an expansion of our economy and to prevent a recession, it would be anomalous, at the same time, to enact legislation which would have the inevitable effect of insuring that the consumer taxpayer would be able to buy less and less with whatever additional funds a tax cut may provide him. The efforts of the administration to stimulate our economy through the natural interplay of a free market would be thwarted by legislation designed to turn our free economy and our free market into a controlled economy and an artificially controlled market.

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

II. Analysis of H.R. 3669

A. Elimination of States Rights Provision

Last year the price-fixing quality stabilization bills, as they came out of this committee, contained the following provision:

Paragraphs (7) to (12) hereof shall apply to all acts and transactions in or affecting commerce which Congress may lawfully regulate except that nothing in such paragraphs shall be construed to permit, directly or indirectly, resale price maintenance in any State where the constitution or laws thereof prohibit such price maintenance.

Traditionally, resale price maintenance has been a matter for each State to decide for itself. One State's meat has been another State's poison. By this amendment, this committee recognized two things: One was the fact that many States have rejected resale price maintenance. They want none of it. Secondly, the amendment recognized that such State policy should be respected.

H.R. 3669, however, contains no such exception. It represents an effort to use Federal supremacy to ram resale price fixing down the throats of the residents of all States, whether or not there is a contrary State policy. One could hardly imagine a more ignoble death for States rights than to be buried under Federal price-fixing legislation.

Rejected, in whole or in part, by the courts of some 24 States, and turned down by the legislatures of at least 5 States—Missouri, Texas, Vermont, Alaska, and the District of Columbia—fair trade is sought through H.R. 3669 to be imposed, nationwide, on unwilling as well as on willing States. Those 29 unwilling States—more than half the States of the Union—which have rejected the sort of fair trade here proposed, would have it willy-nilly.

Worse, our basic national policy of free competition would be subverted into a policy of price fixing. The antitrust laws would be gutted throughout.

B. Price Fixing on a Grand Scale

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 provision would make it easy to effect large scale horizontal price-fixing agreements.

This bill would promote the very types of horizontal and vertical price fixing 73 years of antitrust legislation by Congress was designed to prevent. The businessmen who could not agree to fix prices or agree to have one of them fix prices for all, may do so under this bill simply by arranging for the trademark owner to send them a convenient price-fixing notice.

It is no coincidence, I believe, that some of the most ardent supporters of fair trade 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 lip service then could the proponents of this bill pay at their annual conventions to 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 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."

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. * * *"

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 working man, 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 this pernicious bill should become law.

C. VENDOR'S POWER AFTER SALE

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. 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" now 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 similar bill pending in the Senate last year, made the frank admission that the aim is to reverse a number of Supreme Court decisions and restore the old *Colgate* doctrine in all its vigor, namely, to deprive the retailer of supplies if he uses 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.

This bill gives the owner of a brand name the right to compel a reseller to sell at a price or within a price range determined by the brand-name owner. Apparently there is no limitation upon the power of the owner to make as many price changes as he desires. The reseller is a puppet subject to the pull of a remote string puller.

The reseller who sells at a price he thinks is fair is subject to having his right to resell the product revoked, no mater how much good will he has developed regarding the product by his own efforts. If he persists in selling at a fair price he is subject to a suit for damages, injunctive relief, attorneys' fees and the costs of suit.

The deterrent imposed under the antitrust laws against the collusive price fixer is now to be imposed against the independent retailer who may mistakenly believe in free enterprise.

This bill also grants a right of revocation where misrepresentation has been used in the resale of goods.

The Federal Trade Commission has been attacking 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.

H.R. 3669 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.

The bill provides that:

> Each such currently established resale price and resale price range shall be uniform at each level of distribution within each marketing area determined by the owner of the brand, name, or trademark (par. 14).

The above quoted provision appears to give the brand owner the right to determine what is the "marketing area" for the purpose of having uniform prices. Apparently, at his will, it may be small or large. It is not clear whether the trademark owner is limited to including in such marketing area only an area in the United States.

D. BAIT MERCHANDISING

Section 8 of the bill gives the trade-name owner the right to prevent a retailer from selling the trade-named article, if it is used "in furtherance of bait merchandising." This might give the trade-name owner the power, even without a price-fixing provision, to prevent the retailer from having a special on an item in order to draw people to his store in the hope they might buy something else as well. This would be so even if the special price was one on which the retainer made a profit.

The bill does not define bait merchandising practices, and thus invites litigation as to the meaning of this term. It might include any unusual advertising device.

Those States which have seen fit to prohibit or limit bait advertising—like my own State of New York—have devised appropriate remedies. Other States have not chosen to do so. Both those States which have acted in their own ways, and those which have not, would now have this amorphous, probably preemptive, provision thrust upon them.

E. ENFORCEMENT

The proposed statute would be applicable to "all acts and transactions in or affecting commerce which Congress may lawfully regulate." 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 such suits may be brought in a Federal district court, without regard to the amount in controversy. As chairman of the Committee on the Judiciary, I am sorely troubled by this provision which would engulf our already congested Federal courts in a torrent of penny ante price-fixing enforcement cases. I understand the American Bar Association is also dismayed at this prospect.

Furthermore, H.R. 3669 provides that:

> No action pursuant hereto shall preclude remedial action otherwise available for wrongful use of a brand, name, or trademark (par. "(12)").

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

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 Federal law, and vice versa.

The bill gives a right of action to the consumer against the price fixer for any misrepresentation by the latter as to "size, capacity, quality, condition, model or age." This right of action in the Federal courts exists only if the price fixer is not subject to process "in the courts of the State in which such purchaser acquired such goods." This could readily give rise to extensive small claims litigation in the Federal courts. It also raises troublesome conflicts of law questions since the test seems to be the law where the article is purchased and not the law of the domicile of the purchaser.

F. EXEMPTIONS

The bill exempts sales to Government or Government agencies. This means that there is to be one standard of business conduct in dealing with Government agencies and another in dealing with the public. Price fixing at the expense of the public is to be permitted—in fact, promoted—but price fixing at the expense of the Government is not sanctioned, and if the cost of a high price to most of us is a lower price to the Government, we may console ourselves by reflecting that such indirect form of taxation has not come about without representation, since it would be embodied in an act of Congress. There are other exceptions which have no logic except that of expediency, namely, avoiding the opposition of organizations capable of strong, organized opposition, while leaving the many unorganized to the not-so-tender mercies of the price fixers.

G. OTHER PROVISIONS

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.

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.

III. THIS BILL IS AN ATTACK ON OUR CAPITALISTIC, FREE ENTERPRISE SYSTEM

I think it cannot be gainsaid that a free market is essential to our capitalistic, free enterprise system. And most certainly a free market does not exist when the seller is free but the buyer is not, when the seller determines not only the price which the buyer must pay him but also the price at which the buyer may sell what he has purchased.

The concept of a free market also envisages a market where the consumer is not confronted with a network of price-fixing agreements sanctioned by law.

Increasingly State courts have found fair trade price-fixing laws an affront to those constitutional provisions of their respective States which condemn market control.

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 have been just 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 many manufacturers.

The background of this bill makes it clear that it is intended to overturn two Supreme Court decisions, one decided in 1911,[8] the other in 1956;[9] two court of appeals decisions,[10] and one New Jersey Supreme Court decision.[11] In addition, as noted last year by the head of the Antitrust Division of the Department of Justice in reference to a similar bill, such a bill might also overrule the Supreme Court's decision in the *Parke, Davis* case.[12] I suggest that this alone should give this committee pause before recommending legislation of this sort.

Small wonder that similar bills have been disapproved by the Department of Justice, the Federal Trade Commission, and the Department of Commerce. The Attorney General's National Committee to Study the Antitrust Laws was opposed to fair trade legislation. Five

[8] *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U.S. 373.
[9] *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305.
[10] *Sunbeam Corp.* v. *Wentling*, 185 F. 2d 903 (C.A. 3, 1950); *General Electric Co.* v. *Masters Mail Order Co.*, 244 F. 2d 681 (C.A. 2, 1957).
[11] *Gillette Co.* v. *Two Guys from Harrison, Inc.*, CCH Trade Reg. Cases, par. 70,223 (N.J. Sup. Ct. 1962).
[12] *United States* v. *Parke, Davis & Co.*, 362 U.S. 29.

States have refused to adopt fair trade legislation. In 24 States the courts have outlawed those consumer price increase acts. In August of last year the American Bar Association condemned a similar bill.

I could not hope to put the case against the policy of this bill as eloquently as Congress has already done in the preamble to the Small Business Act, when it said:

> The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed.

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

This bill is a consumer price increase bill. This bill is an anti-free enterprise bill. This bill is a bad bill. It should be defeated.

APPENDIX A

STATEMENTS 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 non-signer clause is anti-competitive price fixing; not the protecting of the good will of trade marked products as other courts have held. Good will, 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 Harv. Bus. Rev. 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 'yard stick' 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 non-contracting 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 antitheses 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 belowcost 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 trade-mark 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 trade-mark owners 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 tradename 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. These 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; J. & J. baby powder for 54 instead of 59 cents; J. & J. cotton for 33 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 instead of 89 cents; Anacin for 99 cents instead of $1.19. The parent could also obtain J. & J. baby oil for 89 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 J. & J. 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 instead of 99 cents; Bayer aspirin for 49 instead of 69 cents; Colgate dental cream for 55 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 instead of 69 cents.

In Spokane, Wash., he could buy Unicaps for $2.63 instead of $3.11, and Theragram 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 of $7.65; Orinase for $6.25 instead of $6.75; Chlor-Trimeton Maleate for $4.50 instead of $5.58; Coricidin for 76 cents instead of $1.08 and Absorbine Junior for $1.25 instead of $1.45. He could also pay 54 for Colgate 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 instead of 98 cents; and Ben-Gay for 70 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 $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 priced 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.

Sun tan 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. STAGGERS. Thank you for your presentation, Mr. Celler. The committee appreciates your appearance.

Mr. CELLER. Thank you, Mr. Chairman.

Mr. STAGGERS. We will now hear the distinguished Senator from Minnesota, the Honorable Hubert H. Humphrey. Senator, we are glad to welcome you to the committee.

STATEMENT OF HON. HUBERT H. HUMPHREY, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator HUMPHREY. Mr. Chairman, I wish to express my appreciation for being afforded this opportunity to offer my views on H.R. 3669, the quality stabilization bill. As I see it, H.R. 3669 is one of the most important pieces of small business legislation to be considered in this session of Congress. At the outset, let me explain why the quality stabilization bill enjoys the enthusiastic endorsement of more than 70 business organizations representing almost 4 million private entrepreneurs from all States and towns across the country. I can best do this by reviewing what the quality stabilization bill is designed to accomplish in behalf of the competitive interests of the Nation's independent businessmen, and the ways and means by which such objectives will be met.

Simply stated, it strengthens our antitrust laws by outlawing certain unfair methods of competition that inevitably promote monopoly in distribution. The bill would let the owner of a product identified by his trademark or brand name stop distributors from, first, making misrepresentations about it; second, using it as bait merchandise; and, third, selling at other than the established resale price. This would allow the product owner to prevent damage to his mark or brand and the goodwill he may have taken years to build up.

Whenever a trademark or brand-name owner discovers his products being used by a distributor in any such scheme, he may revoke the offending distributor's right to use his mark or brand in resales. If the offending distributor disregards the notice of revocation and continues the challenged sales practices, the owner may get a court injunction to stop him.

Basically, no more is involved than recognition of, first the property values inhering in business goodwill and in the trademark or brand name adopted to maintain and extend such goodwill; and, second, the need to give trademark or brand-name owners a means of protecting their rights from injurious marketing practices. In this light, the bill is merely an extension of our historic trademark and copyright laws.

Surely, 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 bill—the protection of valuable investments in trademarks, brand names, and goodwill from ruinous marketing practices.

It should be noted that nothing in the quality stabilization bill 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.

The quality stabilization bill is based upon the conviction that today's small businessman is not losing the battle to stay solvent as a result of inefficiency, but because he does not have the capital necessary to fight off predatory and deceptive price-cutting tactics of bigger competitors.

The predatory price cutter, with his superior capital resources, can, by slashing prices on national branded, fast-moving merchandise, prevent the family retailer from making a profit, and, thus, can doom him to bankruptcy. No question of business efficiency is involved. It is no more than "domination by the long purse."

So you can see that the quality stabilization bill would simply reestablish a system of economic fairplay in the marketplace.

In reviewing the nature and the purpose of the proposed legislation, I should like to stress the permissive character of its provisions. There is no obligation, for example, upon the trademark or brand-name owner to avail himself of the rights accorded under the proposed legislation.

In other words, this is not compulsory legislation; it is permissive. 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 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 the 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 what products they will offer for sale. And consumers, too, enjoy full freedom of choice under this measure. They are free to accept or reject all merchandise, to pick and choose between so-called protected and unprotected products.

But let us also examine the case for quality stabilization from the standpoint of the consumer. It is in the interest of consumers that we encourage independent retailing and fair competitive practices in quality stabilization. Our huge productive capacity turns out a tremendous amount of goods which provide 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 the large 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 the consumers against monopolistic tendencies and resultant high prices. I think that just speaks for itself. When you have a large number of outlets for products, you obviously stimulate commerce, you stimulate consumer desires, you stimulate the flow of goods, and you obviously protect what we call the competitive enterprise system.

The fair competitive practices which are promoted under this proposal assure the consumer that quality tested and reliable products will continue to be available. As the late Associate Justice Holmes once said:

> I cannot believe that in the long run the public will profit by permitting * * * to cut prices for some ulterior purpose of their own and thus 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 economic health of the independent business community, this legislation is long overdue.

The marketplace is witness to a vast multitude of misrepresentations amounting, too often, to outright fraud upon the consumer. The misrepresentations arise from the practice of price juggling by retailers with substantial dollar power. The price juggling consists in selling nationally popular famous brand goods at very low prices, often profitless prices, to create in the public's mind the impression that everything these retailers sell is as much a bargain as the bait items here referred to. In fact, there is hardly a store in the United States which engages in such tactics that does not sell many less well-known branded goods at prices that yield far higher profits to the juggling retailer than he could realize through the sale of famous brand goods at fair prices.

These tactics have put in jeopardy the very survival in America of the independent retailer. On September 12, 1962, in a report on House

Joint Resolution 636, the Committee on Interstate and Foreign Commerce of the House of Representatives observed:

> Business failures in 1961, as reported by Dun & Bradstreet, numbered 17,075, the largest number since the depression year of 1932, and these firms registered aggregate losses of $1.1 billion, an alltime record. Business mortality in 1961 was higher than in 1960, which in turn was up 11 percent from 1959. However, there was a change in the incidence of failures. Whereas the increase in 1960 over 1959 was greatest among construction firms, the 1961 increase was spread over all sizes of business below $1 million, and centered in wholesaling and retailing. Drugstores, general merchandise stores, auto dealers, 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.
>
> The small retailer is at a great disadvantage in competing pricewise with the big department store, the discount house, the mail-order house, the chainstore or supermarket. Looking at the situation very realistically, if a price war should break out, the little retailer, the small businessman, must be the first to die because he lacks the resources to endure the financial strain imposed upon him by a price war.
>
> We are faced squarely with the proposition that unless the small businessman is afforded the opportunity of making 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. And if we permit this trend to continue, the economy of this country will suffer.

Bringing the facts up to date, we find that in 1962, total failures came to 15,782, some 8 percent below the 28-year record set in 1961. Except for 1961, this toll is still the highest since 1934. Also except for 1961, the failure rate of 60.8 per 10,000 listed enterprises is the highest since 1940.

Nor can the small independent retailer take comfort from the slight decline in failures in 1962. Of the 15,782 failures—covering mining and manufacturing, wholesale trade, retail trade, construction, and commercial service—retail trade alone accounted for 7,552, or almost half. Of this number, 7,083 retailers failed with liabilities of $100,000 or less. Only 469 retailers had liabilities in excess of $100,000.

Moreover, the failures among retailers are not entirely confined to those recently entering the business. The latest available statistics show that 20.1 percent of all retail failures in 1961 occurred among retailers who had been in business for 6 to 10 years, and 17.6 percent among those who had been in business for longer than 10 years.

The enactment of the quality stabilization bill 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 to 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 in favor of the consumer.

I am also taking this opportunity, Mr. Chairman, to ask that my remarks be followed at this point by the enclosed reports received by Dr. Norman J. Small, a constitutional law authority with the Library of Congress. These reports, as you will note, make clear that no valid constitutional objection exists in respect to the quality stabilization bill. Thank you for your courtesy and cooperation in this regard.

(The reports referred to follow:)

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D.C., March 7, 1963.

To: Hon. HUBERT HUMPHREY
(Attention of Mr. Peterson).
From: American Law Division.
Subject: Appraisal of quality stabilization bill: S. 774 (88th Cong.)

Inasmuch as S. 774 (88th Cong.) and Senate Joint Resolution 159 (87th Cong.) do not differ appreciably, the contents of a report prepared in 1962 on the older bill, a copy of which is enclosed, is equally suitable for purposes of appraising the current legislative proposal.

NORMAN J. SMALL, *Legislative Attorney.*

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D.C., October 16, 1962.

To: Hon. HUBERT HUMPHREY.
From: American Law Division.
Subject: Constitutionality of quality stabilization bill (S.J. Res. 159, 87th Cong.).

On the ground that the objectives of the two measures are virtually identical, all of the arguments marshaled in support of the validity of S. 1083, introduced during the 86th Congress, would appear to be available to sustain the constitutionality of Senate Joint Resolution 159, submitted during the 87th Congress (U.S. Senate Committee on Interstate and Foreign Commerce. Hearings before a Special Subcommittee on Fair Trade on S. 1083; June 15–16, July 10, 1959; 86th Cong., 1st sess., pp. 538–543). Accordingly, Senate Joint Resolution 159 would seem to be no more vulnerable to the contentions of unconstitutionality than were advanced against S. 1083: to wit (1) improper delegation of legislative power to private citizens to establish a policy of resale price maintenance and thereafter the aid of the Government, proffered in the form of judicial remedies, to enforce said policy; (2) that Senate Joint Resolution 159 is neither a permissible nor a bona fide exercise of congressional power to regulate interstate commerce (art. 1 section 8, clause 1.3) inasmuch as its terms, if adopted, will not be uniformly enforceable but become operative only at the option of certain vendors; and that such lack of uniformity of itself not only impairs the validity of Senate Joint Resolution 159 but also affords conclusive proof that the measure cannot effectively attain its declared objective, the protection and promotion of interstate commerce; (3) that the allegations set forth in the preamble of Senate Joint Resolution 159, intended to support the substantive provisions thereof as a reasonable regulation of interstate commerce, are fallacious in that the measure is not necessary to promote commerce in trademarked merchandise, but rather is the product of efforts of inefficient retailers to survive in competition with other retail establishments which, by reason of lower costs of distribution, are enabled to sell for less; (4) that to compel purchasers of branded or trademarked articles, who have never entered into contractual relations with vendors thereof, to observe resale prices dictated by the latter is to deprive the former of their liberty without due process of law; and, finally, (5) that there can be no property right in a trademark, as such, separate and apart from the commodity to which it is affixed; and to confer such right upon the vendor of such articles by legislative fiat is to impair arbitrarily the unqualified title to trademarked merchandise acquired by the vendee, and hence to deprive the latter of property without due process.

Although, for reasons hereinafter set forth, it is believed that the last mentioned challenge to the validity of Senate Joint Resolution 159 is untenable, it is highly probably that the one provision contained in this measure, which distinguishes it from S. 1083, will be contested as not within the scope of the con-

stitutional power of Congress to regulate interstate commerce, and as an arbitrary deprivation of property without due process of law. Unlike S. 1083, Senate Joint Resolution 159 would appear to confer ownership of the trademark upon the vendor of branded merchandise by affording him a right to revoke it; that is, to enjoin, as an act of unfair competition, the future use of such trademark by a vendee who has been notified that he has been guilty of having previously employed deceptive practices, such as misrepresentations as to "size, capacity, quality, condition, model, or the age" of such commodities, in the sale of branded merchandise, or of having previously resold the same at prices lower than the resale prices established by the vendor by notice thereof effectively conveyed to the vendee.

Accordingly, if Senate Joint Resolution 159 is enacted one may anticipate that those disposed to contest the validity of this measure may base the principal portion of their attack upon the last-mentioned provision, and to support it may marshal arguments such as the following: (1) That insofar as Congress is possessed of any power to regulate trademarks, such power is derived exclusively from the commerce clause (art. 1, sec. 8, clause 3); (2) that this regulatory power is procedural rather than substantive, and accordingly, is limited to providing remedies for the protection of owners of trademarks who employ the same is conjunction with the sale of branded merchandise in interstate commerce; (3) that under the Constitution, the power to define rights in property is reserved to the States by amendment 10, and therefore, it is not within the competence of Congress, under the guise of regulating interstate commerce, to convey to vendors of branded merchandise a property right in the trademarks that the latter have appropriated for promoting the sale of such merchandise; (4) that the law of trademarks as developed in the several States recognizes no property right in trademarks separate and apart from the business and traffic in commodities to which said trademarks are affixed; and that the only remedy accorded under State law to vendors of branded merchandise is the right to enjoin infringement; that is, to prevent deception with attendant loss of market resulting from the use by sellers of competing merchandise of trademarks so similar to those utilized by a complaining vendor that the public is induced erroneously to purchase the products of these sellers under the mistaken notion that such products were fabricated or distributed by the complaining vendor; and, finally, in confirmation of the last-mentioned contention, (5) that neither State nor federal trademark laws hitherto have afforded a remedy in the form of revocation of a right to use a trademark such as is provided by Senate Joint Resolution 159, but, on the contrary, have granted only the right ot effect cancellation of a trademark found to infringe that of the complaining merchant (15 U.S.C. 1064–1067, 1111).

Available to provide superficial support for these enumerated contentions are the following excerpts from Federal and Supreme Court decisions and from texts on the law of trademarks:

"The right to adopt and use a symbol or a device to distinguish the goods or property * * * sold by the person whose mark it is, to the exclusion of use by all other persons, has long been recognized by the common law * * *, and by the statutes of some of the States. It is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, *with compensation for past infringement. This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement.* The whole system of trademark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage.

"*As the property in trademarks and the right to their exclusive use rest on the laws of the States*, and, like the great body of the rights of person and of property, *depend on them for security and protection*, the power of Congress to legislate on the subject, *to establish the conditions on which these rights* shall be enjoyed and exercised * * *, and the *legal remedies* for their enforcement * * * must be found in the Constitution * * *" (*Trade-Mark* cases, 100 U.S. 82, 92, 93, 95–96 (1879). [Emphasis supplied.]

"A vendor has no property in [the trade-]mark per se, any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade * * *. In short, the trademark is treated as merely a protection for the goodwill, and [is] not the subject of property except in connection with an existing business.

"The redress that is accorded in trademark cases is based upon the party's right to be protected in the goodwill of a trade or business. *The primary and proper function of a trademark is to identify the origin or ownership of the article to which it is affixed* * * *. Courts afford redress or relief upon the ground that a party has a valuable interest in the goodwill of his trade or business, and in the trademarks adopted to maintain and extend. *The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another*" (*Hanover Milling Co.* v. *Metcalf*, 240 U.S. 403, 412–413, 414 (1916)). [Emphasis supplied.]

To the same effect is *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U.S. 665, 672, 674, 677–678 (1901).

"A trademark is [not] a right in gross or at large, like a statutory copyright or a patent for an invention. There is no such thing as property in a trademark except as a right appurtenant to an established business or trade in connection with which the mark is employed. * * * *its function is simply to designate the goods as the product of a particular trader and to protect his goodwill against the sale of another's product as his* * * *.

"Property in trademarks and the right to their exclusive use rest upon the laws of the several States, and depend upon them for security and protection; the power of Congress to legislate on the subject being only such as arises from the authority to regulate commerce with foreign nations and among the several States * * *" (*United Drug Co.* v. *Rectanus Co.*, 248 U.S. 90, 97, 98, 100 (1918)). [Emphasis supplied.]

"Congress, by virtue of the commerce clause, *has no power to legislate upon the substantive law of trademarks.* * * * The acquisition of *property rights in trademarks rests upon the laws of the several States*" (*Amer. Trading Co.* v. *Heacock Co.*, 285 U.S. 247, 256, 258 (1932)). [Emphasis supplied.]

"A trademark is not property in the ordinary sense but only a word or symbol indicating the origin of a commercial product. The owner of the mark acquires the right to prevent the goods to which the mark is applied from being confused with those of others and to prevent his own trade from being diverted to competitors through their use of misleading marks. There are no rights in a trademark beyond these" (*Industrial Rayon Corp.* v. *Dutchess Underwear corp.*, 92 F. 2d 33 (1937)).

"The right of the trademark owner in his mark is the right to be protected with respect to its three functions; viz, indication of origin common to all articles bearing the trademark, guarantee of grade or quality, and advertisement * * *. It is still problematic whether the courts will recognize a property right in a trademark" (2 Rudolph Callmann, "The Law of Unfair Competition and Trade-Marks," 994, 998 (1950)).

The aforementioned contentions, pertaining to the invalidity of the trademark revocation provision in Senate Joint Resolution 159, are susceptible of refutation both on the merits as well as on the ground that they rest on a total misconception of the nature of the regulations sought to be imposed by passage of this measure. It would appear to be sufficient to note that Senate Joint Resolution 159, in effect, is a regulation of unfair competition rather than legislation defining ownership and rights in trademarks. What this measure is intended to achieve, subsequently to its adoption, is that protection of vendors of branded merchandise from the loss of their market occasioned by unrestrained price cutting and misrepresentation, whether or not in conjunction with price cutting.

When branded merchandise is resold by outlets with an especial propensity for price cutting, with inadequately trained personnel, and virtually no facilities for servicing such articles, a number of competent authorities are prepared to contend, and to marshal substantial evidence in support of their forecasts, that the reputation and goodwill of the vendors of such commodities are impaired. With profit margins reduced by price cutting, well established and more conservative retailers frequently cease to handle branded merchandise subject to such practices; and, by their abandonment of such articles, a vendor's market is curtailed with resultant diminution in volume of sales. Moreover, since price-cutting outlets, by reason of their low margin of profit, invariably are unable to afford and maintain facilities for servicing branded appliances, there is grave danger that these may be incorrectly assembled, and accordingly, will be vended in a defective condition, with unavoidable breakdowns or malfunctioning such as will give rise to consumer dissatisfacton and

reluctance to purchase trademarked merchandise which hitherto enjoyed a longstanding reputation for quality and durability. In addition, when trademarked or branded articles are resold under such conditions and without a remedy available to the vendor for removing the brand or label from the commodities thus marketed, there arises the likelihood, especially in the case of ineffectively assembled electrical appliances or improperly compounded drug prescriptions, that, in the event of injuries sustained by the consumer, the vendor will be exposed to tort liability under the "inherently dangerous instrument" doctrine (*MacPherson* v. *Buick Motor Co.*, 271 N.Y. 382; 110 N.E. 1050 (1916)). Also prophesied as an unavoidable consequence of the failure to extend effective relief to vendors exposed to such price cutting is their election of the only remaining alternative, namely, a determination to incur the expense of establishing their own vertical distribution, a policy which, if effectuated, would accelerate the rate of elimination of small, independent retailers, and increase the concentration of economic power exercisable by a limited number of oligopolistic corporations (Travers and Wright Restricted Channels of Distribution under the Sherman Act, 75 Harv. L. Rev. 795, 804–817 (1962)).

Although the previously enumerated considerations, at first glance, might appear to constitute a digression from an endeavor to negate the arguments tendered in support of the proposition that Senate Joint Resolution 159, if adopted, could be condemned as unconstitutional, the former have been presented with a view to demonstrating that expert testimony and factual data are available to establish the reasonableness, in terms of due process, of the prohibitions which this measure would impose and the justification for labeling the trade practices which it would proscribe as unfair competition. Under established precedents, the law of unfair competition is broader than, and indeed comprehends, the law of trademarks; and in actions for relief instituted under the former, the question of exclusive ownership or a property right in a trademark ceases to have any significance. "In suits for unfair competition the complaint is not an appropriation of property, but of a tort committed by the defendant, in that his conduct has been unlawful by reason of the consequential injury to the plaintiff." (*P. E. Sharpless Co.* v. *Lawrence*, 213 F. 423, 426 (1914); *Hanover Milling Co.* v. *Metcalf*, 240 U.S. 403, 413 (1916).)

Acknowledged by Federal courts and by the Supreme Court as having attained the status of an instrumentality of interstate commerce and as being widely used as an auxiliary indispensable to sustaining the volume of goods moving in such commerce, trademarks have acquired such a close relation to, and effect upon, that commerce, that abuses in the employment thereof, as in the case of bills of lading, are well within the capacity of Congress to correct through invocation of its plenary power to regulate interstate commercial activity (*United States* v. *Ferger*, 250 U.S. 199, 203–204 (1919)). In the measure under consideration Congress would correct such abuse by providing a means whereby a vendee may be deprived of the use of a trademark during the period of his wrongdoing; and it is arguable that the fact that such deprivation is to be effected only upon the initiative of a complaining vendor does not compel the conclusion that Congress intended to vest title in the mark in the vendor. If suspension of the use of a label is essential to eradication of an unfair trade practice adversely affecting interstate commerce, election by Congress to employ this remedy as a means of implementing an otherwise permissible regulation of said commerce ought not to be frustrated by the necessity of resolving a subsidiary issue as to who, vendor or vendee, or neither, owns the mark or label.

In any event, the vendee is unable to complain, for it already has been established in resale price maintenance litigation that the price-cutting vendee attains ownership only of the merchandise purchased, and not "the mark or the good will that the mark symbolizes." (*Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183, 194–195 (1936).) For want of title in the trademark, the vendee scarcely can gain standing to challenge statutory authorization of revocation accorded to the vendor, for the former cannot maintain that he has been deprived arbitrarily and without due process of law of property which he never owned.

Finally, a persuasive argument can be advanced that, notwithstanding the quotations from older Supreme Court rulings in trademark infringement cases hitherto set forth, Congress is competent to grant vendor title to his trademark as a necessary and proper means (art. 1, sec. 8, clause 18) of implementing as otherwise valid regulation of interstate commerce. Commentators already are contending that when Congress adopted the Lanham Act in 1946 (15 U.S.C.

1051–1127), it conferred substantive and not merely procedural rights upon registrants of trademarks; for under this law, an applicant's right to have his trademark registered is not made to depend upon whether ownership of said mark had been confirmed by the law of the State in which his place of business is located. (Liddy, "Has Congress the Constitutional Power to Legislate on the Substantive Law of Trade-Marks?" * Fordham L. Rev. 408, 412–414 (1937); Schechter, "Fog and Fiction in Trade-Mark Protection," 36 col. L. Rev. 60, 67–73, 77–79 (1936)).

Lending support to the latter conclusion are the following excerpts from federal judicial opinions. The first excerpt, however, is derived from a Supreme Court ruling wherein cognizance is taken of the significance of trademarks as instrumentalities designed to promote interstate traffic in commodities.

"If it is true that we live by symbols, it is no less true that we purchase goods by them. A trademark is a merchandising shortcut which induces a purchaser to select what he wants, or what he has been led to believe he wants. The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol. Whatever the means employed, the aim is the same—to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained the trademark owner has something of value" (*Mishawaka Mfg. Co.* v. *Kresge Co.*, 316 U.S. 203, 205 (1942)).

"Although the question has never been squarely decided by the Supreme Court, we believe it is clear that Congress has the power to legislate upon the substantive law of trademarks. Many things not themselves goods moving in interstate commerce are held to exert such a substantial influence upon the flow of commerce that they are 'instrumentalities of commerce,' and as such subject to regulation by Congress to foster, protect, and control interstate commerce * * *. While trademarks are not essential to all commerce in the absolute sense that nothing could be sold without them, interstate commerce would undoubtedly suffer by their absence, as purchasers, forced to rely solely on the seller's word, grew more wary of new or unknown goods.

"It is our opinion that Congress did create substantive rights in trademarks by passage of the (Trade-Mark) Act of 1905 * * *. Through the Trade-Mark Acts of 1905 and 1920 Congress has occupied that part of the field of unfair competition in interstate commerce having to do with 'passing off' effected solely by the use of a trademark. The intention of Congress was to achieve uniformity within the area occupied. Insofar as State law conflicts with this policy of the Trade-Mark Acts, it must yield to the superior Federal law." (*Philco Corporation* v. *Phillips Mfg. Co.*, 133 F. 2d 663, 668, 672 (1943)).

"The Lanham Act (of 1946; 15 U.S.C. 1051–1127) put an end to any doubts as to whether a substantive Federal trademark law had been created * * *. This conclusion is confirmed, confirmation is necessary, by the report of the Senate committee wherein there is to be found an assertion to the effect that there can be no doubt under recent decisions of the Supreme Court of the constitutionality of a national (the Lanham) Act giving substantive as distinguished from merely procedural rights in trademarks in commerce * * *. A sound policy requires that trademarks should receive nationally the greatest protection that can be given them." (*S. C. Johnson and Son* v. *Johnson*, 175 F. 2d 176, 178 (1949), and quoting from S. Rept. 1333; 79th Cong., 2d sess., pp. 5–6, 1946).

NORMAN J. SMALL,
Legislative Attorney.

THE LIBRARY OF CONGRESS,
LEGISLATIVE REFERENCE SERVICE,
Washington, D.C., July 21, 1959.

To: ——— ———.
From: American Law Division.
Subject: Constitutionality of Federal fair trade bill (S. 1083; 86th Cong.).

From their inception our antitrust laws have been construed as prohibiting price fixing on the part of those trading in interstate commerce. Not long after the adoption of the Sherman Act, however, the Supreme Court acknowledged that express statutory authorization would suffice to render resale price maintenance entirely lawful. Thus, in denying injunctive relief in 1911 against a nonsigner who knowingly undersold the vendor's trademarked mer-

chandise, the Supreme Court uttered the following statement: "Nor can the manufacturer, by rule *and notice*, in the absence of contract or *statutory right, even though the restriction be known to purchasers*, fix prices for future sales" (*Dr. Miles Medical Co.* v. *Park and Sons Co.*, 220 U.S. 220, 405). It will be noted that in the cited case, the Court did not base the validity of resale price maintenance upon agreement *and* statutory authorization, but upon agreement *or* statutory approval. In the light of the facts embodied in the controversy to which the quoted opinion pertains, it therefore becomes exceedingly difficult to accept the conclusion now being set forth that Congress cannot constitutionally authorize traders of branded merchandise in interstate commerce to enforce observance of resale prices by nonsigners apprised of the vendor's price policy.

Before embarking further upon an evaluation of the contentions of invalidity now being put forth by opponents of S. 1083, it may be appropriate to note the comments of a judge who, by present day standards, might be viewed as a conservative. Dissenting in the *Dr. Miles Medical* case, Justice Holmes offered this conclusion:

"I think we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution) as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles' medicines. With regard to things like the latter it seems to me that the point of most profitable return marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Co. knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be best served by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this Court permiting knaves to cut reasonable prices for some ulterior purposes 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" (*Dr. Miles Medical Co.* v. *Park and Sons Co.*, op. cit., p. 412).

In the attack on the constitutionality of Federal fair trade legislation, two major arguments have been employed; namely that (1) the measure, contrary to the separation of powers principle and the due process clause of the fifth amendment, would surrender to private entrepreneurs the power to originate legislation in the form of price fixing, and would permit businessmen to enforce observance of prices thus established by invoking remedies which only governmental instrumentalities are competent to grant; and (2) that the contemplated legislation is not a legitimate exercise of the congressional power to regulate interstate commerce (art. 1, sec. 8, clause 3). To sustain the issue of unconstitutional delegation, reliance has been placed almost entirely upon two holdings of the Supreme Court rendered during the depression era, one invalidating the National Industrial Recovery Act, and the second, the Bituminous Coal Conservation Act of 1935 (*Schechter Corp.* v. *U.S.* (1935) 295 U.S. 495, 521–522, 537–539, 541–542; *Carter* v. *Carter Coal Co.* (1936) 298 U.S. 238, 261–283, 310–311). Were these decisions relevant to the instant controversy they undeniably would be more than adequate for purposes of sustaining judicial condemnation of the proposed legislation as unconstitutional. However the pertinency of the aforementioned cases to fair trade legislation has been examined by Federal courts on several occasions and in each instance has been found wanting.

Thus, in validating the Illinois resale price maintenance statute in 1936, the Supreme Court had ample opportunity to apprise the merits of the unconstitutional delegation argument and disposed of the same by concluding that this constitutional infirmity was not discernible in the Illinois law. Unlike the congressional enactments invalidated in the previously cited cases, the Illinois fair trade law was found to contain precise standards, in conformity with which private businessmen were authorized to establish resale prices, and set forth with unmistakable clarity the procedure to be followed in enforcing compliance

therewith. In short the Illinois statute did not grant, as was true of the unconstitutional Federal enactments, carte blanche authority to private individuals to originate and devise the rules whereby their business relations with others were to be governed and thereafter to obtain governmental ratification of their conduct and aid in effecting observance thereof.

How emphatically the Court rejected the contention that fair trade legislation entails an unlawful delegation of legislative discretion is most convincingly disclosed in the following statement:

"We find nothing in this situation to justify the contention that there is an unlawful delegation of power to private persons to control the disposition of the property of others, such as was condemned in * * * *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311. In these cases the property affected had been acquired *without any preexisting restriction in respect of its use or disposition.* The imposition of the restriction *in invitum* was authorized after complete and unrestricted ownership had vested in the persons affected. *Here the restriction, already imposed with the knowledge* of the appellants, *ran with the acquisition* and conditioned it." (*Old Dearborn Co.* v. *Seagram Corp.* (1936) 299 U.S. 183, 192, 194). [Emphasis supplied.]

When confronted with these disclosures, as set forth in the last-cited case, opponents of the proposed Federal fair trade legislation have had recourse to a variety of arguments in an attempt to prove that the validity thereof cannot be sustained by reliance on the *Old Dearborn* decision. First they contend that States are not compelled by the due process clause of the 14th amendment to observe the preparation-of-powers principle; and therefore a holding by the Supreme Court sustaining the exercise of legislative power by other than the State legislature is devoid of any significance for purposes of determining the constitutionality of a surrender of legislative discretion by the Congress. To this line of reasoning the correct answer to be given is that although States are not constitutionally obligated to observe the separation-of-powers principle in constructing their government their freedom of action extends only to an allocation of legislative power to other than the legislative branch of their government. Insofar as they attempt to surrender legislative or other governmental power to private individuals whereby the latter are enabled to limit the freedom of their fellow citizens, the States are constrained by the due process clause of the 14th amendment no less severely than is the Congress under article 1, section 1, and the due process clause of the 5th amendment. In short, any attempted State delegation of legislative power to private citizens unquestionably would be condemned as unconstitutional (*Carfer* v. *Caldwell* (1906) 200 U.S. 293, 297; see also: *Hurtado* v. *California* (1884) 110 U.S. 516, 535–536).

Second, opponents of Federal fair trade legislation maintain that the *Old Dearborn* case affords no aid in establishing the constitutionality of the former for the reason that this decision was limited to a controversy embracing signers of a resale price maintenance contract. To the extent that only parties to a contract are involved, they are prepared to concede that no denial of due process can result; for through enforcement of a fair trade statute a price-cutting buyer would merely be obliged to live up to his agreement, and hence cannot plead unconstitutional interference with his liberty of action and his freedom to dispose of his own property as he sees fit. In the light of the Supreme Court's reaction, as hereinafter set forth, to this due process contention, such interpretation of the *Old Dearborn* decision, even if accurate, would have dubious value; but the fact is that the *Old Dearborn* case was adjudicated on the premise that the offending buyer was not signatory to any resale price maintenance contract. Thus, on page 187 of its opinion, the Court asserted that "the contract was assailed by appellant [buyer] below as ineffective, *and for present purposes we accept that view*" [emphasis supplied].

In a final effort to devalue its significance, the *Old Dearborn* case is attached as being predicated on an assumption that subsequently will be rejected by the Supreme Court as being at variance with the facts (*Schwegmann Bros.* v. *Calvert Corp.* (1951) 341 U.S. 384, 388–389). Specifically, it is argued that the Supreme Court in the *Old Dearborn* decision erroneously assumed that the vendor of a branded commodity retained a property right in the trademark thereon which a legislature, consistently with due process, is competent to protect. This assumption is evident in the following statement:

"Appellants [the buyer] own the commodity; they do not own the mark or the goodwill that the mark symbolizes. And goodwill is property * * *, injury to

which * * * is a proper subject of legislation * * *. Distinctive trademarks * * * are legitimate aids to the creation or enlargement of * * * goodwill. It is well settled that the proprietor of the goodwill 'is entitled to protection as against one who attempts to deprive him of the benefits resulting from the same' * * *. The ownership of goodwill * * * remains unchanged, notwithstanding that the commodity has been parted with * * *. There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the goodwill and business of the producer and distributor of identified goods, but injurious to the public as well" (*Old Dearborn Co.* v. *Seagram Corp.*, op. cit., pp. 194, 195).

On the ground that the real purpose of a resale price maintenance statute is not to safeguard the goodwill of the manufacturer or distributor but rather to sustain inefficient retailers from the competition of other retailers who, by superior merchandising methods, are able to reduce their distributive costs and consequently to sell for less, it is now contended that the theory of the seller's retention of title in his trademark and his need for protection thereof, on which the *Old Dearborn* case is founded, is no longer supported by the evidence. To establish the falsity of this older premise it is stated that one has only to examine the legislative record wherein there is to be found abundant proof that "retail dealer associations, rather than manufacturers, have been the outstanding protagonists of fair trade legislation" and the manufacturers are merely "unwilling proponents of such measures." Insofar as the latter are disposed to litigate nonobservance of resale price schedules set forth in contracts which they have negotiated, it is alleged that they do so, not with a view to protecting themselves against any tangible loss or injury, but rather to escape the wrath of angry retailers who threaten to boycott the vendors' products unless they are spared from harm by more effective enforcement of resale price maintenance agreements. Fair trade lawsuits thus inspired are said to afford ample proof that the nonconforming merchants vending merchandise at prices below those established by the seller harm not the vendor but rather those of his customers who have agreed to abide by his prices.

By virtue of such vendor-vendee relationship the conclusion is said to be unavoidable that the nonsigning purchaser, or retailer, acquires unqualified title to the merchandise which he resells, and to the extent that he is constrained by resale price maintenance legislation to yield to the dictates of a seller who, in law, is a total stranger to him, such retail purchaser is arbitrarily deprived, without due process of law, of his liberty to dispose of his own property as he pleases (*Eli Lilly and Co.* v. *Schwegmann Bros.* (1953) 109 F. Supp. 269, 270–272). Such a deprivation could become constitutionally tenable only by the introduction of evidence that the price fixing authorized by a Federal fair trade law was necessary to promote the public interest in maintaining interstate trade on a fair, competitive basis or to further police power objectives such as Congress is competent to foster through exercise of the commerce clause. For the reasons already stated this evidence is alleged to be lacking.

Embodying as it does an attack based principally on the ground of unconstitutional denial of due process, the last-mentioned argument presents what is perhaps the most effective legal criticism that can be devised against the validity of the proposed legislation. Thus far however there is not the slightest indication that the Supreme Court is, or will become, receptive to this line of reasoning. On at least two occasions since rendition of the *Old Dearborn* opinion, it has rejected opportunities to appraise the merits of the aforementioned argument. Thus, when the U.S. district court judge in the *Second Schwegmann* case suggested the advisability of a reversal of the *Old Dearborn* case based on the contentions just presented, his recommendation was completely ignored by the court of appeals in an opinion sustaining the constitutionality of both a State fair trade law and the Federal McGuire-Keogh Act (U.S.C. 15: 45). By denial of certiorari, the Supreme Court refused to review the latter opinion (*Schwegmann Bros. Giant Super Mkts.* v. *Eli Lilly and Co.* (1953) 205 F. 2d 788; cert. den. (1953) 346 U.S. 856, 905). Subsequently, in an appeal from a State court ruling upholding as valid another State fair trade law and the Federal act, and rejecting the issues of unconstitutional delegation, denial of due process, and unlawful price fixing, the Supreme Court again denied review. In fact it dismissed said appeal "for want of a substantial Federal question" (*S. Klein on the Square, Inc.* v. *Lionel Corp.* and *Masters, Inc.* v. *General Electric Co.* (1954) 307 N.Y. 229; 120 N.E. 2d 802, 805; cert. den. (1954) 348 U.S. 860, 892). Thereafter another Federal court of appeals sus-

tained the McGuire-Keogh Act without even alluding to the arguments submitted in opposition thereto (*Sunbeam Corporation* v. *Richardson* (1957) 243 F. 2d 501, 503).

In the light of this judicial record, the proposed Federal fair trade legislation would seem to be immune from attack on the grounds heretofore considered. If the Supreme Court could perceive no substantial constitutional issue in the previously cited decision of the New York Court of Appeals, which embraced all of the contentions most likely to be marshaled against S. 1083, if enacted, then, short of a wholly unanticipated and abrupt reversal of long-established precedents which the Supreme Court only recently refused to reappraise, it becomes exceedingly difficult to ascertain the basis upon which the Court could be induced to invalidate the proposed measure.

The delegation and due process contentions that might be advanced in litigation arising from adoption of S. 1083 are indistinguishable from those which have been repeatedly rejected in the decisions construing State fair trade laws. Consequently, any prediction that, in litigation precipitated by enactment of S. 1083, the Court will resolve these issues any differently appears to be thoroughly unsound. Not being retroactive but prospective in its application, the measure would not subject vendees to arbitrary and unforeseeable restraints in disposing of branded merchandise. By the very precision of its terms, the proposed legislation would put vendees on notice that acquisition of trademarked articles may be conditioned by the resale price maintenance policies which a manufacturer or distributor, under warrant of authority granted by this measure, would become privileged to impose. It is therefore incorrect to describe even a vendee who is not signatory to a resale price maintenance contract, but who has been advised of its terms, as a total stranger to the fair trading distributor. Such vendee's acquisition of branded merchandise having been conditioned by the provisions of such contract, he is not in a position to contend that his title is unqualified and therefore that he is at liberty to resell at any price he may choose. Only a vendee whose title to branded merchandise has been retroactively subjected to the terms of a Federal fair trade law could correctly advance this contention; but the prospective operation of the contemplated measure effectively precludes utilization of such an argument.

To contend at this late date that price fixing is valid only when made applicable to a business affected with a public interest or imposed in an emergency endangering public health or safety is to advance an argument founded upon principles of constitutional interpretation long since discarded by the Court. "Upon proper occasion and by appropriate measures [a] * * * State [is now deemed competent to] regulate a business in any of its aspects, including the prices to be charged for the products or commodties it sells" (*Nebbia* v. *New York* (1934) 291 U.S. 502, 537); and since "the authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the States over intrastate commerce," it follows that no constitutional infirmity would attach to price fixing authorized by the proposed measure (*U.S.* v. *Rock Royal Co-op.* (1939) 307 U.S. 533, 569–570; *Olsen* v. *Nebraska* (1941) 313 U.S. 236, 244–245).

One other argument going to the constitutionality of the proposed measure remains to be appraised; namely, that S. 1083, if adopted, would not be a bona fide regulation of interstate commerce. Although embodying a much more amplified regulation than that imposed by the McGuire-Keogh Act. (U.S.C. 15:45), S. 1083, as an exercise of the Federal commerce power (art. 1, sec. 8 clause 3), is not appreciably different from that act; and inasmuch as the McGuire-Keogh Act has withstood the test of constitutionality, there is every reason to believe that the proposed measure, if enacted, will be sustained by the Court as an equally valid utilization of the commerce clause. Indeed the Supreme Court has already acknowledged that when fair trade proposals approximating the scope of S. 1083 were previously under consideration by the Congress, it was "not without significance that while the proposed legislation was vigorously assailed in other respects * * * [no] * * * constitutional objection was urged" (*Old Dearborn Co.* v. *Seagram Corp.*, op cit., p. 190). An equally persuasive intimation of validity also is to be found in the older *Dr. Miles Medical* case wherein the Court suggested that resale price maintenance in the form now sought to be employed could be sanctioned by statute (*Dr. Miles Medical Co.* v. *Park and Sons Co.*, op. cit. p. 405).

With these observations of the Supreme Court in mind it is understandable that lower Federal courts have not considered themselves obligated to employ more than a sentence or two in rejecting challenges to the validity of the McGuire-Keogh Act as a regulation of interstate commerce. "As to interstate commerce it is now settled that the power of Congress is * * * plenary" (*Schwegmann Bros. Giant Super Mkts.* v. *Eli Lilly and Co.*, op cit., p. 793). The refusal of the Supreme Court to grant certiorari for purposes of reviewing that decision or the decision of the New York Court of Appeals, also upholding the McGuire-Keogh Act, as well as its avoidance of any comment on the validity of that act in *McKesson and Robbins* v. *U.S.* (1956) 351 U.S. 305, induced another Federal court of appeals subsequently to add the following succinct statement. "The foregoing is certainly pursuasive that the Supreme Court views the McGuire Act as not invalid on constitutional grounds" (*Sunbeam Corporation* v. *Richardson*, op. cit., p. 503; see also: (1953) 346 U.S. 856, 905; (1954) 348 U.S. 860, 892).

Inasmuch as the proposed legislation would accord a limited exemption, exercisable at the option of the seller, from the present statutory ban on price fixing as a restraint of interstate trade (U.S.C. 15:1), its lack of uniformity in operation presumably would afford the only ground for challenging it as a regulation of interstate commerce. Since not all distributors will elect to utilize the resale price maintenance privilege granted by the measure, it probably will be contended that a proposed regulation, which may or may not be employed at the election of the vendor, can scarcely have more than a tenuous connection with its declared objective, the promotion and protection of interstate commerce. Enhancement of interstate trade, it will be argued, is unlikely to be attained by a regulation which participants in interstate commerce are at liberty to ignore; for the very enjoyment of such an option provides all the evidence necessary to demonstrate that the proposed measure is utterly devoid of any substantial relationship to interstate commerce and is nothing more than an arbitrary concession to private businessmen to engage in price fixing as they see fit.

Upon more careful examination this argument appears to be addressed to the expediency or practicability of the contemplated enactment rather than to its constitutionality as a regulation of interstate commerce. With the former consideration the Court repeatedly has stated it has no concern. As long as there is a reasonable basis for the conclusion of Congress that resale price maintenance will "promote the distribution in commerce of merchandise which is identified by a trademark * * * ", the Court will not go behind such finding for purposes of determining whether the proposed measure is a reasonable exercise of the commerce power. For satisfactory disposition of the lack of uniformity contention, all that needs to be noted is that the uniformity rule has been employed by the Court only as a test of the validity of State legislation affecting commerce and not of the constitutionality of Federal legislation regulating interstate trade (*Clark Distilling Co.* v. *Western Maryland R. Co.* (1917) 242 U.S. 311, 327: *Prudential Insurance Co.* v. *Benjamin* (1946) 328 U.S. 408).

NORMAN J. SMALL,
Legislative Attorney.

Mr. STAGGERS. We appreciate your appearance and testimony, Senator.

Senator HUMPHREY. Thank you for the privilege, Mr. Chairman.

Mr. STAGGERS. At this time we will hear from the Honorable Lee Loevinger, Assistant Attorney General of the U.S. Department of Justice.

Mr. Loevinger, we are glad to have you with us this morning. I am sure the Department of Justice has testified each time this bill has been before the committee. I see that you have a prepared statement.

I might say to you that for the sake of time, each time we have heard the bill, we have had several volumes, and this is the last one, and I am certain the bills are almost identical, so if you wanted to, you might present your statement for the record and give just a summary, if you wish to; whatever you wish to do.

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

Mr. LOEVINGER. I would be happy to follow your suggestion, Mr. Chairman.

I think that we have tried, this time, to be particularly factual and to meet some of the arguments that have most recently been urged with respect to the legislation specifically presented by this bill, and, therefore, if the committee will bear with me, I think it might be worthwhile for me to go through at least part of my statement.

As I say, I will make every effort to be strictly factual and not to indulge in oratory or generally unsupported statements.

I am glad to have this opportunity to state the views of the Department of Justice on H.R. 3669. This bill bears the title "Quality Stabilization Act" and is a revision of S.J. Res. 159 and H.J. Res. 636 of the 87th Congress about which I testified on April 19, 1962, and June 15, 1962.

The Department strongly opposes enactment of H.R. 3669. This is price-fixing legislation and, as such, is detrimental to the consuming public. The title "Quality Stabilization Act" is a misnomer for a bill whose real purpose is to make legal, on a nationwide basis, price fixing at the retail and wholesale levels. Enactment of this bill would substitute Federal law in an area now reserved to the States, would cause all consumers to pay higher fixed prices for products needed for daily living, and would be harmful to small business.

H.R. 3669 would amend section 5 of the Federal Trade Commission Act so that the owner of a brand, name, or trademark can establish and control resale prices on goods identified by the distinguishing mark and can revoke the right of the reseller to sell the goods at prices other than the established prices.

It would accomplish this by authorizing the owner of the brand or trademark to revoke the right of the owner of the goods to resell them if the owner has (1) used them "in furtherance of bait merchandising practices"; (2) knowingly sold them at a price other than the trademark owner's "currently established resale price or price range"; or (3) with intent to deceive purchasers "published misrepresentations concerning" them. This bill is clearly a price-maintenance bill of a type which the Department of Justice has repeatedly and strongly opposed over a number of years. Moreover, other interested Federal agencies have registered opposition to this type of legislation consistently over the past 25 years.

The first question to be answered with respect to a proposal to establish broad exceptions to important laws is: What reason is urged for the proposal? The proponents of this type of legislation, of whom you have heard several speaking this morning most eloquently and effectively, have consistently contended that it is needed in order to protect small businessmen, principally retailers, against loss leader selling which is allegedly engaged in by chainstores and large business enterprises that have the financial ability to compete in this unfair manner. Occasionally it is also argued that such proposed legislation is helpful to the large national manufacturers of branded merchandise. However, the arguments made to Congress in support of this

proposal are almost wholly made in the name and on behalf of small business.

Examination of the proposed bill discloses the weakness of these arguments. It does not prohibit loss leaders.

Incidentally, I might say that legislation to prohibit loss leaders has been offered in this House and in the other body. It has notably failed to excite not merely the support, but even the interest of those who are so avid in their support of this legislation.

The proposed legislation does not lessen economic advantage of chainstores or curb the power of big business in any manner. It does not give any rights or protection whatsoever to small business. On the contrary, all of the rights and privileges created by H.R. 3669 are reserved exclusively for those large business enterprises which are the owners of brands, names, or trademarks, which is to say national manufacturers and distributors.

Examination of the actual operation of resale price-maintenance laws shows that they do not help small business. Regardless of whether or not legislation of this type is enacted, the national manufacturers of branded commodities set their price levels to please their principal customers and maximize their own profits, quite properly. The large national chainstores have much greater influence with the national manufacturers than the small local retailers. Thus, prices are set which serve the interests of the chainstores rather than those of small retailers. On commodities which can most advantageously be sold by the chains at a low margin, the price set by the manufacturer for resale is low. On commodities in which it is advantageous to retail at a high margin, the retail price is set high. Small retailers with limited buying power have very limited independence with respect to the prices at which they sell. Their sales are necessarily confined largely to branded products of national manufacturers. Under legislation of this type, they are forced by law, to sell at the fixed price.

On the other hand, chainstores and very large retail establishments have both the power and the independence to price their goods largely as they like. Such large retail establishments have a much larger choice among the various brands that they may choose to carry and sell and, in addition, are able to secure private branded and unbranded merchandise. Thus, their freedom to establish the price of their goods is not restricted as is that of small business.

What happens is this: Chainstores and large enterprises will continue, regardless of any legislation, to dominate the advertising media. Where small retailers have fixed prices on most commodities, the chainstores and big businesses naturally feature those commodities which they are able to offer at relatively low prices. Whether it is called bait merchandising or loss leaders, they are going to advertise the commodities that they have at "sensationally" low prices. These ads will continue to come out. Consumers will continue to be attracted by them. Large enterprises and chainstores always have a wider range than competitive small business is able to offer. Once attracted into the chainstore by advertising, the patron knows that the prices on branded products are the same as those offered elsewhere. Consequently, there is no inducement for the customer to shop around. The result is that the chainstores and the big business retailers increase their market share of both branded and unbranded merchandise.

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the total number of retail businesses, overall, increased and reached an alltime high of some 2,022,000 in 1962.

It has never before been so high.

Mr. KEITH. Mr. Chairman, may I interrupt at that point?

Mr. STAGGERS. Perhaps we should withhold questions until after the statement is completed. Go right ahead.

Mr. LOEVINGER. Thus, the actual facts available, as distinguished from the claims and emotional appeals, seem to point almost conclusively to the lesson that legislation of this type does not help small business, tends rather to handicap and therefore to hurt small business, and is not required because of the number or rate of business failures.

Small business itself seems to be aware of these facts, although many of the advocates of this legislation purport to speak in the name of small business. Our investigations suggest that, while opinion is divided, the majority of small businessmen do not desire such legislation. A survey reported in the Congressional Record in 1960 discloses that a national organization of small businessmen had polled the small business community and found that 52 percent opposed so-called fair trade laws whereas only 43 percent supported them, with 5 percent undecided. It also found that in New York State, which at that time had such a law, the percentage of small businessmen opposing such a law was even greater. Another organization of small businessmen, reputedly the largest in the country, made a survey in 1962 of some 179,000 small businessmen located in every State in the Union. This group voted 51 percent in opposition to quality stabilization legislation, 45 percent in favor and 4 percent undecided.

This proposed legislation would also deprive the States of the right to decide whether or not price-fixing laws should prevail within their borders. Some States have never adopted such laws; some States have declared such laws to be unconstitutional either in whole or in part; some States have allowed only minimum resale prices to be set; and other variants have been adopted by other States. The proposed legislation would override the decision of every State on this subject, whether made by its legislature or its courts. As the Texas attorney general said with respect to a similar bill:

> 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.[1]

Finally, the Department of Justice has found by economic surveys that consumers in States with price maintenance, or so-called fair trade, laws pay from 19 percent to 27 percent higher prices than consumers in States without such laws. Projecting an average price increase of 20 percent for all sales that may be covered by the operation of a national price maintenance law shows that it would cost the American consumer billions of dollars and have a powerfully inflationary effect.

All of these points, as well as others, have been recognized and articulated in recent years by various State courts that have con-

[1] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., 1st sess. (1959), "Fair Trade," p. 494.

sidered such legislation. The statements of the State courts regarding price maintenance legislation express the experience of the States that have actually tried such laws and declare State policy on the issues involved.

I think that some of these statements, Mr. Chairman, are worthy of reference.

The Supreme Court of Wyoming said:

The (Fair Trade) Act leaves to the uncontrolled and uncertain discretion, option and whim of private parties the determination of a retail price suitable to their own interests and for their private benefit, without any regard for the welfare of the public and in derogation of the public's right to a voice in the matter or even to be represented by any public authority interested in the people's behalf (*Bulova Watch Co.* v. *Zale Jewelry Co.*, Wyo., 371 P. 2d 409, 418 (1962)).

The Supreme Court of Pennsylvania said:

The very idea that a commercial entity may hold in one fettering price-fixing grasp all businessmen engaged in vending a certain product, just as a herdsman holds lassoed cattle on the plains, offends against the most elementary concept of a free and independent society. The Fair Trade Act is not only in derogation of the common law, it is in defiance of principles which the Federal Government has on countless occasions enunciated in its antitrust legislation and litigation. Hence, the Fair Trade Act must be construed strictly (*Meade, Johnson & Co.* v. *Breggar*, 1963, CCH Trade Regulation Reporter, par. 70,721).

The Circuit Court of Alabama, in an opinion affirmed by the Supreme Court of Alabama, said:

* * * said statutes are unconstitutional in that they purport to authorize an unlawful delegation of legislative power to purely private interests who may, at their discretion, by their unsupervised, independent, or perhaps selfish actions make unlawful certain business activities which were formerly entirely lawful and not subject to judicial restraint (*Bulova Watch Co.* v. *Zale Jewelry Co.*, 1962, CCH Trade Cases, par, 70, 343, affirmed 147 So. 2d 797).

The Supreme Court of Arkansas said:

The history of the promulgation of fair trade acts justifies the inference they were thought to benefit a few manufacturers and not the general public. Nowhere has our attention been called to any demand by the public for the enactment of such legislation. On the contrary, it appears that special groups have been active in its support.

* * * * * * *

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 (*Union Carbide and Carbon Corporation* v. *White River Distributors, Inc.*, 224 Ark. 558, 563, 568 (1955)).

The Supreme Court of South Carolina said:

It is difficult to find any justification for this legislation based upon considerations of the public health, safety, morals, and general welfare. It applies to every product bearing the trademark, brand, or name of the producer. No distinction is made between commodities affected with a public interest and those that are not. Under the terms of the act, a nonsigner has no voice whatsoever in fixing the price at which he may sell his property. By entering into a contract with a single retailer, the trademark owner may fix the price for all retailers, without regard to their interests or welfare. The manufacturer is not required to take into consideration the cost of his article. He may change the retail prices at will, or even terminate the contract and remove

any article from the operation of the statute. It is solely up to him to say whether or not there shall be a law controlling the price at which his trademarked article shall be sold. There is no review of his acts (*Rogers-Kent, Inc.* v. *General Electric Co.*, 1957, Trade Cases, par. 68, 810, 231 S.C. 636, 645 (1957)).

The Supreme Court of Florida has said:

This court has expressed its views on fair trade and similar acts and has consistently and unequivocally rejected, on constitutional grounds, both the underlying theory and the economic facts on which they are sought to be predicated (*Miles Laboratories, Inc.* v. *Eckerd*, 73 So. 2d 680, 681 (1954)).

The Supreme Court of Colorado has said:

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. During a recent decade numerous attempts were made to regiment the general public and in each instance they were struck down as violative of constitutional rights of a free people. 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 Corporation* v. *Associated Consumers*, 134 Colo. 160, 186 (1959)).

The Supreme Court of Georgia in an effective and poignant statement has said:

* * * This is one of the few powers left to States to decide for themselves regardless of what the Supreme Court of the United States may or may not have decided * * *. The scheme described in the petition now under consideration permits a manufacturer, under the guise of protecting his property rights in a trade name and trademark to control the price of his product down through the channels of trade into the hands of the ultimate consumer, and into the hands of persons with whom he has no contractual relation whatever. This statute clearly violates the provisions of the due process clause of the constitution of the State of Georgia (*Cox et al.* v. *General Electric Company*, 211 Ga. 286, 291–292 (1955)).

Passage of this legislation would presumably involve the exertion of Federal power to achieve acts which the Supreme Court of Georgia has said violate the due process clause of the State of Georgia. I submit that this committee and this House should not do such a thing.

Similar statements and decisions may be found in the opinions of the courts of Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, New Mexico, Ohio, Oklahoma, Oregon, Utah, Washington, and West Virginia.

Mr. Chairman, the statements that I have given are not my own conclusions. These are the conclusions of the highest courts of the respective States, issued after full hearing and after full consideration of the issues presented by such legislation as this.

Without attempting any conclusive judgment, the logic and weight of these court opinions cast serious doubt on the constitutionality of legislation of this type. The principles of *Schechter* v. *United States*, 295 U.S. 495, seem to be more nearly apposite than those of *Old Dearborn* v. *Seagrams*, 299 U.S. 183.

Although the thrust of the proposed legislation is ostensibly at resale price maintenance, it would certainly facilitate horizontal price fixing. The fact that price movements are inhibited would tend to diminish the area of price competition. Furthermore, it is apparent that retailers will not readily accept competitive branded merchandise

at substantially disparate prices. Therefore, the strong tendency would be for retailers to insist upon manufacturers setting identical or substantially similar prices, to the extent that they set prices. It is unimportant now what particular mechanism may be adopted toward this end; but it can hardly be doubted that some devices, legal or illegal, will be found to insure that ostensibly competitive commodities subject to fixed resale pricing will be sold at the same prices in at least one, and therefore in all stores.

The proposed legislation is not only without a sound legal foundation but, on the contrary, is inconsistent with common law property concepts in that it permits a person to sell his property and still maintain substantial control over it. There are many years of common law history in which the courts have sought to establish the concept of private property free of such restraints on the rights of alienation.

It is impossible to review in detail all of the economic, legal, historical, and social factors involved in the issues presented by this proposed legislation. However, it should be noted that the Department of Justice has had experience in combating unreasonable restraints on competition since 1890. The Department has been observing the operation of resale price maintenance laws for more than 25 years. The unanimous judgment of all those who have had responsibility in enforcing the antitrust laws has been that resale price maintenance legislation is unworkable and does not accomplish its objective. The proposed legislation would lead to the following undesirable consequences: (*a*) it would handicap small business in its competition with chainstores and big business by restricting its freedom to price; (*b*) it would lead to a higher rate of small business failures; (*c*) it would impose Federal supervision of pricing practices upon nearly all retail sellers; (*d*) it would prevent price reductions, encourage price increases and tend toward inflation; (*e*) it would destroy the right of the States to determine their own policy in this field; (*f*) it would result in flooding the Federal courts with small cases and petty litigation; (*g*) it would reduce the incentive for higher quality, increased standards and better values; (*h*) it would create an advantage for big manufacturers who are able to pay for large scale enforcement and for big distributors who use private brands to the disadvantage of small manufacturers and distributors; (*i*) it would impose upon the consuming public the payment of a subsidy through artificially high prices to particular manufacturers and distributors; and (*j*) it would establish conditions and foster a climate conductive to agreements among competitors and destructive of a competitive economy.

The Department of Justice, therefore, strongly recommends that this legislation should not be enacted.

(The tables referred to follow:)

TABLE 1.—*Business failure rate for 10,000 listed concerns,*[1] *1962*

FAIR TRADE[2]

State:	Rate	State—Continued:	Rate
Alabama[5]	29	New Hampshire	32
Arizona	110	New Jersey	60
California	120	New York	116
Connecticut	64	North Carolina	21
Delaware	32	North Dakota	6
Idaho[6]	39	Pennsylvania	48
Illinois	69	Rhode Island	50
Maine	26	South Dakota	2
Maryland	45	Tennessee	42
Massachusetts	42	Virginia	32
Mississippi	17	Wisconsin	58
Nevada	72	Average failure rate	71

NONSIGNER INVALID[3]

State:	Rate	State—Continued:	Rate
Arkansas	27	Minnesota	33
Colorado	37	New Mexico	11
Florida	110	Oklahoma	25
Georgia	62	Oregon	138
Indiana	30	South Carolina	79
Iowa	31	Washington	89
Kansas	21	West Virginia	34
Kentucky	21	Wyoming	9
Louisiana	30	Average failure rate	51
Michigan	52		

FREE TRADE[4]

State:	Rate	State—Continued:	Rate
District of Columbia	16	Texas	35
Missouri	27	Utah	34
Montana	15	Vermont	17
Nebraska	13	Average failure rate	29

[1] Listed concerns represents the number of names listed in the July issue 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 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.

[5] The Alabama Supreme Court invalidated fair trade "especially as to nonsigners on Dec. 20, 1962.

[6] An Idaho district court invalidated fair trade as applied to nonsigners on Oct. 16, 1962.

NOTE.—Alaska and Hawaii are omitted because of lack of data. Ohio is omitted because of a split in lower court decisions concerning the validity of its 1959 fair trade law. The press reported that on Apr. 15, 1963, the Ohio Supreme Court upheld the lower court decision holding the Ohio fair trade law invalid.

Source: Dun & Bradstreet.

TABLE 2.—*Distribution of business failures per 10,000 listed concerns [1] within fair trade,[2] nonsigner invalid,[3] and free trade [4] States, 1946 through 1962*

[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	1962
Fair trade	6	15	22	36	36	34	32	37	45	47	53	56	65	61	65	75	71
Nonsigner invalid						13	18	19	28	29	44	52	47	43	51	56	54
Free trade	3	7	9	20	15	8	9	14	19	14	21	26	26	24	26	30	29
Ohio															63	78	77
U.S. total	5	14	21	35	34	31	29	33	42	42	48	52	56	52	57	65	61
	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	23
Nonsigner invalid						1	3	2	2	5	6	8	14	14	15	17	18
Free trade	4	4	4	4	4	4	4	5	4	5	6	7	6	6	6	7	7
Ohio															1	1	1
U.S. total	49	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 3 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. The press reported that on Apr. 15, 1963, the Ohio Supreme Court upheld the lower court decision holding the Ohio fair trade law invalid.

Source: Bureau of the Census, "Statistical Abstract of the United States" for the years 1947 through 1960 (data from Dun & Bradstreet) and for 1961 and 1962 from Dun & Bradstreet.

Mr. STAGGERS. Thank you very much, Mr. Loevinger.

I have just one or two questions. I noticed, although I may be wrong, that you referred to this, or by implication, rather, to the Supreme Court decision that this is a price-fixing bill. I do not say that you said that.

Mr. LOEVINGER. Yes, sir.

Mr. STAGGERS. But by implication I think you did. Would that be your interpretation, that it is a price-fixing bill?

Mr. LOEVINGER. Well, of course, price fixing is essentially an epithet, and I suppose the witnesses who have been reluctant to admit the term have been correct in saying that you simply should not use names of this sort.

In antitrust litigation we distinguish between vertical and horizontal price fixing. Vertical price fixing is price fixing by the imposition of control from one level of distribution to another. Clearly this is vertical price fixing. It is the imposition of control by the manufacturer on down through the various distributive levels.

There is nothing in the bill that ostensibly legalizes horizontal price fixing.

For the reasons I have suggested, as well as numerous others, we think that it would facilitate and tend to encourage horizontal price fixing. It will make prices less flexible. It will make the comparison of nationally established vertical price lines easier. It will eliminate the possibility of competition at the various distributive levels beyond that of the brand-name owner, and, therefore, it will tend to horizontal price administration and price fixing, although it does not ostensibly legalize that phenomenon.

Mr. STAGGERS. I noticed that you have given several rulings of the Supreme Court and you mentioned my own State of West Virginia here. Do you think that this committee ought to be influenced by the supreme court of any State or by the United States when we legislate—I mean from the fact that they are only there to interpret the laws after we make them? I do not think they are legislators in any sense of the word, only to interpret what has been passed. Do you think that they should influence our thinking here today only from what has been done in the States, not as to Federal legislation?

Mr. LOEVINGER. There are two respects in which I think these things are significant, Mr. Chairman.

To begin with, legislation of this type, this general type, is passed usually under the so-called police power. Certainly State legislation of this type is passed under the police power. There is no Federal police power, and, therefore, the attempt is made to bring it under the commerce power. However, it is perfectly clear that legislation of this type—and there have been many, many cases brought to the U.S. Supreme Court—legislation of this type is legitimate only if the laws have a reasonable relation to a proper legislative purpose.

This, I believe, is the test stated by the U.S. Supreme Court in the famous *Nebbia* case (*Nebbia* v. *New York*, 291 U.S. 502, (1934)). Now, the courts, therefore, do not examine legislative policy, but they do examine the underlying factual background and the ostensible purpose of legislation.

Now, the State court opinions that I have cited are opinions that have passed not on a Federal law, but on State laws that are in their principal provisions of essentially the same type as the legislation before this committee now. The State courts have remarked that the underlying factual foundation simply is not there. The State courts have said that these bills do not accomplish their ostensible public objective and that they have the various bad features that I have mentioned.

It seems to me that with the number of State courts that have reached this conclusion, that there is some evidence of the fact that this is not the proper means to achieve the objective sought.

As I have suggested, if you want to attack loss-leader selling, there are legislative devices and proposals for doing it. This bill does not do it and the fair trade laws do not do it and the courts have remarked on this.

Beyond this, it seems to me that the expressions of the State courts that I have referred to and of many other State courts show a very strong public policy among the States on this subject. It seems to me that the Congress should not undertake to override the strong public policy of these States unless there is some compelling reason for doing so.

I know of no such compelling reason, and I suggest that many of the Congressmen who support this legislation, and whom I respect, have indicated in many ways in other fields that they do not believe that the Federal power should override State policy.

I submit that it is a bad precedent to override State policy by Federal power for the kind of reason that has been urged in support of this legislation.

Mr. STAGGERS. Mr. Loevinger, I was just wondering this, and this is the only reason I bring this up. I know that you are opposed to the bill and you have so stated and you bring this up to support your argument.

The other side could possibly bring up court decisions to support their side, too, that would be in favor of the bill, and I do not believe that any court could tell what this Congress or what this committee is thinking about until it comes out of the committee.

They could not be against any bill, wholesale, until they know what is going to be in the bill.

Mr. LOEVINGER. Surely.

Mr. STAGGERS. I mean especially the courts. I do not believe they have the power and should not be in this thing in any way. Their job is to interpret the laws after the Congress and the State legislatures have made them. That is my only point in bringing it up.

I have no further questions.

Congressman Dingell?

Mr. DINGELL. Thank you, Mr. Chairman.

Do you have any idea of the number of items of litigation which would be brought if the Congress in its wisdom or lack of it were to enact H.R. 3669?

Mr. LOEVINGER. The number of items that might be subject——

Mr. DINGELL. The number of cases which would be brought in the Federal courts if H.R. 3669 were to be enacted by the Congress?

Mr. LOEVINGER. No, sir, I do not suppose that there is any method of estimating that. However, it would be considerably greater than all of the cases that have been brought in all of the State courts under so-called fair trade legislation, for a number of reasons.

For one reason, this legislation is broader in the scope of its application than many fair trade statutes. For another reason, this legislation, in effect, virtually requires—it does require the brand owner who sets his resale price to police his resale price maintenance scheme or lose his right to set retail prices.

In other words, if he is going to bring any cases, he has apparently got to sue virtually everybody. It is a defense to any single suit that he has not sued others, so that the provision of this proposed bill which would give Federal courts cognizance of such suits without regard to the amount in litigation undoubtedly would result in a tremendous number of cases.

Mr. DINGELL. Do you have available to you sources whereby you could report to this committee a rough idea of the number of cases which are brought—I am not asking you to do this, Judge Loevinger. I am just asking, whether you have available to you sources which would make it possible for you to give us an idea of the number of cases which are brought in the State courts with regard to fair trade in any given year? Would you do that for the committee without an undue amount of trouble for yourself?

Mr. LOEVINGER. We would be happy to take a look and see if those statistics are available, Mr. Dingell. I am somewhat dubious that we can get too reliable statistics. I have occasionally tried this sort of thing before. You see, the difficulty is that usually the cases that reach only the trial court level in State courts are not reported either in the reports of descisions or in the statistics.

Occasionally the looseleaf reporters pick them up, but there are many, many cases at the trial court level and State courts that are never reported and never get into the statistics.

Mr. DINGELL. There is another item on page 6 of the bill which concerns me. If you were to turn to page 6, line 3, you will note the following language:

> Any injunction granted under clause (ii) of this paragraph shall remain in effect for 1 year from the date it is granted unless it is the second or a subsequent such injunction issued against the same defendant in favor of the same plaintiff in which case it will be a permanent injunction; except that any such injunction, upon petition of such plaintiff, may be vacated unconditionally by the court granting it.

Now, as I read this, I find it is a rather unusual piece of legislation in that it extends a particular direction to a court of equity.

I was wondering if you would like to comment on this section in view, at least, of my understanding that where injunctive power is given to the courts, it is generally given with a rather wide range of discretion to issue an injunction or to fail to issue an injunction, or to issue it according to such time and circumstances as appear best to the court.

Mr. LOEVINGER. I believe that is correct, sir.

I know of no other comparable provision in any other law, nor is there any comparable provision in any law seeking to enforce the provisions of the antitrust laws.

Mr. DINGELL. This is, then, a unique provision in the law, in your experience?

Mr. LOEVINGER. So far as I know, yes, sir.

Mr. DINGELL. Now, I am interested to note other sections and other comments which appear in the bill in section 10 on page 5 and following.

I would like to refer particularly to the section dealing with authorization to initiate suits in the Federal courts without regard to the amount in controversy.

I was wondering if you would like to make a comment on that, in view of the fact that the courts just recently have had the jurisdictional amount increased by the Congress.

Mr. LOEVINGER. I am sorry, which section are you referring to now?

Mr. DINGELL. I am referring to page 5, section 10, line 18:

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 shall be entitled,

and so on and so forth.

This is rather unique, in view of the fact that the Congress just raised the jurisdictional amount of Federal courts very substantially. Am I correct, Judge?

Mr. LOEVINGER. Yes, sir.

The jurisdictional amount in Federal courts formerly was $3,000; now it is $10,000; and the whole effort of recent legislation, recent congressional action, has been to insure that the Federal courts shall deal only with cases of substantial significance, even though they may arise under Federal laws.

The direction of evolution has been in the other direction, and it strikes me, also, Congressman Dingell, that in some respects this is somewhat inconsistent with another provision in this same proposal.

There is on page 3 a provision in this proposal saying that—

The owner of a brand, name, or trademark—

who avails himself of the provisions of this act—

shall thereby subject himself without respect to the amount in controversy to the jurisdiction of the district court—

in case he has misrepresented in his own advertisement.

But this is subject to the limitation that the Federal courts have jurisdiction only if the owner of the brand, name, or trademark is not subject to process in the courts of the State.

In other words, the right of an injured purchaser, which is purportedly given by this proposal, is limited to the State courts unless the State courts are unable to secure jurisdiction. But the right given to the trademark owner is very much broader.

Mr. DINGELL. Now, I note also that the defendant is subject to suit, on line 20, in any district court of the United States in which the defendant resides, or is found, or has an agent.

Now, this is rather more broad than the venue provisions and the more or less common law provisions which are generally applied with regard to Federal jurisdiction as to venue. Is that correct?

Mr. LOEVINGER. Yes.

The phrase "has an agent" is far broader than any comparable provision that I know. I think that the comparable provision of other laws—and I am speaking now only from memory—are usually to the effect that the defendant is subject to suit in the district in which defendant resides, is found, or is doing business.

A defendant might have an agent in, I suppose, almost any district, and this would certainly be a very broad provision.

Mr. DINGELL. This would be rather disruptive on small businessmen sued by very large corporations. Am I correct?

Mr. LOEVINGER. Yes, sir.

This could be completely ruinous, I should assume.

Mr. DINGELL. Now, I notice also that the bill authorizes recovery of the amount of damages sustained, injunctive relief, and the costs of suit, including reasonable attorney's fees. What would the impact of these sections be on the small businessman sued by a large corporation?

Mr. LOEVINGER. Well, it is quite obvious that the imposition of money judgment might be very large. It might be difficult for a manufacturer to establish that he had sustained any significant amount of damages from a relatively few sales at a price below his fixed price. However, if a retailer were independent and wished to maintain his right to sell at his own price and, therefore, went to litigation, the costs of suit and even reasonable attorney's fes might exceed by many, many times the amount of damages involved.

This is a fairly unusual kind of provision, also, although it is found in some of the antitrust laws.

Mr. DINGELL. It would actually be fair to say that under this damages might be nominal, say $1, awarded by the court, but attorney's fees might run into the thousands or tens of thousands of dollars for the same piece of litigation, am I correct?

Mr. LOEVINGER. Conceivably hundreds of thousands.

Mr. DINGELL. Conceivably hundreds of thousands, and against a small businessman, am I correct?

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. All right.

Now, I note further on page 6, line 11, section 11, there appear the following words:

> In any proceeding under paragraph (1) it shall be a defense for the defendant to establish that the plaintiff has not used due diligence to effectuate observance or enforcement of plaintiff's rights under paragraphs (7) to (17).

What resources does the little businessman have available to him under this statute or proposed statute to ascertain whether or not the plaintiff in such litigation has, in fact, used due diligence or has failed to use due diligence?

Mr. LOEVINGER. I cannot answer that, Congressman Dingell. I do not know. There is tremendous variation among small businessmen.

Mr. DINGELL. As a matter of fact, would it not be fair to say that under this particular language the small businessman would find it almost impossible to exercise the resourcefulness and the discovery procedures and so forth to actually find out whether or not due diligence has been used by a large corporation with headquarters in many States, with vast records?

Mr. LOEVINGER. Let me say this:

It is always difficult for a small businessman to sue one or more big businesses. The sheer psychological barriers, as well as financial, economic, procedural barriers to this suit are far greater than people normally assume. Nevertheless, it can, in fact, be done, and I have, myself, on behalf of small business done it and done it successfully. So I do not want to say that it cannot be done.

Mr. DINGELL. But it is difficult?

Mr. LOEVINGER. It is very difficult.

Mr. DINGELL. And costly?

Mr. LOEVINGER. You have to find a very good lawyer.

Mr. DINGELL. Now, I would like to discuss with you page 8, line 14, section 15, the section on forcing a brand-name owner to initiate a lawsuit, or, rather, to initiate a program of fixing prices for wholesalers and retailers with whom he is also in competition.

I would like to have your comments on that particular section.

Mr. LOEVINGER. This section is designed to reverse the opinion of the U.S. Supreme Court in the *McKesson-Robbins* case (*U.S.* v. *McKesson & Robbins, Inc.* 351 U.S. 305, 1956). Actually, despite the incredulity of, I believe, Congressman Friedel, there are, in fact, many, many instances in our contemporary economy of producers who are engaged in distribution in competition with distributors who are independent of them. Indeed, I believe that the Small Business Committee of the House is conducting hearings on the problems of so-called dual distribution.

Mr. DINGELL. And Friday next.

Mr. LOEVINGER. I am not sure when they are set, sir.

Mr. DINGELL. I happen to be a member of that subcommittee.

Mr. LOEVINGER. The problem is serious enough to have occasioned some legislative concern both in the House and in the other body. In the *McKesson-Robbins* case, McKesson-Robbins set prices under fair trade, but also competed with its distributors who are selling the same goods. The Court said that this amounted to horizontal price fixing, and that this was forbidden under the fair trade laws.

Mr. DINGELL. The antitrust laws?

Mr. LOEVINGER. No, it was specifically forbidden under, I believe, the Miller-Tydings and the McGuire Acts, not under the fair trade laws, you are quite right. When I said a moment ago that this act does not ostensibly legalize horizontal price fixing, as a matter of fact, in this section, it does legalize horizontal price fixing because it reverses the rule of *McKesson-Robbins*.

Mr. George Burger, for example, who may be known to the members of this committee as being very active in the National Federation of Independent Businesses, has for years been complaining about the action of the large rubber companies and tire companies in establishing retail outlets competitive with the independent tire dealers.

He will be prepared, I am sure, to give the committee literally dozens and hundreds of instances of such competition. Such competition does, in fact, exist in the very fields in which the demand for legislation of this type is most often heard, so that this provision would legalize horizontal price fixing between a brand-name owner who had his own distributive outlets and the distributors who were otherwise independent of them.

Mr. DINGELL. This would also repeal legislatively the impact of *Esso* v. *Secatore* before the Federal Trade Commission, if I am correct, in a similar case?

Mr. LOEVINGER. Yes, I believe so.

Mr. DINGELL. Now, you indicated some of the vices that are inherent. I would like to turn, if I could, to the language appearing on page 2, line 12:

> If 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 are in free and open competition therewith—

This authorizes the fixing of prices under these particular circumstances, and I am wondering if you could give us any comments on the meaning of this language in the light of recent decisions of the courts dealing with free and open competition. I believe there was a case recently in Pennsylvania on this particular point wherein the court held that the manufacturer who marketed an unduly large share of commodities of a particular type sold, did not have available to him then the right to fair trade——

Mr. LOEVINGER. Yes, sir.

Mr. DINGELL. Would you care to give us some comment on that?

Mr. LOEVINGER. Well, I do not know what I can usefully say about this, Congressman Dingell. I would hope that if legislation of this kind is passed, that such phrase would be most rigorously and strictly construed by the courts. I would hope that if in the case even where there were a number of sources of a particular kind of goods, if these sources all took advantage of the law to fix their prices and if they fixed the same or substantially the same price, that this would be construed to be not that kind of competition which the public is entitled to, and which Congress sought to encourage, and that, therefore, this would invalidate all of such prices.

Mr. DINGELL. You submitted last year for the record a list of particular commodities wherein certain manufacturers or small numbers of manufacturers, in effect, dominated the industry. I was wondering if you would care to bring them up to date and to make such comments as you feel would be appropriate in the light of your last statement with regard to the language on lines 12 through 15 of the bill on page 2.

I think that would be particularly helpful.

I would also like to have from you, if you find it possible, Judge Loevinger, some updating of the comments which you so capably gave during the last session of Congress with regard to the use of fair trade, the various price-fixing statutes and devices that are available on the market for purposes of evasion or evading the antitrust laws.

I am sure you probably have some more recent information to give the committee on this point.

Thank you very much, Mr. Chairman.

Judge Loevinger, I would like to commend you for what I regard as a very splendid refutation here this morning.

Mr. STAGGERS. Mr. Van Deerlin?

Mr. VAN DEERLIN. Mr. Chairman, I, of course, have great respect for the number of veteran members who have sponsored this legislation.

I did, however, send copies of the proposed bill and some information concerning it to a number of businessmen in my home district, including some discount house owners, one of whom wrote to me rather strongly on the subject, including this opening gambit:

"Quality stabilization is the same old prostitute decked out in bright new party dress."

I cleaned that up a little, Mr. Chairman. I think what he was telling me was that there was no essential difference between this and earlier fair trade legislation which has gone by the boards.

Would this be your summary of the legislation, Mr. Loevinger?

Mr. LOEVINGER. I do not think there is the slightest question about it, Congressman Van Deerlin. In fact, I was a little bit confused by Congressman Madden's disclaimer on this point. Congressman Madden testified to this committee that the present bill was simply a means of carrying out legislatively the principles that were expounded in the *Old Dearborn* case. Then he went on and said that this has nothing to do with fair trade.

However, the *Old Dearborn* case is the case in which the Supreme Court upheld the Illinois Fair Trade Act. It is concerned with nothing but fair trade, and if this bill has any relation to the *Old Dearborn* case, it must be fair trade, because that is all that the *Old Dearborn* case is concerned with.

Mr. VAN DEERLIN. Thank you.

Mr. STAGGERS. Thank you very kindly, Mr. Loevinger, for your testimony. I was going to suggest, since there are three members of the committee who have not had a chance to ask you questions and who do have some questions, I am wondering if you could come back tomorrow at 10 o'clock?

Mr. LOEVINGER. Yes, sir.

Mr. STAGGERS. Thank you.

The committee will adjourn until—I might say this before we do adjourn. If there are any witnesses here who care to insert in the record their prepared statement who, perhaps, cannot come back tomorrow, we will be glad to have them do so now. If they have any prepared statement that they would like to insert in the record in lieu of presenting it themselves, they may do so.

Thank you very kindly. We will expect you back tomorrow at 10 o'clock.

(Whereupon, at 12 noon, the hearing was adjourned, to reconvene at 10 a.m., Wednesday, April 24, 1963.)

QUALITY STABILIZATION—1963

WEDNESDAY, APRIL 24, 1963

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

The subcommittee met, pursuant to recess, at 10 a.m., in room 1334, Longworth House Office Building, Hon. Harley O. Staggers (chairman of the subcommittee) presiding.

Mr. STAGGERS. The committee will come to order.

Yesterday, when the committee adjourned, we were having testimony on H.R. 3669, and Assistant Attorney General Lee Loevinger is here to answer questions on behalf of the Attorney General this morning. I think we can finish up shortly with you, sir, if you would like.

STATEMENT OF HON. LEE LOEVINGER, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE—Resumed

Mr. LOEVINGER. Yes, sir.

Mr. STAGGERS. At this time, Mr. Loevinger, I believe Mr. Glenn has some questions that he would like to ask you. So we will start with Mr. Glenn.

Mr. GLENN. Thank you, Mr. Chairman.

Mr. Loevinger, in your statement on page 4, you mentioned that the survey reported in the Congressional Record in 1960 disclosed that a national organization of small businessmen had polled the small business community and found that 52 percent opposed the so-called trade laws, whereas 43 percent supported them, 5 percent undecided.

Now, of course, we know that nothing gets into the Record unless it is put in there.

Mr. LOEVINGER. Yes, sir.

Mr. GLENN. Other than the testimony of what was said on the floor. Can you tell us who put this in the Record?

Mr. LOEVINGER. Yes, sir. Senator Javits.

Mr. GLENN. And can you tell us the name of this organization?

Mr. LOEVINGER. I am sorry, Congressman, I cannot recollect it at the moment. One of my assistants has the clipping, but I do not think they have it here. I think it was the National Federation of Small Business, but I am not sure.

Mr. GLENN. How do you reconcile that report of this one organization with the endorsement of this bill by 70 nationally recognized trade and professional organizations which were itemized by Mr. Madden in his statement of yesterday?

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Mr. LOEVINGER. My inquiries indicate that there is a division of opinion among small businessmen, as indeed these poll results will show. I believe that there are some organizations the leadership of which is very much convinced that legislation of this sort is desirable, and which, year after year, support it.

I am equally convinced that a majority of small businessmen themselves are opposed to it. This is reinforced by the other survey of the National Federation of Independent Businessmen referred to in my statement, which, as far as I know, is far and away the most extensive survey that has ever been taken.

Incidentally, the National Federation that took this survey was a fair trade advocate. It has carried the term "Fair Trade" on its masthead as an indication of its advocacy of this approach.

However, when it polled approximately 200,000 small businessmen in every one of the 50 States, it found that a slight majority was opposed.

I have spoken to the leaders of some of the larger organizations, and also to a number of businessmen, and I am persuaded that small businessmen themselves do not uniformly support this by any means.

It is, of course, very difficult to say that there is a majority one way or the other. This would require a very careful and rigorous survey; and so far as I know, this sort of thing has not been done. I doubt that anyone except the U.S. Government has the resources to do it.

Mr. GLENN. In the recitation yesterday, you also said that you were going to limit your statement to the facts rather than citation of legal principles and cases, and yet, reading your statement, it seems to me that rather than a recitation of fact it is conclusions. Do you not think that these are your conclusions after considering what facts you wanted to consider in the preparation of this very fine brief?

Mr. LOEVINGER. No, sir, I do not. I think that this is the most factual statement that has been presented to this committee on the subject.

I know of no other presentation to this committee on this subject in which a similar effort has been made to examine the hard-core figures. There is a good deal of talk, particularly among the advocates of the legislation, about the plight of small business, about the necessity for helping small business, about the value of small business to the country. With all of those statements the Department of Justice and I completely concur. We agree with all of the encomiums about small business that have been given. We agree that small business needs help and should be helped.

What is notable in those statements is a complete absence of any careful analysis of the operation of the proposed legislation, of the means by which it would affect small business, and finally of any pragmatic attempt to investigate what the actual effect of such legislation has been where it has been in operation.

We have undertaken to examine the actual operation of this proposed legislation. And this can be ascertained; this is not speculative or hypothetical, because such legislation has been in operation in many States and over relatively long periods of time.

We have also examined the results of that operation. Our examination wholly persuades us that, far from helping small business, what this proposed legislation does is handicap small business and result

in a higher rate of failure of small business than would exist without such legislation.

Mr. GLENN. Now, you mentioned failure of small business. Have you also made a study of the failures of small business within the last 3 or 4 years?

Mr. LOEVINGER. Yes, sir.

Mr. GLENN. Have they been increasing or decreasing?

Mr. LOEVINGER. They have been increasing. Starting from a very low point immediately after World War II, they increased up to 1961. They decreased in 1962.

Mr. GLENN. They decreased in 1962?

Mr. LOEVINGER. Decreased, both numbers and rate.

Mr. GLENN. It seems to me I read somewhere that 1962 was an increase over 1961.

Mr. LOEVINGER. No, sir. I believe that is erroneous.

Mr. GLENN. Do you have your facts there?

Mr. LOEVINGER. Yes, sir, I have the figures.

The generally used statistics are Dun & Bradstreet's statistics reported in the Statistical Abstract of the United States for recent years. We got the 1962 figures directly from Dun & Bradstreet, because they have not been published yet.

The total business failures started out in 1946 with a national number of only slightly over 1,000; in the postwar era there were great demands for all kinds of business, and the business failures were relatively low.

They increased steadily up through 1961, when they reached a high of 17,000. In 1962, they fell to 15,700.

It is interesting to note on the historical pattern, however, that, if you take the failure rate per 10,000 listed concerns, that the rate, the present rate, the 1962 rate is now lower than it has been at any time except during the post-World War II period and during the 2 years of 1936 and 1937. During the period from 1921 through 1935 the failure rate was higher. In 1938, 1939, and 1940 the failure rate was higher. Of course, you then got into the war period, and the rate of entry was very low in the postwar period.

It has now come back to a level that is below the level that prevailed during the relatively prosperous years of 1921 to 1931. And it is lower than it was in 1961.

Mr. GLENN. Would you say the 1962 figures have not been published yet?

Mr. LOEVINGER. I do not believe so. I believe that we got them directly from Dun & Bradstreet.

I understand that we have made inquiry directly to Dun & Bradstreet to get as complete a set of figures for 1962 as possible.

It takes several months to get these figures out. This is now April, and I think that it usually takes about 6 months after the close of the year before the figures are generally published. They are now available on inquiry, however.

Mr. GLENN. Now, sir, I notice in your statement you quote from a number of supreme courts of the various States on the decisions on the so-called price-fixing, fair trade acts. And are there any States in the Union that have found fair trade acts constitutional and upheld them?

Mr. LOEVINGER. Yes, sir.

Mr. GLENN. Do you quote very many of those cases in your statement?

Mr. LOEVINGER. No, sir.

Mr. GLENN. Why not?

Mr. DINGELL. If the gentleman will yield, I assume the fair trade witnesses will be back.

Mr. LOEVINGER. Well, among other things, they are not decided upon the same basis, Congressman. The issue presented, the constitutional issue presented, to the States, to the courts, that consider such legislation as this is: Is the means adopted by the legislature reasonably adapted to the securing of a proper legislative end?

Where the constitutionality of such a statute is upheld, the finding of the court is merely that within the very wide range of legislative discretion which is permissible under both State and Federal constitutions, that this does not seem to exceed the limits.

However, those courts that have found it unconstitutional have said that it goes even beyond the wide range of legislative discretion that is permissible, that either that the end sought is an improper one, and they say it is simply the aggrandizement of a few at the expense of the public; or the means adopted is so clearly improper that it cannot be permitted to stand.

Now, it seems to me that these are fairly persuasive and fairly powerful findings when they are made by as many supreme courts as have made such findings.

The contrary finding of some courts that, regardless of our personal opinion of the wisdom or unwisdom of this, it does not quite reach the extreme of unconstitutional impropriety, does not seem to me to be any fair answer to the findings of these courts that have said that the delegation of power and the ends sought, the enrichment of a few at the expense of many, is so clearly improper that it cannot be permitted to stand.

Mr. GLENN. Have there been any definite findings by the Supreme Court of the United States on fair trade acts?

Mr. LOEVINGER. The only decision by the Supreme Court of the United States is the *Old Dearborn* case, in which it held, in 1935, that the Illinois Fair Trade Act as presented in the context of that case was not unconstitutional. This, of course, was an application of the Federal Constitution to a State act.

Mr. GLENN. You say: Was not unconstitutional?

Mr. LOEVINGER. Yes, sir.

Mr. GLENN. In other words, it was constitutional?

Mr. LOEVINGER. Yes, you can say it is constitutional. The finding is a negative sort. Again, the Supreme Court does not say: "We think this is a good act"; they say it does not transgress the bounds of legislative discretion.

Mr. GLENN. Well, sir, then for this difference between the State supreme courts—in which they apparently hold a diversity of opinions—and with this opinion of the Supreme Court which you have just mentioned, and certainly maybe this was not exactly on the basis of the bill which we have before us; do you not think it is within the realm of the legislative body to pass this act and make it the law, and then let you or someone else take it to the Supreme Court and let them pass on whether it is constitutional or not?

Mr. LOEVINGER. Certainly what Congress wishes to do, Congressman Glenn, is a matter of Congress discretion and judgment. I would assume that, if there is serious constitutional doubt about legislation, Congress might hesitate to enact it, for two reasons:

First, it may not wish to burden the Court with the kind of issue that is involved in such a constitutional trial; and, second, but more important, I think, is that where the constitutional doubt arises from such a serious attack upon the propriety of the means adopted and the ends sought, I would think it would be unwise for Congress to enact such legislation. And that is what I am urging.

I have suggested that I do not believe that the *Old Dearborn* case is in any respect decisive of the constitutional issue so far as Federal price-maintenance legislation is concerned. That considered only a State law and said that: "We are not prepared to strike down the economic experiment of the State under applicable Federal constitutional principles."

It is now proposed that Congress should enact legislation which would displace all State legislation and which by Federal action would occupy the field. Whether or not that is constitutional raises wholly different issues.

Mr. GLENN. Have we not been doing that in quite a few fields within the last decade?

Mr. LOEVINGER. Yes. Congress has done that in several fields within the last decade. And I raise the issue whether or not Congress wishes to do it again in this field, which traditionally has been reserved to the States.

Mr. GLENN. Sir, do you not agree with me that one of the arguments of last resort, perhaps of lawyers and particularly lawyers that specialize in appellate work, is always one that it is unconstitutional, and, of course, whether it is or not has to be decided by some court of jurisdiction, competent jurisdiction, and I cannot see where something which is so controversial as this issue, and particularly on this new so-called quality stabilization bill, which in my opinion is not the same as those which we have had heretofore on so-called fair trade bills; whether this should not be brought before the Supreme Court and have the decision made once and for all, and the only way you are going to do that is to enact this bill into law?

Mr. LOEVINGER. That is certainly an argument, sir, and there is no question that the final adjudication of constitutionality can be made only by the Supreme Court.

I have the clipping which you asked about a moment ago, Congressman, if you want it.

Mr. GLENN. Yes.

Mr. LOEVINGER. It is from the Congressional Record for January 18, 1960, at page A363, the extension of remarks of Senator Jacob K. Javits of New York. And it refers to a poll made by the National Small Businessmen's Association.

Mr. GLENN. And when was that poll made? Does it state?

Mr. LOEVINGER. Senator Javits, speaking in January 1960, says that the poll was conducted "last summer," which would have meant sometime, I suppose, in the latter half of 1959.

Mr. GLENN. Thank you.

Now, sir, on page 2, second paragraph of your statement, you say that:

> * * * all of the rights and privileges created by H.R. 3669 are reserved exclusively for those large business enterprises which are the owners of brands, names, or trademarks, which is to say national manufacturers and distributors."

Now, where is the language of the bill that says, "rights are reserved exclusively for large business enterprises"?

Mr. LOEVINGER. It does not say it in those terms, but those are the terms in which the bill is written. No rights are given to anyone other than the owner of a brand, name, or trademark. These are, as a matter of observation, the large companies, the large national manufacturers and distributors.

Actually, our own survey of enforcement activity under the Fair Trade Act shows that the plaintiffs are predominantly, in fact almost exclusively, large companies, and that the defendants are predominantly small local retailers.

Furthermore, this gives tremendous advantages to the large national companies that are the trademark owners. For example, referring to the provision on page 8 concerning which Congressman Dingell had a colloquy with Congressman Friedel, what this does is permit a large national company that has its own distributive system to set the prices at which it will sell its merchandise, as well as the prices at which all of its competitors will sell its merchandise. It can reserve different brands for itself and sell them at a higher or a lower price, whatever will serve its interests.

There are many cases in which so-called dual distribution systems are in operation. These are cases in which manufacturers or producers distribute their products through their own outlets and also distribute to independent outlets. This gives them complete control of the prices, both of themselves and of their competitors.

I submit that this can hardly be an effective way to help small competitors, to put them wholly within the legal power of the people who now have a great deal of power over them, their suppliers, but who will henceforth be able to control not only the costs at which they buy but the price at which they sell.

Mr. GLENN. Well, you do not mean to say, sir, do you, that there are no small business enterprises that do not own brands and names and trademarks?

Mr. LOEVINGER. There are very few, sir, and those few will mostly not be able to take advantage of the privileges accorded by this bill, because they will not be able to afford the kind of policing system that the bill premises as necessary.

Mr. GLENN. Now, on page 2 of your statement you say the bill does not prohibit loss leaders. And I think loss leaders is one of the great cries which we are seeking to get after.

Let us assume that the XYZ manufacturing company, which owned that XYZ trademark, decides to use this law and it announces its retail price schedule and gives notice to all its dealers that it is dealing with; then assume that dealer ABC sells the XYZ product below cost, which is the loss leader system. Does this bill permit the XYZ manufacturing company to revoke the right of ABC to use that trademark?

Mr. LOEVINGER. It all depends on whether or not the price range that

has been set by the manufacturer does or does not include the price at which the sale was made. But there is nothing in this bill that provides that a price range must be at, above, or below the cost of acquisition of any particular retailer. It is perfectly possible that a manufacturer may set the price range for a whole line of trademarked goods at a level that will permit a profit by large purchasers, such as chainstores, but that will not permit a profit by small retailers.

Mr. GLENN. Well then, sir, can you suggest an amendment to this bill which would remedy the situation and tie it in so that the problem which you just mentioned would be covered?

Mr. LOEVINGER. Congressman, in all candor, I do not think that I can suggest an amendment to this bill that will make it achieve the objectives that are sought. However I can make a suggestion which is a personal suggestion and not one on the part of the Department.

That is this—that if, in fact, the concern is with loss leaders, it seems to me that it would be much more rational on the part of Congress to pass a law that in effect prohibited loss leaders as a matter of general legal principle, and that did not leave it to the unfettered discretion of a number of large businesses as to whether or not they would, in their beneficence, protect various retailers against this kind of thing. Such legislation has been proposed, has been offered, and, as I have remarked, I think it is a measure of the lack of sincerity in many of the advocates of this legislation that they are not only unenthusiastic, they are downright disinterested in genuine loss leader legislation. They do not want it. What they want is this gimmick.

Mr. GLENN. What would your legal opinion be on the constitutionality of this legislation of which you speak?

Mr. LOEVINGER. I think that the means that it seeks and the ends that it attempts to achieve are much, much more defensible on a legal basis than the ends sought to be achieved by this legislation.

I think that there is little doubt that such legislation is far more clearly defensible, and therefore more likely to be constitutional than price legislation of this type.

Mr. GLENN. But do you thing that it could be properly attacked as unconstitutional?

Mr. LOEVINGER. I think that any legislation of this type will be attacked as unconstitutional and that, as you say, the final decision will have to be made by the Supreme Court.

Mr. GLENN. Thank you very much.

That is all, Mr. Chairman.

Mr. STAGGERS. Mr. Curtin.

Mr. CURTIN. Thank you, Mr. Chairman.

Mr. Loevinger, I listened yesterday, as a lawyer, with much appreciation to your marshaling of precedents to set forth your position on this proposed legislation. I am also very much interested in what you have just said on loss leader legislation as being one of the answers to this problem. Do you think that this Congress could pass legislation so as to effect this type of activity in purely intrastate business?

Mr. LOEVINGER. No. So far as the scope of legislation is concerned with respect to intrastate transactions, neither this legislation nor loss leader legislation could reach purely intrastate transactions.

The scope of both kinds of bills would be precisely the same in that respect, however. This legislation cannot reach purely intrastate transactions either.

Mr. CURTIN. That I agree with. However, when we have a bill to reach the manufacturer who sends his product into interstate business, I would think that it probably would affect a lot more of the business outlets than perhaps just pure loss leader legislation would be likely to do, because of the intrastate type of business of so many of these stores.

Mr. LOEVINGER. I do not believe so, sir; because the "affecting commerce" concept is sufficiently broad so that I believe it is immaterial which approach is adopted.

I might say also that the loss leader legislation which has been enacted in many States—I cannot give you the precise count now—under the title of "unfair practices" legislation is, I believe, in effect in more States today than the retail price maintenance legislation. Should Congress undertake to adopt loss leader legislation, I think there is relatively little doubt that the States would follow this lead and that you would get a pretty good coverage of such legislation.

Mr. CURTIN. Now, sir, as I understand it, one of the purposes of the legislation presently being considered by us is to insure to the small retailer that he will not be substantially undersold by a large competitor on these famous name or brand name products. Do I understand from you that you do not think that this will be the result should this legislation be enacted into law?

Mr. LOEVINGER. I think the result will be that the small retailer will not be undersold on many highly advertised brand name products, but that what will happen is that he will simply lose his patronage for these products altogether. There will be no longer any competitive price advertising with respect to the price-fixed products.

However, this is not going to stop the chainstores and the big stores from competitive price advertising. They will have their private brands; they will have unbranded products. They have a wide choice as to the kind of merchandise they can get. Frequently it is the identical merchandise as the brand merchandise but without the brand. This will continue to be offered and continue to be offered at competitive prices. This will attract customers into the stores of the discount houses and the chainstores. Once in those stores the customers are going to do all of their buying, because they will buy the bargain-rate goods that they came there to get, and they will know that the other goods are being sold at exactly the same price as they are being sold in the independent stores.

Consequently there is no inducement for them to leave the discount house or the chainstore in order to buy at the store of the independent. And the independents will therefore lose their patronage on both branded and unbranded merchandise. And this is, in fact, what actually has happened in those States with such resale price maintenance laws.

Mr. CURTIN. Do you think that perhaps the price range feature of proposed legislation is one of the parts of it that will negate what we are trying to accomplish?

Mr. LOEVINGER. I do not think this makes any difference. I think that the effect will be the same. The big stores, the chainstores and

the discount houses, are going to sell at the bottom of the price range. And it is immaterial whether or not the fixed price is in terms of a range or of a minimum. The customer is going to know that he cannot buy it any cheaper at an independent store and that there is no reason to go to an independent store to do his purchasing. There are going to be very few customers who are going to take the trouble to leave one store and get back in their car and drive to another store that happens to be an independent, just because they want to preserve independent retailing.

Mr. CURTIN. Thank you, sir. That is all.

Mr. STAGGERS. Thank you.

Mr. Long.

Mr. LONG. No questions, Mr. Chairman.

Mr. STAGGERS. Mr. Van Deerlin.

Mr. VAN DEERLIN. No questions.

Mr. STAGGERS. Mr. Dingell.

Mr. DINGELL. Mr. Chairman, I have a couple.

Judge Loevinger, I have been very interested in your comments, and I was wondering if we could return to the discussion we had yesterday with regard to free and open competition.

I have last year's hearings before me, with the list of items which you were kind enough to give the committee last year with regard to the percentage of shipments accounted for by the 4 largest chains and 20 largest companies. I was wondering if you wanted to make any discussion with regard to the free and open competition in the language of the bill relating to the table of information that you submitted on the economic comments of a few of the manufacturers controlling a very large portion of the market?

Mr. LOEVINGER. Congressman Dingell, this calls either for a relatively brief negative answer or for a long dissertation on economics and law.

The concept of free and open competition is, of course, a very complex one, and it gets into all kinds of bypaths as to whether or not limited numbers of suppliers indicate that there is not free and open competition.

I can, I think, usefully say, without boring this committee with a long dissertation, only that I would hope that if any legislation of this type at all is passed, that this phrase would be very strictly construed and that the legislative history would make it apparent that Congress meant it to be most rigorously construed.

Mr. DINGELL. Where you have, for example, cigarettes, in which the four largest companies marketed 80 percent of that particular commodity, does there appear to be free and open competition there?

Mr. LOEVINGER. Well, as I say, this depends upon a number of factors. I am not referring to cigarettes particularly, because I dislike to discuss concrete cases; every time I do some newspaper says that the Antitrust Division has got something or other in mind—which is not the case.

But if you had four manufacturers, you might have each one of them supplying a particular section of the country and virtually a monopolist in one section of the country. You might, on the other hand, have four of them competing nationally at disparate prices, actually engaged in genuine price competition, or you might have

four of them engaged nationally in distribution at very sticky oligopolistic prices, and with no genuine price competition.

I think that these are all different situations, and I do not think you can lay down a categorical rule.

Mr. DINGELL. Under this particular provision, you might have a situation where you would have geographical application of this free and open competition, allowing the price fixing by a manufacturer. For example, there might be competition in one area; whereas, in other parts of the country or in limited parts of the country, there might be no competition because of an undue control by one particular company or two companies, or something of this kind. Am I correct?

Mr. LOEVINGER. Yes, sir, that might well be the situation.

Mr. DINGELL. All right.

Now, we discussed yesterday the question of venue, in regard to the rather unique language that appears in this bill. I am wondering if you had any further comments you would like to make today in regard to that?

As I read the bill dealing with this particular section, the provisions for suit against the small businessman are rather extraordinary. Am I correct?

Mr. LOEVINGER. I think they are extreme, Mr. Dingell. I do not know of any venue statute of the United States today that permits suit in any district in which the defendant resides, is found, or has an agent. The language of the antitrust statutes is that a defendant may be sued in any district in which he resides, is found, or transacts business. Now, this is quite a different concept.

If having an agent is meant to be the same thing as transacts business, it seems to me it is most unwise to use a different phrase and create a lot of unnecessary litigation. If it is meant to be something different, I think it goes far beyond any normal rule that we have applied.

And I certainly recommend that that phrase be modified. I think it would cause a great deal of difficulty and a lot of unnecessary litigation.

Mr. DINGELL. Would this authorize a suit against an individual who, let us say, lives in Michigan, engages in business in Michigan principally, but who happens to be traveling in California and is served in California by a process from a U.S. district court of California; would this authorize a suit against that individual in California?

Mr. LOEVINGER. I suppose it conceivably could. I hate to engage in any pronouncements as to what this language might or might not do. I hope that it will not find its way into the law.

Mr. DINGELL. It is possible, though, under this language, that that situation could arise?

Mr. LOEVINGER. Well, since this is new language, it could mean almost anything.

Mr. DINGELL. This is an extreme imposition to place upon the small businessman, is it not?

Mr. LOEVINGER. Clearly, this would be an imposition upon the small businessman. And having engaged in some litigation with some large businessmen, I can tell you that they would claim it was an imposition on them.

Mr. DINGELL. Now, over and above this, I note you have some comments with regard to the *McKesson-Robbins* decision in this bill. I wondered if you had anything further you would like to add in the discussion made with regard to those two in the exception made from the antitrust laws and the decision in those two cases that is supported by the legislation that is before us.

Mr. LOEVINGER. Well, my two points, sir, are simply this: One, that the section on page 8 that begins with the number—15—at line 14 clearly legalizes horizontal price fixing. The present Federal permissive legislation and most of the State fair trade laws do not go so far as to legalize horizontal price fixing, which is price fixing between competitors.

In that sense, this bill is certainly a price-fixing bill in every manner in which that term "price fixing" is used. This provision legalizes price fixing in the broadest and most opprobrious use of that term in antitrust law.

For this reason, I think it is bad from the antitrust viewpoint. From the viewpoint of small business, it seems to me to be most anomalous that one should attempt to help small business by putting within the power of its big business competitors the right to dictate the prices at which small business must sell.

I do not see how you can possibly help small business by subjecting it to the power of its big business competitors with respect to pricing practices.

Mr. DINGELL. Thank you very much. Your statement has been most helpful.

Mr. STAGGERS. Mr. Harris, do you have any questions?

Mr. HARRIS (chairman of the full committee). No, Mr. Chairman, I do not believe I would engage in any questions at this time.

Let me say that I am glad to be here during this part of the hearing, when Judge Loevinger is here. I have heard the judge's discussion on this type of legislation in the past, over the years. I am quite familiar with his consistent position. We have had some meetings at which he and I have participated. On occasion I thought it might be possible to come to an understanding, but it did not work out that way.

I thoroughly respect the views of the judge on this matter, as I do the views of the Federal Trade Commission. I just do not agree with them.

Before our visitors leave, I might say, Mr. Chairman—will you wait just a little bit?

I want to extend a cordial welcome to a group of students from Paul Junior High School here in the District of Columbia. These students came by my office, and I had occasion to meet them. I have an affection for Paul Junior High School, because my daughter graduated from there, and our son also a year ago graduated from Paul Junior High School; and I do want to take this occasion to say to these students that we are honored that they would come to this committee and observe some of its operations today.

Now, coming back to the subject, I just do not believe that any department of Government is capable—and this is no reflection—is capable of formulating the broad general policies which will take care of every aspect of the complex economy that we have under our free

enterprise system. And I think that a broad, general policy is most appropriate when, in my opinion, it does not actually conflict with the antitrust laws. Therefore, there would be no need for me to take the time, or the judge's time, to engage in a question and answer contest.

I have great admiration for Judge Loevinger and his Department. I think he is doing a good job in his position. I am sorry that we do not see eye to eye on this matter.

Mr. LOEVINGER. Thank you, Mr. Harris.

Mr. STAGGERS. I thank you kindly, Judge Loevinger, for your appearance here and coming back today to answer questions. Thank you.

Mr. LOEVINGER. Thank you, Mr. Chairman.

Mr. STAGGERS. Our next witness will be Prof. J. Lester Hayman of West Virginia University School of Pharmacy. And I am pleased to welcome Prof. J. Lester Hayman. And accompanying him is Miss Ann Dinardi, who operates a large pharmacy in Morgantown, W. Va., the seat of our university.

Mr. Hayman was a professor and member of the faculty at the University of West Virginia for 44 years, dean of the school of pharmacy for 25 years, and he served as president of the American Association of Colleges of Pharmacy in the past.

Professor Hayman, we are certainly pleased to have you with us this morning, and you may proceed.

STATEMENT OF J. LESTER HAYMAN, PROFESSOR OF WEST VIRGINIA UNIVERSITY SCHOOL OF PHARMACY, MORGANTOWN, W. VA.; ACCOMPANIED BY ANN DINARDI, PHARMACIST

Mr. HAYMAN. Thank you, Mr. Chairman, members of the subcommittee. I am J. Lester Hayman of Morgantown, W. Va. For more than 55 years I have been identified with the profession of pharmacy, including the retail drug operations.

I appear here as a member of the executive council of the West Virginia State Pharmaceutical Association, an organization I served as secretary-treasurer for 23 years. I have served the organization in every elective office as well as on every committee.

With your permission, I would like to make a few additional statements pertaining to my background as it pertains to my profession and the drug trade. I have been a member of the faculty of the School of Pharmacy of West Virginia University for 44 years, serving as dean for 25 years, from which position I retired 2 years ago.

I have served as president of the American Association of Colleges of Pharmacy, as second vice president of the American Pharmaceutical Association, for 9 years as a member of the national drug trade conference, as president and as secretary of the national conference of pharmaceutical association secretaries, and have been active in the work of numerous other national and State organizations identified with pharmacy and the drug business.

I am grateful for this opportunity to offer my views on the need for H.R. 3669 to promote quality and price stabilization in the distribution of goods identified by distinguished brand names or trademarks.

Let me begin with a discussion of the property rights which the quality stabilization bill is designed to protect. Of course, I am referring to brand names and trademarks. The primary purpose and function of a brand name or a trademark is to denote the origin of the goods and to identify the source of the product to which it is applied. Basically, brand names and trademarks represent goodwill, and I would like to emphasize goodwill. They protect consumers from misrepresentation as to the source of the product. Brand names and trademarks protect their owners against unscrupulous merchants trading on the reputation and the public acceptance which their products have earned over the years.

The manufacturers of branded and trademarked commodities, as you well know, spend millions of dollars to standarize the quality of their products and to make them known and acceptable, as qualified products, to millions of consumers. The consumer soon learns to depend upon branded and trademarked items as quality products. If this were not so, there would be no point in establishing brand names or trademarks by law or in the producer spending vast sums of money in the varying advertising media to attract consumers to the quality of his brand name or trademarked merchandise.

The U.S. Supreme Court, in 1936, in the celebrated *Old Dearborn* case, made it very plain that a purchaser of a brand-named or trademarked commodity owns only the material which he purchases and that he does not purchase the name nor the goodwill of the manufacturer of the commodity. In spite of this pronouncement by the U.S. Supreme Court, it appears that the predatory merchants may do with trademarked or branded merchandise what they will in spite of the interests of the producer or manufacturer or in spite of the best interests of the consumer.

I presume that I first realized the need for quality stabilization legislation early in the 1920's as I recall, when the manufacturer of the Ingersoll dollar watch was forced into bankruptcy when their "dollar watch" was predatorily cut to 57 cents by large merchandisers across the country. I remember, gentlemen, the area of the so-called pine board drugstores in the early 1930's when these establishments were only interested in predatory merchandising in large volumes. In our State of West Virginia, Mr. Chairman and members of the committee, the pine boards were mostly interested in the sale of whisky on prescription. Our State was "dry" and a physician's prescription order was the only means the public had to obtain this U.S. pharmacopoeial product. The pine boards employed pharmacists because the law required that they do so, but they did not have enough chemicals, pharmaceuticals and equipment to fill any other type of prescription. They were a sham and a fraud but their ruinous pricing put many an independent out of business.

This was the time, Mr. Chairman, when our mutual friend Mr. E. V. Romig of Keyser was president of our State pharmaceutical association, and when the small merchants of our State and every other State were using every legitimate means to obtain the passage by Congress of a quality stabilization bill, then known as the Capper-Kelly bill. On January 23, 1930, when the House Inter-

state and Foreign Commerce Committee favorably reported that bill, Congressman Clyde Kelly stated that—

> The action of the committee is proof of the justice of the contention urged through many years that predatory price cutters shall not be permitted to destroy standard, quality goods and independent distributors through cutthroat competition.

I am sure, gentlemen, that you know that the Capper-Kelly bill never became law. The predatory retailing practices were not curbed, the well-known, brand-named merchandise continued to be footballed by fast-buck merchandisers; the switch artists continued to gyp the unwary or the unsuspecting consumer; the price wars continued to destroy profits, to close the outlets that could not compete, and to eliminate jobs. May I repeat the statement made a few moments ago where the U.S. Supreme Court made it plain that—

> The purchaser of a trademarked or brand-named item owns only the material which he purchases and that he does not purchase the name nor the goodwill of the manufacturer of the commodity.

The predatory seller of trademarked or brand-named merchandise is not at all interested in selling the manufacturer's product as such, but is only interested in selling at cutrate prices when the material is identified with the trademark or brand name. May I illustrate with an example?

I have here a well-known toothpaste which is trademarked and very popularly known. Now, the cutrate merchandisers would like to sell this material at cost or below cost as a loss leader item, so long as it is identified with this trademark. But if I removed the trademark they are not interested in selling it at all, and the consumer is not at all interested, because they know nothing of this product when it is not identified with the trademark.

Many witnesses have brought to the attention of the committee that—

> Nothing in the proposed legislation would bar a distributor from removing the trademark or brand name from a product—

Which I have just illustrated—

> 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.

For some few years in the late thirties and forties, the fairminded distributors and retailers were afforded some relief from the chaotic retailing practices of the early 1930's, but in many States, including West Virginia, the condition has again changed and retailing practices in some of our areas are far worse than I have seen them in my more than 50 years of experience.

Gentlemen, unless the Congress provides some legislation which includes the provisions now embraced in H.R. 3669, I would predict that the small merchant who must depend upon fair merchandising and a reasonable profit will be nonexistent in another two decades.

If I may be permitted a few more minutes, I would like to include some brief information resulting from a visit I had on April 15 with the oldest and one of the most respected practicing pharmacists in West Virginia and the holder of pharmacist's certificate No. 1 in the

State of Ohio. This 93-year-old gentleman is the principal owner and the manager of five drugstores in Wheeling, W. Va. and one in Ohio.

I was informed that this company bought almost every item direct from the manufacturers in quantity lots and that in every instance they took advantage of available cash discounts. I was also told that within two blocks in the city of Wheeling there are nine so-called discount retailers which are attempting to cut prices lower than their competitor. My friend informed me that these predatory retail outlets were telling their customers that if they could find a lower price on any item they were selling that all the customer had to do was to name the price and they would undersell the competitor's quoted price. Such pricing tactics have only one objective—destruction of all smaller competitors. Whoever has the long purse will win that price war.

The 93-year-old active pharmacist and store owner said that he had never before competed with such demoralizing practices and that he could not continue to stay in business were it not for the professional reputation that he had built in the community over the many, many years that he has served those needing his service.

Gentlemen, I need not dwell on the fact that the quality stabilization bill is not mandatory on the manufacturer, the distributor, or the consumer. Others have or will discuss this point far better than I.

May I say that the organization which I represent wholeheartedly approves of the remarks made by the Honorable Ray J. Madden on the quality stabilization legislation made in the House of Representatives on April 16, 1962, and of the speech made in the Senate of the United States by the Honorable Hubert H. Humphrey, both of which were printed in the Congressional Record, and which I hope have been made or will be made a part of the record of these hearings.

I urge you to give serious and favorable consideration to this proposed legislation which I believe to be in the best interests of the manufacturer, the distributor, and the consumer of trademarked and brand-named merchandise.

Mr. Chairman, may I make one further statement?

Mr. STAGGERS. Surely.

Mr. HAYMAN. I understood the previous witness to say that in the *Old Dearborn* case that the Supreme Court did not say whether or not the Congress had the power to pass legislation having to do with goodwill of trademarked and brand-named merchandise.

I have here a copy of one of our national magazines, dated December 4, 1936, with very large headlines which reads:

Supreme Court declares, "goodwill is a real property, injury to which is a proper subject for legislation."

If I may, I would like to include that as a part of this testimony.

Mr. STAGGERS. Without objection, so ordered.

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

Mr. STAGGERS. Does that conclude your statement?

Mr. HAYMAN. Thank you very much.

Mr. STAGGERS. The committee wishes to thank you for appearing, Professor Hayman, and for your very scholarly and comprehensive presentation before the committee; and we would like to ask at this

time if Miss Dinardi has any statements she would like to add to the presentation.

Miss DINARDI. Mr. Chairman and subcommittee, the most important part of this bill that has come up is to protect our young graduates that are expecting to go into further business. I have worked with them, I have been their secretary for almost 25 years, and I know their problems. They are all hesitant in going into their own private business or making any further ventures. And if they are more protected with bills of this sort, they would not hesitate. They will give some contribution to the world.

Mr. STAGGERS. Thank you very kindly. Do you have any questions, Mr. Dingell?

Mr. DINGELL. No questions, Mr. Chairman.

Mr. STAGGERS. Mr. Glenn?

Mr. GLENN. I would just like to comment, Mr. Chairman, Mr. Hayman made a very fine statement.

And I wonder if you will agree with me that the example that you quoted as an example of the tactics being used by big business today would have been considered unethical 20 or 25 years ago and we had no such thing in those days; and that what we are probably doing, unfortunately, is legislating on ethics, but there is no other way we can bring such actions to a stoppage.

Mr. HAYMAN. Congressman Glenn, I can remember very vividly 25 and 30 years ago, when such products as the one I have demonstrated here, as well as other products, were sold at a price which was quoted on the label. We did not have predatory price cutting, and the small merchants were able to make a living, a decent living, and stay in business. We did not have these predatory price conditions at that time.

Mr. GLENN. Thank you very much.

Mr. STAGGERS Mr. Van Deerlin.

Mr. VAN DEERLIN. Mr. Hayman, the gist of your testimony is that this is consumer protection legislation as well as protection for the businessman; is this right?

Mr. HAYMAN. In my opinion, sir, it is mostly a protection for the manufacturer of the branded and trademarked names, but also through that, it does protect the fairminded retailer as well as the consumer.

As I illustrated here a little while ago, without the brand name on a product, the consumer has no idea as to what the product is or what the quality is; and therefore, of course, they would not want to buy it, I do not believe.

Mr. VAN DEERLIN. I was thinking about such products as aspirin or other products like Serpasil and one thing and another, which I would assume under present law must conform to certain absolutely well defined standards and must contain labels indicating what they contain.

And I was wondering whether the Food and Drug Administration and other such policing agencies are doing an adequate job in consumer protection or whether they should be supplemented by new legislation.

Mr. HAYMAN. Well I presume that you are referring to the products which may be sold over the counter, which must have certain statements insofar as the Federal food, drug, and cosmetic law is concerned.

In my opinion, I think the statements that are necessary and the

requirements pertaining to formula, and so on, are adequate to protect the consumer on those kinds of products.

Mr. VAN DEERLIN. Thank you.

Mr. STAGGERS. Mr. Curtin.

Mr. CURTIN. Thank you, Mr. Chairman.

A statement has been made by a previous witness that the answer to this problem is not the type of legislation we are considering here today but, rather, a loss leader type of legislation. Would you care to comment on that?

Mr. HAYMAN. Well, sir, I am not an attorney, and I do not know the fine differences insofar as different legislation is concerned that might accomplish the same end. I do not believe that I would have any authoritative statement in that regard.

Mr. CURTIN. The statement was also made that there is such type of loss leader legislation in some of the States.

Mr. HAYMAN. Yes.

Mr. VAN DEERLIN. Do you know whether or not they happen to have any in the State with which you are familiar, with Virginia, or Ohio?

Mr. HAYMAN. Well, we did have a Fair Trade Act which was declared unconstitutional about 3 or 4 years ago.

And I may say that the predatory pricing has greatly increased since the law was declared unconstitutional.

Mr. CURTIN. That is all.

Thank you, Mr. Chairman.

Mr. STAGGERS. Mr. Long.

Mr. LONG. No questions.

Mr. STAGGERS. Again we wish to thank you for appearing, and for your remarks—you and Miss Dinardi.

Mr. DINGELL. Mr. Chairman?

Mr. STAGGERS. Mr. Dingell says he has a comment to make.

Mr. DINGELL. Did you say that 25 or 30 years ago, sir, there were no predatory prices, prices fixed by the manufacturers that were observed?

Mr. HAYMAN. There may have been, sir, in some of the larger cities, but I am a resident of West Virginia, where we have small towns and small villages, and, to my knowledge, at that time we had no such problem in the area in which I am familiar with.

Mr. DINGELL. I see. Then your statement is particularly interesting, because at the bottom of page 3 you refer to the time when the small merchants of your State and every other State were using every legitimate means to obtain passage by Congress of the quality stabilization bill.

Mr. HAYMAN. That is correct.

Mr. DINGELL. It was known as the Capper-Kelly bill. And at that time Congressman Clyde Kelly stated:

> The action of the committee is proof of the justice of the contention urged through many years that predatory price cutters shall not be permitted to destroy standard quality goods and independent distributors through cutthroat competition.

Mr. HAYMAN. Yes, sir.

Mr. DINGELL. Now, in those days was there cutthroat competition or was there not cutthroat competition?

Mr. HAYMAN. In some of the larger places I would have to admit that there probably was.

Mr. DINGELL. Just in a few of the larger places?

Mr. HAYMAN. Well, to my knowledge, I cannot answer that.

Mr. DINGELL. There was not in West Virginia, then?

Mr. HAYMAN. Not in the area that I knew of.

Mr. DINGELL. That is particularly interesting, because just a little higher on the same page you refer to the "pine board" drugstores.

Mr. HAYMAN. That is correct.

Mr. DINGELL (reading):

* * * who are only interested in predatory merchandising in large volumes.

So apparently, then, there was some predatory pricing in your State of West Virginia.

See, I am trying to figure out which part of your statement we are supposed to believe. Now, I am very anxious to believe you, but you are making it very difficult.

Mr. HAYMAN. I will have to go back and say that we were interested in fair trade; we did have some "pine board" stores; we had them in Morgantown, Clarksburg, Charleston, and Wheeling, and some others; yes, sir.

Mr. DINGELL. Would it be fair to say, then, that you really do not know whether there was such predatory pricing or not, since you made such conflicting statements to the committee here this morning?

Mr. HAYMAN. We were interested in preventing this; yes, sir.

Mr. DINGELL. Thank you very much.

Our chairman speaks very highly of you, Mr. Hayman.

Mr. HAYMAN. Thank you, sir.

Mr. STAGGERS. Thank you again for appearing before the committee.

Our next witness will be Mr. Sam Karoll, director of the National Association of Retail Clothiers & Furnishers.

Mr. Karoll, we are glad to have you with us. Would you identify yourself and the gentleman who accompanies you for the record, and you may proceed.

STATEMENT OF SAM KAROLL, DIRECTOR, NATIONAL ASSOCIATION OF RETAIL CLOTHIERS & FURNISHERS; ACCOMPANIED BY LOUIS ROTHSCHILD, WASHINGTON, D.C., EXECUTIVE DIRECTOR

Mr. KAROLL. Thank you, Mr. Chairman and gentlemen.

My name is Sam Karoll. I am vice president of Karoll's, Inc., Chicago, Ill. Karoll's is in the men's wear business and has four retail stores. I also have an interest in and am secretary of Gassman's, Ltd., an apparel store for men, women, and children. I am here on behalf of my own business, as well as the National Association of Retail Clothiers & Furnishers, an organization of over 2,700 men's apparel stores, headed by its president, Harry O'Brien of Medford, Mass., and Louis Rothschild of Washington, D.C., our executive director, whom I asked to sit here with me.

This is the first time I have had the honor and privilege of addressing a congressional committee. As a personal note, I would like to say that I am happy to be a citizen of a country where our elected

representatives consider every point of view, where my point of view, also representing the thinking of my fellow members of NARCF, will be given due consideration.

I came here to voice my opinion on H.R. 3669, the quality stabilization bill. At the outset, I want to tell you I am strongly in favor of this bill. I will give you my opinion of why this bill should be enacted. I want to deal specifically with the three segments of our population (consumer, manufacturer, and retailer) that this bill affects, and why it is beneficial to all.

1. The Congress and the people of this country are in favor of keeping the small and medium size businesses as an integral part of the American scene.

The Government has clearly indicated time and again its avowed policy to be interested in the welfare of these smaller businessmen. This is evidenced by the enactment of legislation establishing the Small Business Administration and the various financial assistance plans supervised by this agency.

Apparently, Government believes that from a social, economic, and general welfare of our population standpoint, it is in the best interests of our country to encourage these small and medium size businesses to continue to exist and prosper. I know of no measure that could possibly help these groups more than the enactment of the bill presently being considered by this committee. It goes right to the core of the question concerning the very existence and prosperity of these small and medium size businesses.

The various components of the vast men's wear industry cannot be considered essentially big business. Retailers and manufacturers alike are comparatively small operations. The interest of the manufacturer in this legislation is indicated by the replies from a number of brand name manufacturers to my inquiry as to their opinion of H.R. 3669. I would appreciate it if these letters could be submitted to the committee and considered a part of the record for further study and consideration.

Mr. STAGGERS. If there is no objection, that will be done.

Mr. KAROLL. Thank you.

(The letters referred to may be found in the subcommittee files.)

Mr. KAROLL. The public favors protection of brand names from predatory practices. The historic approach to this problem has been through the so-called fair trade laws, now existing in some form in 29 States. These States contain 71 percent of our Nation's population which indicates there is both a need and a desire on the part of the consumer to accord such protection to reputable merchants and manufacturers. It is general knowledge that fair trade laws are not really effective in all of these States, but in 19 States with over half of our population, the voice of the people—the legislatures—have enacted workable and effective fair trade legislation.

2. Stores of our type are service businesses, in addition to being sellers of merchandise. We are concerned about the appearance of a man who buys any product from us. If it is a suit, it may need quite a bit of tailoring—this can be quite expensive in manpower costs. We carry extensive size ranges in shorts, regulars, longs, extra longs, and in portlies for stout men, which also are available in short, regular, and long. This is done just so that we have the right model to

fit the individual. Contrast this with an operation where practically no tailoring is done and no consideration is given to proper fit.

The same would apply to Manhattan shirts—a qualified man would know the type of shirt, should this man wear a full cut shirt or a tapered shirt, the type of collar that would best fit the individual, the color combinations, etc. In selling Stetson hats, should a man have a regular oval, a long oval, a round oval or an extra long oval?

In stores selling better merchandise, the salesmen are familiar with fashion, color, fit, etc. This assistance, plus the tailoring involved, gives the wearer and others who see this garment on the wearer an entirely different reflection of the product, as compared to a garment sold by inexperienced help or taken off a rack with very little thought given to fashion, color, fit, and so forth.

It takes a man of great experience to sell the item most suitable for the individual. These men are well paid, as their experience is valuable. It requires a continuing effort to satisfy your customer and you will find generally that both the ownership and the employees in our type of business work hard at it every day.

The contrast in the service in stores can be very great and the consumer does not get as much satisfaction or service out of a garment which is bought in a store that does not give him the proper service. In the final analysis, his cost per wearing is higher.

While I am speaking as a retailer, I feel that the brand manufacturer should have the right to handpick his representatives at the retail level; he wants a distributor with a long-range view, who will endeavor to maintain the public confidence and good will toward his product. The quality stabilization bill will give him this opportunity.

3. The consumer is entitled to the protection of the brand name. Without a brand name, you have no method of comparison for the consumer. By having a Botany 500 suit at a price of $69.95 and an Eagle suit at $85, the consumer is made aware of what prices are fair prices in the clothing field for reputable manufacturers; by having a Manhattan shirt at $5, a Stetson hat at $11.95, these set the standards as they are good values.

The constant advertising of the brand names informs the consumer of price levels and the brand line people are well aware of the fact that should they try to price their goods beyond its actual worth, they will be stopped first by the retailer, who is an expert in his field and who sees the various lines. If by chnace it gets by him, then the consumers as a group are pretty smart and they won't buy the goods if they are not priced right.

For example, in the shirt field, Manhattan, Arrow, and Van Heusen are constantly striving to be tops in their field. Despite the fact that all three produce a very fine garment, they try to establish their prices at the lowest possible level; the amount they do otherwise, their competitors will get the business.

Branded manufacturers have a tremendous investment in advertising as well as the many years spend in building up their lines, so they cannot become careless in what they do, both as to quality and price. There are many fine nonbranded lines; yet, where there is no brand name involved, there is not the same stake involved because even if the product were to come out less than what was desired by the manufacturer, he, nevertheless, has not lost the value of the brand

name. But when one of the brand name manufacturers turns out an item that is inferior, the consumer will stay away from that name.

If he turns out an item and prices it too high, he will also lose out. There is a built-in protection for the public in branded lines. With these checks in mind, the manufacturer should have the right to merchandise his product in a manner that he determines to be to his best interest and for that reason, I urge the passing of the quality stabilization bill.

4. I have here a group of ads that will give you a very clear picture of how brand names can be used in a very legitimate manner, telling your story to the consumer, naming the brand, the price, and not telling him that he is getting something for nothing. The average gross markup on the merchandise advertised in these ads is between 41 and 43 percent.

Mr. ROTHSCHILD. Would you gentlemen like to have these ads passed to the committee table?

(Mr. Dingell assumes the gavel.)

Mr. DINGELL. The committee will receive them for the files, and we will make a determination at a later time at to whether it is appropriate to have them included in the hearing record, without objection.

Mr. KAROLL. Thank you.

You will also see the ads of a group of stores that use the brand names in a manner that would be outlawed by the quality stabilization bill. I am certain that you will agree with me that this type of advertising is misleading and gives the consumer a very distorted picture of our industry at the top of their ads—various brand names—3–G, Cooper, Juilliard, Alligator, Knox, Florsheim shoes, and so forth.

You will notice a spread of brand names across the top of their ads; there is no relationship or tie-in between the body of their ads and the brand names.

They just list the price under that, but do not tell you what brand they are referring to. There are three clothing brands there, and they do not distinguish the price of one against the other. They merely say: We are giving you these three brands, they name prices below that, and they in no way tie in the difference—giving them all this flexibility, so that when a customer comes in and asks them the price on a 3–G suit, "Well, this is the one that is $118," or whatever it might be, because he is not pinning himself down to what he is giving them in any way.

It is quite obvious that the objective here is to trade on the brand names to the detriment of both the manufacturer and the retailer who handle these brands in an honest and forthright manner.

The two operations that I have just shown you and illustrated are the group belonging to my family and which I am the operating head of, and another men's wear organization in Chicago which operates several stores under several names that they have bought out.

My reason for that is that I know the workings of our company and I have watched the workings of this other group. I think that this advertising will tell you more about the merits of the quality stabilization bill than a book written on the subject by an expert.

I have in my possession a financial report on this company, indicating the number of stores they keep buying out. This report, prepared by Dun & Bradstreet, can be made available to the subcom-

mittee if it is so desired. They just recently bought two more stores who sell branded goods. I also am introducing a recent letter signed by this company, under the masthead of an old established firm, wherein their leadline states, "Our First Major Sale in 50 Years." They go on to mention such outstanding names as Hickey-Freeman, Kuppenheimer, Botany 500, and others. A careful examination of the previously noted financial report discloses that they bought this business a few days prior to this ad.

The same report also indicates under "Special Notice" that this company did not take over any of the liabilities of the Weinberg Bros. Clothing Co., a corporation, the company they are advertising. This means that they did not buy this as a corporation, but merely bought the assets and then had the effrontery to fool the public by stating, "Our First Major Sale in 50 Years." This gives the consumer the impression that there has been no change at all.

I am also introducing two of the Weinberg newspaper ads. I would especially call your attention to this statement in the ad:

* * * There's no use kidding ourselves! After 50 years in business we should know better * * * but our buyers bought more nationally advertised famous brand suits than we have room for.

This statement made less than a week after the purchase of the store.

I will also draw your attention to the $63 suit in this ad. It reads "formerly sold for $99.50." The mohair and wool fabrics that they have described cost them $38.95. We checked this with the manufacturer that they bought it from. At $99.50, this would show over 60 percent gross, as compared to the traditional 41 percent to 43 percent gross. In the men's wear field, 60 percent gross is an unheard of markup and obviously this is a false statement. If these people follow their usual pattern, within 90 days, they will have a going-out-of-business sale at Weinberg's, and this gives them a double-barrel shot at the consumer.

I am also introducing several of a series of ads of Erie Clothing Co., operated by the same people—not the same name, but the same people—starting with an ad dated October 28, 1962, showing a going-out-of-business sale with city permit No. 1552. This is followed up with other going-out-of-business sales. Then in another ad on December 29, 1962, and January 12, 1963, they start naming the number of days they still have to go.

On February 14, 1963, they have a full-page ad in the Chicago Tribune, showing a reorganization sale and using the brand names across the top with a statement of—

* * * our organization sale means savings of 25 to 75 percent * * *—

with no tie-in between the brand names and the prices. On February 23, 1963, they have a forced reorganization sale. Now, this forced reorganization, or reorganization, nobody could fathom as to what the difference was, but nevertheless the next one—it is a forced reorganization sale. There are also many other Erie ads of which I have copies here, running the reorganization theme.

Both the brand-name manufacturer—I would also like to introduce an ad that our company ran on a sale. And I want to point out to you that on this sale, while the majority of the goods carried in our stores is branded goods, there is no brand name mentioned in there at all.

I also want to point out how we qualify the goods that we are selling. As an example, we say: "Famous brand hats," and we say: "Discontinued styles," because that is what they are getting; they are getting previous year's merchandise. They are not getting fresh new goods that we are buying for the coming season. And we so inform them.

On the suits, you will notice there are boxes indicating the sizes so that, if we do not have your size, you are not making a trip to our store under some false pretense that we can fit you. We tell you the truth all the way through.

And in suits we tell them that there are discontinued styles in the lot.

Now, under all-weather coats we have this statement that you would be interested in: "A terrific value for the man who does not mind a discontinued style."

They are getting the truth all the way. We are not hurting anybody there. Our store is not hurt by it, because we build up goodwill with this kind of thinking. The manufacturer is not hurt in any way, and no other retailer is hurt by our advertising, because it is all honest.

Both the brand-name manufacturer and the retailer of quality men's wear are entitled to some protection against these types of operations. And what is even more important, the consumer is entitled to protection in his relationship with operators of this kind.

I am citing these examples because this is right in our own backyard and we know what goes on in Chicago. I can assure you that this is not a local condition, but one that is quite prevalent nationally. This entire method of doing business is frowned on by people who are conscious of their obligation to the consumer, as well as to our industry.

This type of business is unfair competition for the honest retailer who plays the game fairly and squarely. These are "borax" operations which get every dollar they can out of the consumer. This is a carryover from the days of "caveat emptor," buyer beware—and does not fit in with modern society.

Certainly, a brand-name manufacturer should have the right to determine whether retailers of this kind will keep his product a leader in the field. The quality stabilization bill will be very helpful in curing this ailment.

And, in closing, I want to sum up why I believe that this subcommittee should favorably report on this bill.

It is for the best interests of the quality manufacturer, the quality retailer, and the consumer. The consumer will get the best service and fairest prices through this bill, the retailer will not be harassed by unethical competition, and the manufacturer should have the inherent right to protect his label without being sniped at by retailers who are trying to outsmart the public.

And now, quoting a well-known brand manufacturer—"What's in a brand name?" So long as it remains anonymous, a product can be as footloose and changeable as it likes.

But, as soon as it gets an advertised brand name, it has to grow up and behave itself.

Well-known brand names live in the constant spotlight of competition where everyone can see them. They invite trial and comparison. That is why they advertise.

And that is why, over the years, the public comes to prefer products with brand names. It knows that it can depend on them. It knows that shopping without them would be shopping in the dark.

Thank you, gentlemen.

Mr. DINGELL. Does that complete your statement, Mr. Karoll?

Mr. KAROLL. I beg your pardon?

Mr. DINGELL. Does that complete your statement, Mr. Karoll?

Mr. KAROLL. Yes, it does, sir.

Mr. DINGELL. Mr. Long?

Mr. LONG. No questions, Mr. Chairman.

Mr. DINGELL. Mr. Glenn?

Mr. GLENN. No questions, Mr. Chairman.

Mr. DINGELL. Mr. Van Deerlin?

Mr. VAN DEERLIN. I think not. That is a very interesting review, well illustrated, and it is something that I have been interested in for a long time, and I have talked about as a television newscaster. In fact, I began to think that maybe some of the San Diego sharpies learned their stuff in Chicago.

There will be the question in my mind as to whether this legislation, while containing safeguards against this kind of thing, may not go beyond this field unnecessarily, and I shall proceed with an open mind, but I do compliment you on a very effective presentation on this phase of the matter.

Mr. KAROLL. Thank you, sir.

Mr. DINGELL. Mr. Keith?

Mr. KEITH. I am sorry that I did not get here sooner, Mr. Chairman, to have the benefit of this statement which has been so highly complimented.

It is fine for us to hear from the National Association of Retail Clothiers & Furnishers in support of this; but, at the local level, I have not heard from a single clothing store or manufacturer. The druggists and the hardware people have been carrying the ball.

Before we are successful in getting this legislation before the Congress for a vote, we must have more widespread support than we are getting at the local level. Have you any comment on that?

Mr. KAROLL. Well, yes.

Mr. ROTHSCHILD. May I comment on that, Mr. Chairman?

It is unfortunate, but there has been the general misconception in these hearings this year and the year before and the year before that, that quality stabilization is a drug bill. It is not a drug bill; it affects the entire gamut of brand name operations and is particularly needed in the men's apparel field.

Before you came in, Mr. Keith, Mr. Karoll intorduced into the record a number of records from manufacturers of brand names indicating a geat need and a keen support for this bill.

This bill has been considered at our conventions by our resolutions committee, by our board of directors, by representative groups of merchants from all parts of the country who are very much in need for protection against the bootlegging of brand names in men's wear merchandise; by discounters, price cutters, going-out-of-business sale operators, and other fringe ethical operations.

I am delighted, Mr. Keith, that you raised the question, because I think it should be very clear that all industries—drug, men's wear,

hardware, furniture—are keenly interested, wherever there is a brand name on a consumer item which is subject to unethical practices, injuring the manufacturer and the ethical retailer—there is the need for this legislation.

Mr. KAROLL. I think that the retailers of the country could be more effective in letting the people in their areas know about this. I am not talking about the men's wear only in that field. But I think there has been—there has not been enough done on that, because to me the quality stabilization bill is a bill that is completely fair, and it is not tying down any manufacturer who feels that he does not want to be part of this. There is nothing in that bill that forces him into it. So he has a freedom of movement. If he does not want to be part of it, then he can stay away from this bill.

Now, I think this makes this bill such a wonderful bill because there is still freedom of choice on the part of everyone involved, including the consumer, who can say if this item is too high: I do not want it.

Mr. KEITH. Thank you, Mr. Chairman.

Mr. DINGELL. Your statement has been very interesting. I was particularly interested in your comments as to the need for this legislation. Are you satisfied there is no other recourse for the small buinessman who is injured by these big advertising practices to which you refer to as switch advertising?

Mr. KAROLL. Well, I am convinced that they have been able to get away with it up to this point. This I have seen from the practical standpoint. From the legal standpoint, I really do not know, because not being a lawyer——

Mr. DINGELL. You indicated you had made a rather thorough study of some of the advertisements that you produced before the committee this morning.

Mr. KAROLL. Yes.

Mr. DINGELL. Now, perhaps Mr. Rothschild, who is sitting next to you, would hold up one.

That is the reorganization sale. Now, your comment on that one was what?

Mr. KAROLL. Well these people first ran a going-out-of-business sale. They had to get a permit from the city of Chicago, and I think it was permit No. 1552. They then took it for 60 days, which is the maximum you can get. They can renew for 30 days, which they also did. And then, when this was over with, they started in with a reorganization sale.

Now, I do not know the legal aspects, whether this is unlawful. It would appear to me that it would be, as a layman, not as an attorney. But still they are doing it.

Mr. ROTHSCHILD. May I add, Mr. Karoll, that the evil of this ad from the viewpoint of the quality stabilization bill is the use of the brand names in the ad.

Mr. DINGELL. Well was there any intention on the part of the advertiser not to sell this commodity, according to your knowledge?

Mr. KAROLL. Well, yes, I have some knowledge, because I know the purchasers. These people are making on the outside that have no relationship to these ads or to these——

Mr. DINGELL. You mean you are telling me that they were advertising commodities that they had no intention of selling?

Mr. KAROLL. When they bought this store out, they might have had a small quantity of this goods. I know this, that under the law, they are not supposed to bring in any additional goods.

Mr. DINGELL. I see. But your assertion is that they were, reduced to the simple terms, advertising goods that they had no intention of selling, is that correct?

Mr. KAROLL. They had some of these goods at the time of purchase. They then bought nonbranded goods, which was by far the majority of their stock. The vast majority of their stock was nonbranded. And they continued advertising even at the point of reorganization, and my guess would be—now, this would be a guess—that by the time they ran the reorganization, they had very, very little branded goods in there. They were not filling it up.

Mr. DINGELL. In other words, you are making the assertion here, Mr. Karoll, that they were advertising goods they had no intention to sell?

Mr. KAROLL. Yes.

Mr. DINGELL. In other words, you are saying to the committee they had no intention of selling the goods advertised in this particular advertisement?

Mr. KAROLL. Well, they had some of that goods, and I would say there is a possibility of a man going in there and getting that suit, but I would say percentagewise that there was a 99-percent possibility or probability of him not getting it, against that 1-percent possibility of getting it.

Mr. DINGELL. Well, you are saying, then, that this was an alluring but insincere offer to sell the commodities; is that right?

Mr. KAROLL. That I am saying very definitely.

Mr. DINGELL. I see.

Well, this is very interesting, because it so happens that this is the exact quote from the language of the Federal Trade Commission's guides against State advertising. Now, has your organization initiated any action through the Federal Trade Commission against this kind of practice?

Mr. ROTHSCHILD. May I answer that?

The Federal Trade Commission does not have jurisdiction in advertising of retailers engaged in intrastate commerce.

Mr. DINGELL. As a matter of fact, there is a case pending before the courts on that one case right there, is there not?

Mr. ROTHSCHILD. The case in New York I believe has been dropped by the Federal Trade Commission. To the best of my knowledge there is no test case now pending, on the theory that, because advertisements move in interstate commerce, the Commission has jurisdiction.

Mr. DINGELL. It is very strange, because I know of one particular oculist who sells only in intrastate commerce, who has been under the bane of a Federal Trade Commission consent decree for a number of years for violating Federal Trade Commission Act.

What I am asking is, Has your organization engaged in any scrutiny of the Federal Trade Commission Act and the Federal Trade Commission guides against bait action adopted as long ago as February 1959 with regard to the particular kinds of advertisements that you are complaining about this morning?

Mr. ROTHSCHILD. Our organization, the National Association of Retail Clothiers & Furnishers, is keenly interested in the guides for advertising. We do——

Mr. DINGELL. Have you attempted to use these devices to counter these bait advertisers against which you complain?

Mr. ROTHSCHILD. We have distributed those to all of our members.

Mr. DINGELL. Why was not the complaint made to the Federal Trade Commission on the basis you are bringing out this morning?

Mr. ROTHSCHILD. No. 1——

Mr. DINGELL. Do not you feel that——

Mr. ROTHSCHILD. Pardon me, Mr. Staggers. No. 1, as a national association—pardon me, Mr. Dingell. I should know from the question who the gentleman was.

Mr. DINGELL. I assume that the subject of fair trade would carry my name now.

Mr. ROTHSCHILD. No. 1, a national trade association does not attempt to be an enforcement agency. We have neither the facilities nor the scope to enforce truth in advertising in all of the 50 States of the country.

Mr. DINGELL. As a matter of fact if you have not got these resources under existing Federal Trade Commission law, how are you going to have them available to you under a change in the law which would be available to you under this quality brand stabilization?

Mr. ROTHSCHILD. The beauty of the quality stabilization bill is that it does not rely upon a Government agency for the enforcement of the law, but relies upon the initiative of the people being hurt, the manufacturer of the brand name and the retailer who builds his business by dealing legitimately in the brand name.

Mr. DINGELL. As a matter of fact, however, you have not explored with the Federal Trade Commission utilization of the Federal Trade Commission procedures?

Mr. ROTHSCHILD. That is correct.

Mr. DINGELL. For attacking this bait merchandising about which you complained today?

Mr. ROTHSCHILD. That is correct, sir.

Mr. DINGELL. I see. Now I want to discuss one more thing with you here.

Referring to page 8 of the bill, a manufacturer is authorized on line 5 to fix prices within marketing areas. Would you like to define what a marketing area is for us this morning?

Mr. ROTHSCHILD. So far as I am concerned, Mr. Dingell, I would not consider myself competent to define a marketing area.

Mr. DINGELL. Well, then suppose I——

Mr. ROTHSCHILD. I doubt if Mr. Karoll, as a merchant and not an attorney, would be able to define it.

Mr. DINGELL. Let me define it, and then let us discuss it.

Let us say a marketing area would be an area fixed by the owner of a brand; is that correct?

Mr. ROTHSCHILD. Not necessarily.

Mr. DINGELL. Well, what would it be?

Mr. ROTHSCHILD. A marketing area would be an area where one competitor was in competition with another competitor. A market-

ing area would be—for example, a store in Silver Spring and a store in Washington are in a marketing area.

Mr. DINGELL. I see.

Mr. ROTHSCHILD. Whereas a store in Richmond, Va., would not be in a marketing area. That is my curbstone definition.

Mr. DINGELL. There are a number of interlocking marketing areas between Silver Spring and Richmond, Va., are there not?

Mr. ROTHSCHILD. Oh, yes.

Mr. DINGELL. And people with automobiles can commute back and forth by choice between the different ones, am I right?

Mr. ROTHSCHILD. That is correct.

Mr. DINGELL. So what this bill actually does, then, is to authorize a manufacturer to fix prices, different prices in different parts of the country, for different retailers. Am I correct?

Mr. ROTHSCHILD. Theoretically you are correct. Practically——

Mr. DINGELL. As a matter of fact——

Mr. ROTHSCHILD. Pardon me, Mr. Dingell; I would like to finish the answer.

Mr. DINGELL. Just a minute, Mr. Rothschild. As a matter of fact, he can fix one price in Richmond and one price in Washington, D.C., right?

Mr. ROTHSCHILD. Has he——

Mr. DINGELL. You are just fixing two prices.

Mr. ROTHSCHILD. Theoretically that can be done; practically it cannot be done, because——

Mr. DINGELL. Then are you telling me that he is going to have to fix nationwide prices despite this language?

Mr. ROTHSCHILD. May I answer your question, or attempt to, sir? In the men's wear field which I know most about, brand names are nationally advertised. They are nationally advertised with price—Botany 500 suits, $69.95.

Now no advertiser of national advertising can fix a price varying from his national advertising.

Mr. DINGELL. All right, now, we are discussing national advertising, but that is——

Mr. ROTHSCHILD. The exclusive brand names.

Mr. DINGELL. Let us exclude national advertising. So, as a matter of fact, unless we exclude national advertising, there are large numbers of items in national advertising—I am sure you agree—on which the manufacturer will be able to fix prices in different geographical areas according to his whim; am I correct?

Mr. ROTHSCHILD. Theoretically you are correct, but practically you are wrong.

Mr. DINGELL. As a matter of fact, practically I am correct, too, because, under the statute as it is stated, it says, I will quote here:

> Each such currently established resale price and resale price range shall be uniform at each level of distribution within each marketing area determined by the owner of the brand, name, or trademark.

Now, as a matter of fact, what this does is authorize the fixing of different prices in different parts of the country. And if a manufacturer so desires, he can do this, can he not?

Mr. ROTHSCHILD. Let us take that in a——

Mr. DINGELL. This is a simple question.

Mr. ROTHSCHILD (continuing). In a practical application. Manhattan Shirt has a national shirt advertised for $5——

Mr. DINGELL. Let us not talk about nationally advertised commodities. Let us have a simple answer as to whether, if he so chose, he could fix different prices in different parts of the country. Am I correct?

Mr. ROTHSCHILD. Theoretically he can; practically he cannot. He would be cutting his own throat.

Mr. DINGELL. Well I did not want to discuss that part of it. But he can do this?

Mr. ROTHSCHILD. Theoretically.

Mr. DINGELL. Under this. Or if he does this, the impact on the small businessman is going to be very, very harsh, is it not?

Mr. ROTHSCHILD. Not necessarily.

Mr. DINGELL. Well, let us say that he fixes one price on it on one side of the Potomac River and another price on it on the other side of the Potomac River, or in Hackensack, N.J., and in Hoboken he fixes prices. Now that is going to have an adverse effect on the small merchants in those areas, is it not?

Mr. ROTHSCHILD. Not necessarily.

Mr. DINGELL. Not necessarily, but it conceivably could; could it not?

Mr. ROTHSCHILD. I do not see how.

Mr. DINGELL. As a matter of fact, it conceivably could have a very devastating effect on a small merchant in those areas; could it not?

Mr. ROTHSCHILD. Mr. Karoll would like to get into our debate.

Mr. KAROLL. There is no such thing as a deviation of price.

Mr. DINGELL. Now just a minute.

Mr. KAROLL. At the wholesale level.

Mr. DINGELL. I am not talking the wholesale level; I am talking the retail level.

Mr. KAROLL. Well, how would——

Mr. DINGELL. Let us just put it this way—we will get around to our point very quickly—if a manufacturer were to fix different prices in different areas; for example, in Washington, D.C., and Arlington, Va., or Hoboken and New York City, or Hackensack and Hoboken or Chicago and Evanston, Ill., the impact on the merchants in the area could be rather devastating; could it not?

Mr. KAROLL. It has never been done in the history of our business.

Mr. DIGELL. No, but if it were done, it would be devastating; would it not?

Mr. ROTHSCHILD. Theoretically, but——

Mr. DINGELL. It is a very simple question; it could only be "yes" or "no."

Mr. ROTHSCHILD. I do not think it would, and I do not think it is a simple question. I think it requires more than a "yes" or "no" answer, because no retailer is required to buy an item or a line. If a manufacturer of Arrow Shirts——

Mr. DINGELL. Twenty-five percent of the Nation's shirts are marketed by three manufacturers. You and I discussed this last year.

Mr. ROTHSCHILD. Yes. That is correct.

Mr. DINGELL. Some 25 percent are marketed by three companies.

Mr. ROTHSCHILD. That is correct.

Mr. DINGELL. So let us say that the three manufacturers market these three commodities, according to a schedule of prices which distinguishes and discriminates between two adjacent areas. The impact on the small businessman is going to be absolutely devastating if he becomes the victim of this hypothetical set of circumstances I am referring to. Am I correct?

Mr. ROTHSCHILD. I do not see it.

Mr. DINGELL. Well you are not going to tell me his business is going to bloom and flourish because of such a practice; are you?

Mr. ROTHSCHILD. Well let me see——

Mr. DINGELL. I do not want to argue. I just want you to give me a simple answer.

Mr. ROTHSCHILD. New York City has an Arrow shirt with a price of $5. Arrow fixes the price in Scarsdale, where a lot of wealthy people live, at $6.

Mr. DINGELL. If the wealthy people have any sense, they will go to New York, will they not?

Mr. ROTHSCHILD. That is correct.

Mr. DINGELL. They are going to go to New York to get better prices.

Mr. ROTHSCHILD. Now if Arrow is pricing these shirts at the same wholesale price that you admitted only a theoretical case that they are, the little retailer in Hackensack or in the high-class district might be getting a better markup and might be very happy.

Mr. DINGELL. And might not be.

Mr. ROTHSCHILD. They might not be. These are impractical, theoretical examples. You are reaching into the air, if I might suggest, to——

Mr. DINGELL. As a practical matter, however, the bill will be better for the small businessman without this price discrimination which is built into the bill; am I correct?

Mr. KAROLL. I would like to have that question again. The bill would be better without what?

Mr. DINGELL. The bill would be better without this area discrimination in prices which is built in in the section of the bill that I refer to. Now you are a small businessman. You represent an association of small businessmen. Do you want to go back to them and tell them you endorsed language in proposed legislation which would authorize their competitors in an adjacent area to receive a better or a more stimulating price than they are going to receive?

Mr. KAROLL. At the wholesale level there is no——

Mr. DINGELL. I am not talking about the wholesale level.

Mr. KAROLL. At the retail level?

Mr. DINGELL. Yes.

Mr. KAROLL. I do not think this is an important part of the bill, in my estimation.

Mr. DINGELL. In other words, area price discrimination is——

Mr. ROTHSCHILD. I have not given it sufficient study on that point to commit ourselves on that, Mr. Dingell.

Mr. DINGELL. As a matter of fact you do not think that your membership would like to find out that the store across the street would be able to get a more favorable and a more competitive price fixed by their suppliers; is that correct?

Mr. ROTHSCHILD. It would not happen.

Mr. DINGELL. But if it did happen they would not like it?

Mr. ROTHSCHILD. Across the street they would not like it; that is correct.

Mr. DINGELL. Absolutely.

Mr. ROTHSCHILD. It would not happen, however. I believe——

Mr. DINGELL. Well, thank you, Mr. Rothschild. We have a great number of witnesses. I do not want to impose upon the time of my colleagues. The committee is grateful for your views and comments.

Mr. ROTHSCHILD. Thank you very much.

Mr. KAROLL. Thank you, gentlemen.

Mr. DINGELL. Let me ask this: Is there anyone here present who desires to file a statement at this time?

FROM THE AUDIENCE. No.

Mr. DINGELL. The committee will recognize Mr. Maurice Mermey, director of the Bureau for the Advancement of Independent Retailing.

Mr. MERMEY. Mr. Chairman, I would be very happy to testify at this time, but with your permission I would like to yield to Mr. Kuntz, who is here from Texas.

Mr. DINGELL. The committee will be happy to hear from him.

That is Mr. Walter Kuntz, Jr. Mr. Kuntz is indicated here as being from New York, N.Y.

Mr. KUNTZ. Well, I am the president of the National Wholesale Druggists' Association, New York, N.Y. I live and work in Dallas, Tex., however.

Mr. DINGELL. Very well, you may proceed, Mr. Kuntz.

STATEMENT OF WALTER N. KUNTZ, JR., PRESIDENT OF THE NATIONAL WHOLESALE DRUGGISTS' ASSOCIATION

Mr. KUNTZ. Mr. Chairman and members of the subcommittee, my name is Walter N. Kuntz. I am president of the National Wholesale Druggists' Association, an association of 366 full-line, full-service wholesale druggists. I am very pleased to have the opportunity to appear before you today on behalf of the association to express support for the quality stabilization bill.

The quality stabilization bill is essential legislation. It is in the interest of manufacturers who make quality products. It is in the interest of wholesalers and retailers who distribute quality products. And it is in the interest of consumers who wish to have quality products available.

The general public benefit of this legislation may not be fully appreciated by people unfamiliar with the vital importance of trademark protection in the distribution of consumer goods. Those who have learned through hard experience know that it is the consumer who suffers when quality merchandise is forced off the market unfairly.

Some merchants, known as bait merchandisers, are more concerned with convincing consumers that they are getting "something for nothing" than they are with providing consumers with dependable quality merchandise at a fair price.

It should be obvious that an economy cannot operate on the theory of "something for nothing." Yet many consumers are misled by bait merchandising techniques into believing that brand name products can be virtually given away.

The products of the drug industry, which are exemplary of high quality, are frequently selected for misuse as bait. Indeed, some large bait merchandisers use their entire drug department as a traffic builder. But the problem is by no means confined to our industry. The famous brands of many other industries also are exploited.

The predatory merchandisers are destroying the market for quality brand products. Our own industry is simply an example. The members of our association are efficient wholesalers, using the best modern equipment and business methods. We perform an essential function in the distribution of goods. Wholesaling is our business and we do it well.

However, last year the members of our association had an average net profit after taxes of 1.5 percent of sales. This was the industry's poorest performance since the depression days of 1935. Why?

The reason is quite plain. Our business is based upon the distribution of a full line of quality brand merchandise. However, the bait merchandisers are making the proper handling of such merchandise unprofitable. They use the quality brand merchandise only as a means of building traffic into their stores. They are not interested in selling the bait item, and are even less interested in promoting or servicing it. Once the consumer is in their store, they do not find it difficult to sell him other merchandise at a handsome profit.

Distributors who deal only in quality brand products are forced out of business when the prices for such products are depressed to uneconomic levels by the bait merchandisers. As the quality brand distributors disappear the distribution of quality products is seriously impaired and the consumers' selection is limited to those goods which the bait merchandiser chooses to promote and carry in stock.

We believe that the consuming public is entitled to a fair choice between quality brand goods and other competing goods. The public is denied a fair choice if some distributors can use with impunity the quality brand goods as bait for the sale of other goods and thereby destroy the distributors of quality goods.

The consumer suffers in other respects as well. Bait merchandisers do not stock a full line of quality products but only a short line of fast-moving items. A patient who urgently needs an infrequently called for drug not stocked by the bait merchandiser is likely to get small comfort from the knowledge that the bait merchandiser can sell him a famous brand aspirin for a few cents less.

The public needs and demands a full line of quality goods. I cannot imagine how the public will get them if there is no incentive for manufacturers to make them and for wholesalers and retailers to distribute them.

I have touched upon only two aspects of the problem created by the absence of any effective remedy against misuse of a valuable trademark. Some of the other consequences of the predatory use of trademarked goods have been described by other witnesses. Even opponents of this bill acknowledge that such abuses exist.

A trademark owner does not have any effective remedy to prevent the misuse of the goodwill and reputation symbolized by his trademark. It is not only important that Congress provide such a remedy, it is also important that it be done before it is too late. Unless the trademark owner is permitted to prevent the ruthless exploitation of

his trademark a few predatory retail giants will monopolize the field. It may not be possible to revive the quality brand manufacturers and distributors once they have been gobbled up.

This legislation would not require a manufacturer to adopt the quality brand method of distribution. No manufacturer would be prevented from making and offering as cheap a product as he wishes to sell, or be compelled to establish a resale price. However, it would enable a quality brand manufacturer to defend his trademarked product from merchandising practices which destroy the value of his trademark and ultimately the market for his product.

The quality stabilization bill would help our members as distributors of quality brand products. However, I would not appear here today if that were its only purpose or effect. The bill would help all segments of our economy as well.

We urge favorable action on this bill, not only on behalf of ourselves, but on behalf of the social and economic welfare of the country as a whole.

That concludes my statement, Mr. Chairman.

Mr. DINGELL. Mr. Long, do you have any questions?

Mr. LONG. No questions, Mr. Chairman.

Mr. DINGELL. Mr. Glenn?

Mr. GLENN. No questions.

Mr. DINGELL. Mr. Van Deerlin?

Mr. VAN DEERLIN. No questions.

Mr. DINGELL. Mr. Keith?

Mr. KEITH. No questions.

Mr. DINGELL. I am very interested in one thing. Are you having any trouble in the National Wholesale Drug Association with manufacturers entering into the wholesale drug area and beginning to compete by wholesaling in competition with your membership?

Mr. KUNTZ. There are some manufacturers—a number of them have direct distribution policies. In the field of pharmaceuticals a good many have a dual distribution policy; that is, they operate depots or warehouses which to some degree compete with wholesale drug houses and they also distribute through wholesalers.

Mr. DINGELL. Some of them compete practically full line with drug houses, do they not?

Mr. KUNTZ. In their line only.

Mr. DINGELL. Yes, but many of them do?

Mr. KUNTZ. This has been the case for years but they are at a disadvantage in competing.

Mr. DINGELL. And that disadvantage works toward whom, the manufacturers or wholesalers?

Mr. KUNTZ. The wholesalers.

Mr. DINGELL. Is it a noticeable disadvantage?

Mr. KUNTZ. I think so.

Mr. DINGELL. Do you regard it as being hurtful to the interests of the wholesaler?

Mr. KUNTZ. No.

Mr. DINGELL. You do not regard it as being hurtful to the interests of the wholesalers?

Mr. KUNTZ. Not if we are competing on the same price basis, I do not see how it would be.

Mr. DINGELL. I see.

Are you familiar with the *McKesson-Robbins* decision which said that a manufacturer could not wholesale in competition with his wholesale outlets and fix their prices by fair trade?

Mr. KUNTZ. Let me have that statement again, Mr. Dingell.

Mr. DINGELL. The *McKesson-Robbins* decision said that a manufacturer could not wholesale in competition with his wholesale outlets, fix prices in competition with his retail outlets and at the same time fix their prices. Do you regard that as being a sound decision?

Mr. KUNTZ. Well, I am not prepared to comment on the validity of the decision.

Mr. DINGELL. Well, do you think—I will ask you——

Mr. KUNTZ. I will say this, Mr. Dingell; the area we are talking about is an extremely limited segment of our business. As a practical matter it has no bearing on the overall wholesale drug operation.

Mr. DINGELL. Do you think it would look good if you were to go back and tell your organization that you had endorsed the principle that wholesalers should be faced with competition of manufacturers who could compete with them on the wholesale level and at the same time fix the prices of the wholesalers?

Mr. KUNTZ. I did not say that we endorsed that; and I am not saying that at this time.

Mr. DINGELL. Do you endorse it?

Mr. KUNTZ. No.

Mr. DINGELL. Do you oppose it?

Mr. KUNTZ. I do not. I do not have an opinion on it at this point.

Mr. DINGELL. You take no position on it?

Mr. KUNTZ. That is right.

Mr. DINGELL. Do you feel that you should go back to your people, your membership, telling them you take no position on having the manufacturers and retailers fix their prices?

Mr. KUNTZ. At this point that is what my position is. And I would say as long as we are competing on the basis of price, I do not care whether it is a manufacturer or——

Mr. DINGELL. You cannot compete on the basis of price if a manufacturer fixes your price, can you?

Mr. KUNTZ. If we are competing on the same price schedule; in other words, manufacturers who have a direct distribution policy and a wholesale distribution policy, who had a price structure that puts the wholesaler in a position to perform his service and compete within that area; then I say wholesalers can compete. This is a thing that has been going on for many, many years.

Mr. DINGELL. Well, do you think it ought to continue to go along?

Mr. KUNTZ. I do not take a position on that point one way or the other.

Mr. DINGELL. Do you have to report back to the members?

Mr. KUNTZ. Yes, sir.

Mr. DINGELL. You do?

Mr. KUNTZ. Yes, sir.

Mr. DINGELL. Is this the reason you take no position?

Mr. KUNTZ. No.

Mr. DINGELL. Do you think that your strictly wholesale——

Mr. KUNTZ. No; the manufacturers are associate members who have no votes in the NWDA.

Mr. DINGELL. Do you think that your strictly wholesale members are going to approve of having manufacturers fix their prices and at the same time compete with them?

Mr. KUNTZ. That is a matter of conjecture. I do not know whether they would or would not.

Mr. DINGELL. As a matter of fact, it would be logical to assume they would not, would it not?

Mr. KUNTZ. That is your statement, Mr. Chairman.

Mr. DINGELL. No, it would be logical to assume that, would it not?

Mr. KUNTZ. I do not think it would necessarily.

Mr. DINGELL. Are you aware of the fact that very frequently manufacturers will run promotions whereby they will give things like typewriters to wholesalers, rather, to their large direct accounts for purchases of large orders, and so on, promotions of large amounts of a particular commodity? Are you familiar with this practice?

Mr. KUNTZ. No, not of my own knowledge, I do not know anything about that.

Mr. DINGELL. Are you telling this committee, then, this practice does not go on in——

Mr. KUNTZ. I do not say it does or it does not. I do not know about it if it does go on.

Mr. DINGELL. Conceivably it would be an unfair thing if a wholesaler would be faced with competition from a manufacturer who fixes prices, to say: "Let us have a promotional campaign of this kind"; would it not?

Mr. KUNTZ. I do not know that it would.

Mr. DINGELL. You do not think it would?

Mr. KUNTZ. You are talking about free goods.

Mr. DINGELL. It would not hurt a wholesaler, then, to have his prices fixed?

Mr. KUNTZ. Here is the point, Mr. Dingell: If the manufacturer requires the retailer to buy this merchandise in order to get the free goods in quantities disproportionate to that retailer's needs, the wholesaler will take chances on that kind of competition. It is a practical matter of inventory investment and turnover. And the ease with which the product is sold and the speed at which they are sold is a problem at the retailer level. And we think the wholesaler answers that problem.

Now, if there are any built-in premiums, then there has to be disproportionate quantity of sales made to offset them.

Mr. DINGELL. Now let me ask you: Are you fearful under this bill that the manufacturer, under the *McKesson-Robbins* exemption which appears on page 8, will be able to take all of the good accounts, the direct buys, the large volume, the quick pay, the cash customers, and leave the wholesalers with the slow-paying credit people, and the small orders? Are you not fearful that that conceivably could happen?

Mr. KUNTZ. No, because your statement presupposes that they can do this. They cannot do it.

Mr. DINGELL. Well, my statement merely says that in the bill the owner of the brand name or trademark has an opportunity, in section 15, to fix the prices of the wholesale and retail outlets, both those which

he owns and those which he does not own, and which he competes with.

Now I am asking you if you are not fearful, under this section, that the manufacturer is not going to have an opportunity to take over, at least on the wholesale level, the large volume distributors, those who pay cash, those who are particularly desirable, for one reason or another, and leave your wholesalers, those people whom you represent, with the slow-paying, and risky outlets, the ones in shaky economic circumstances and others which might conceivably be less desirable for one reason or another, including the fact that they will buy in small lots?

Now, are you not fearful that this will happen?

Mr. KUNTZ. Not if we are competing on the same price structure.

Mr. DINGELL. Thank you very much.

Oh, one more thing. Drug News Weekly had an article in there that says:

> Sales of National Wholesale Druggists Association members rose 5.05 percent in 1962 over 1961, according to cumulative quarterly figures. Fourth-quarter sales increased 4.65 percent.
>
> All 12 regional areas gained with sales increases ranging from 2.08 to 8.89 percent.

That would indicate that you represent a rather healthy industry, does it not?

Mr. KUNTZ. On the basis of sales, this is right. On the basis of profit, that is not the case. Profits are down.

Mr. DINGELL. All right, thank you very much, Mr. Kuntz. You have been most helpful.

The Chair notes that there is a quorum call and that we will have to adjourn. The committee will convene tomorrow at 10 o'clock.

Off the record.

(Discussion off the record.)

Mr. DINGELL. The committee will stand adjourned until 10 o'clock tomorrow; at the call of the Chair if otherwise called earlier.

(Whereupon, at 12:20 p.m., the hearing was adjourned, to reconvene at 10 a.m., Thursday, April 25, 1963.)

QUALITY STABILIZATION—1963

THURSDAY, APRIL 25, 1963

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

The subcommittee met, pursuant to recess, at 10 a.m., in room 1334, Longworth House Office Building, Hon. John D. Dingell presiding.

Mr. DINGELL. The committee will come to order.

This is a continuation of the public hearings on H.R. 3669 by our chairman, the honorable and distinguished gentleman from the State or Arkansas.

Our first witness is our good friend and colleague, the Honorable Bruce Alger, of Texas.

We are extremely honored to hear from a former member of this committee who has lived with this bill over a number of years. I think his testimony will be extremely valuable to the committee. The Chair is particularly delighted to hear our friend and colleague and his views on the free American capitalistic system.

STATEMENT OF HON. BRUCE ALGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. ALGER. Mr. Chairman, it is a pleasure to be back in this room and with this committee. I suppose I have forgotten some of the pain because what I remember now is the happiness of the hours and days and years spent in this committee with my colleagues.

I shall be brief, but I submit for the record a statement. Rather than read that statement, Mr. Chairman, it is a seven-page statement, I would like to go through it merely making the salient points and leaving the material for a fuller treatment in the record since I know you have many other very able witnesses to follow me.

As preface to what I say today, I have read some of the testimony given, including the statement of Mr. Loevinger, Assistant Attorney General.

About myself let me simply say this: I have the unique experience in my background of having been with a manufacturer, and having been with the manufacturer work through the distribution: that is, the wholesale and the retail level. Through these experiences I learned something, though I was a junior businessman of the manufacturing and distribution and pricing of merchandise.

With that preamble, I would just like to hit the high spots of my statement.

On page 1, I point out that so far as I see the quality stabilization bill, it is price fixing. Then I point out that this will result in both horizontal and vertical price fixing.

On page 2, I point out that the manufacturer can pick the area to market the trademark item, and rather than it being throughout the country it will be at his discretion, another one of the discretionary privileges of the manufacturer in this bill.

The invasion of States rights is quite obvious to me. I think there is a clear case of unconstitutionality, but I am not an attorney and I leave this to my legal friends who are better qualified to debate that issue.

In Texas we do not have the fair trade law and we would like our State laws to be honored rather than to be steamrollered by this type of bill.

This bill, as I point out on page 3, leaves little, if any, rights in the retailer and again the manufacturer will determine the market.

At this point I give the example of a city both in our State of Texas and the adjoining State of Arkansas called Texarkana where you could have the fair trade or the quality stabilization price set on one side of the street but not on the other. While this might seem an extreme case, this is one way to highlight by an analogy or an example of what could happen under this bill. This of course builds further the power of the all powerful Federal Government that we seem bent on accomplishing, which of course I am opposed to also.

More than that, this transfers the right to be heard in court into the Federal courts and the guilty party, whomever he may be that violates the Quality Stabilization Act, can be tried where he lives, where the violation occurs, or where any act may be found that the manufacturer might choose to use as the reason for suing in that area.

I cite the example of the Dallas businessman who could be in Hawaii—or rather I take that back. The suit could be brought in Hawaii and he then would have to at his expense, against the full expense of the U.S. Treasury, defend himself in court. He would not have a jury trial. To me, the cost to this businessman, this retailer, would be exhorbitant and could easily result in bankruptcy of smaller businessmen.

From the consumer standpoint, this bill as I see it would result in higher prices.

I mention some of those who are united in opposition to the bill and it is a rather interesting group I find myself in company with, including the gentleman from Michigan. As I have said before, I think fairly, that while we are of different parties and have different philosophies as to the role of Federal Government in our lives, the proponents of the bill should beware of the fact that the gentleman from Michigan, Mr. Dingell, and I are united in opposition to this bill.

Then I summarize on page 6, Mr. Chairman, the major reasons why I oppose the legislation. These I will quickly recount at this point.

First, retail price maintenance, otherwise known as fair trade, is inconsistent with our free enterprise economy and contrary to public policy expressed by the Congress in the Federal antitrust laws.

Second, the legislation would substitute a Federal mandate for State or local discretion.

Third, the legislation would increase the cost of living for consumers.

Fourth, the legislation would not benefit small business but might indeed handicap them.

Fifth, the bill is of doubtful constitutionality.

It strikes me that there is a grave redefinition of private ownership of property which should be further studied because the title does not fully transfer into the hands of the retailer. This is a new concept as I see it in private enterprise and I feel this bill to be destructive of private enterprise.

Mr. Chairman, I ask unanimous consent that my full statement be included at this point.

Mr. DINGELL. Without objection it is so ordered.

(The statement referred to follows:)

STATEMENT OF HON. BRUCE ALGER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman and members of the committee, I shall be very brief, but I felt it was my duty to come before your committee to express my views regarding the so-called quality stabilization bill because insofar as I have been able to determine this is the same old price-fixing bill that seems to come up in every session. I would like to repeat that I am concerned about this legislation because I was a member of a subcommittee that studied this type of measure for almost 2 years and cannot ignore what I learned at that time. Also, I was formerly in manufacturing and I operated in the manufacture and distribution and retail levels of business. I was with a big factory and I know a little bit about what the small retailer and wholesaler is up against.

I would like to remind you, as I have done on each occasion that I have appeared in opposition to price fixing, that this bill will permit horizontal price fixing, which is illegal, although it is not intended as such. This bill will permit some vertical price fixing by asking that the antitrust laws be set aside, but the net effect of it would be to make horizontal price fixing, which I think is contrary to what even the small businessmen would have who are being represented as the chief proponents of this bill. It is with regret that I say that I think that many of the small businessmen are being victimized by some of the lobbyists concerned with pushing this measure through.

Furthermore, the manufacturer who has the right to market his trademark item under this bill will have the opportunity to pick the area in the country where the goods can be sold at the price that he sets and this, of course, no matter how you sugar-coat it is nothing in the world but price fixing. It is something that I believe politically Members of both parties and all businessmen would oppose if they recognize it at least as I recognize it as a serious danger to all segments of our society, to the wholesaler, the retailer, to the manufacturer. Indeed those (whose?) business ultimately would suffer and most important of all to the consumer.

Some of you who have been on this committee have heard me say these things before, and I appear here today because I sense even greater danger in this bill's version of price fixing under the quality stabilization title.

One of my deep concerns is the invasion of States rights which is inherent in this bill. This is a Federal price-fixing bill. It enables the Federal Government to preempt the field and allows no choice of action by the States. In my opinion, although I am not a lawyer, this kind of legislation is clearly unconstitutional. I have been advised by legal authorities that my opinion on the unconstitutionality of such measures is soundly based. I would think that in this period of world crisis when Congress is faced with preserving the capitalist system against socialism that we have far better ways to spend our time than in making laws which are almost certain to be declared unconstitutional. My deep concern of the invasion of States rights stems from the fact that in my State, Texas, we do not have fair trade price fixing. We have never enacted such a law and from the previous Governor on down feel that it would be wrong. I have not had an expression from the present Governor of Texas up to this time.

Another point that I think should be carefully considered is that if this bill becomes law, it will make every small retailer and wholesaler an appendage of the large manufacturer. The individual merchant will have no rights in the product which he has purchased. The manufacturer will have the sole right to set prices to change them at will for whatever reason he states or without any stated reason. The manufacturer under this bill can determine the market area in which he will fix prices. This can be carried to the ridiculous extreme, for instance, in Texarkana, a community which lies both in my State of Texas and in our neighboring State of Arkansas, under this bill it is not inconceivable that a manufacturer could determine Texas as one market area and Arkansas as another and set different prices within the same community, and a retailer on one side of the street would be forbidden by law to maintain a competitive price with the merchant on the other side of the street. Can any member of this committee justify a measure that would make such a situation possible?

At this time when the greatest danger to our private enterprise system is an expanding and all-powerful Federal Government, this bill plays right into the hands of those who would change our society. Under this bill, neither Texas courts nor the Texas Legislature would have any authority and this would be true in every other State. Only the Federal courts would have jurisdiction. And again I point to what could happen under the provisions of this bill giving jurisdiction solely to Federal courts wherein the bill states that a businessman, small retailer or wholesaler charged with violation of the price-fixing act can be tried where he lives, where he is found (and think of that phrase where he is found), or where he has an agent. Under this bill and this is almost unbelievable, a small businessman in my city of Dallas, Tex., could be charged by a manufacturer with violating the act and suit could be brought against him in any Federal court which had jurisdiction where he lived, where he was found, or where he had an agent. So if my Dallas businessman were travelling in Hawaii and the manufacturer charging him with the violation had an outlet in Hawaii, my businessman being found in Hawaii, could be tried there for a charge brought against him in Texas. He would have no chance of a jury trial and he is subject under this bill to all the cost of the trial including reasonable attorney fees. Think what this could do to a small businessman under those circumstances, forced into a protracted trial nearly 4,000 miles away from where his business is located. Perhaps there are those who will say that I am being ridiculous in citing such examples, but gentlemen, I think it is more ridiculous to place in the law the possibility that such things could happen because we always find someone who will take full advantage of the quirks of law which will enrich him or assure him of his objective however devious it may be. I would like to point out just one more thing in the proposed legislation, the House version of the bill exempts prescription drugs. The Senate version does not. But I am given to understand that assurances have been given that either on the Senate floor or in conference the exemption against prescription drugs will be taken out. It would seem that some of those who are the strongest proponents of this type of legislation will use any means to gain support of the small businessman who does not have the facilities nor the time to know all of the inherent dangers in the measure.

Finally, Mr. Chairman, I would like to direct your attention to those who oppose this type of legislation and have consistently opposed it as being against the best interests of small business, the independent wholesaler and retailer, and the consuming public of the United States. These include the Departments of Justice, Commerce, the Federal Trade Commission, the Bureau of the Budget, and every responsible agency of the Federal Government. While it is fairly well known that certain organizations and I don't see eye to eye on many issues, I would like to point out some of the groups who are joined in opposition to the quality stabilization, price-fixing bill, along with me. These include the AFL–CIO, National Farmers' Union, National Council of Senior Citizens, U.S. Chamber of Commerce, Farm Bureau. I mention these organizations in opposition to impress upon you the wide diversity of viewpoint that has now centered against this bill, primarily because it is unfair to the consumer as we see it. I would also like to point out that the National Association of State Purchasing Officials and the National Association of Municipal Purchasing Officials have also expressed their opposition to the quality stabilization bill. Their claim is that this bill offers little or no protection. One other important group expressing vehement opposition to this bill is the antitrust section of the American Bar Association.

Now, if I may, Mr. Chairman, I would like to summarize quickly the major reasons why I am opposed to this bill and why in my opinion it has such diverse organizations also opposing it:

First, resale price maintenance, otherwise known as fair trade, is inconsistent with our free enterprise economy and contrary to public policy expressed by the Congress in the Federal antitrust laws.

Second, the legislation would substitute a Federal mandate for State or local discretion.

Third, the legislation would increase the cost of living for consumers.

Fourth, the legislation would not benefit small business but might indeed handicap them.

Fifth, the bill is of doubtful constitutionality.

Now, gentlemen, these are not my views, though I share them. I am not even an attorney, so you might easily destroy my logic on it from the legal standpoint, but these are views of the agencies of Government.

But most of all, gentlemen, and this is the one I think that you and certainly we and the other body must consider, it will make higher prices to the consumer. I realize this is somewhat—could even be a demagogic appeal, so let's not put it just on that basis.

I really think this will be destructive of free competitive enterprise. Some feel the small retailer needs help; yes, we all need help in small business, but I think a bill of this kind will do more harm than good and actually hurt those people that we are most inclined to want to help; namely, the small business area, because as I say, it will actually help the big manufacturing companies.

Price fixing at that level, I say, is wrong; it is horizontal. It violates the antitrust laws; it will increase the prices; it changes our traditional concept of property rights.

Gentlemen, when a property transfers from the hands of the manufacturer to the retailer, it is the retailer's, but now there is a new definition of property right that permits the manufacturer to carry in the retailer's hands, for all time, his trademark as this bill defines it. This is wrong in principle.

I sincerely hope you will consider the views expressed in opposition to this bill and will recommend against it.

Mr. ALGER. Now to go back to what I said at first as to my background in manufacturing in the wholesale-retail field, let me point out in an analogy again the invasion that would result from this bill becoming law as I see it.

I was with a large manufacturer, the RCA Victor Co., that marketed many fine products through distribution, through dealers, through distributors who then resold to dealers. Under this bill, that manufacturer who when I was with the factory made the same type product for example for Sears, Roebuck under their own trade name, under this bill the manufacturer could set the retail price for the trademark goods and then undercut his own product by manufacturing an identical product that would be resold under another trade name by a large store.

This example I cite to show the unfairness to the small retailer, and the small businessman would be hurt.

So it is that I relate my views to Mr. Loevinger's statement again showing what has happened to the small businessmen in those States where there are fair trade laws as against those where there are not, showing that business failures are greater in those areas where the retail price is set by the manufacturer as compared with those areas where they are not.

Mr. Chairman, that concludes my statement. I would be delighted to answer questions, but I have tried to be brief, as I promised I would.

Mr. DINGELL. We are most grateful to our good friend and colleague for returning to this committee and giving us the benefit of

his counsel and wisdom on this very important legislation. I would like to express to him my personal appreciation for his presence this morning.

The Chair will recognize Mr. Hemphill.

Mr. HEMPHILL. No questions.

Mr. DINGELL. I recognize the distinguished chairman of the committee.

Mr. HARRIS. I disagree with our colleague from Texas. I do understand his situation from the days he served on this committee, and I admire his viewpoint. We do appreciate your always coming to the committee with whatever you have in mind.

Mr. ALGER. If I may respond, Mr. Chairman, as I said earlier, I guess I have forgotten the pain because in returning to this room I remember the happy days I thoroughly enjoyed in this room.

If you will recall, and this is both a warning if not a threat to you, Mr. Chairman, when you find John Dingell and me joined against a bill you better beware and recheck your premises.

It is a pleasure to be with you. Thank you.

Mr. HARRIS. Yes; I know, and I have always appreciated worthy adversaries and this will be no exception.

Mr. ALGER. Thank you, Mr. Chairman. Thank you again.

Mr. DINGELL. Mr. Keith has a question.

Mr. KEITH. Thank you, Mr. Chairman.

I regret that I was not here to hear the expert testimony offered by our colleague from Texas. I would like to ask, suspecting that there is probably a constitutional question concerning this: Mr. Alger, I used to carry a rate book for a life insurance company and I was told what the rate should be. If I violated that rate scale and gave a rebate to a client, it voided the contract and the insurance company could take action against me. As a matter of fact, in many States rebating was or is contrary to the law. I would like to have your observation on this kind of practice and perhaps any relationship it might have to the problem at hand.

Mr. ALGER. I would respond by saying, of course I am not as acquainted with the situation you mention relative to insurance and rate schedules. Again I would have to relate it to what I did testify to earlier which you will see in the transcript, but I was with a manufacturer, and to parallel what you have just said the manufacturer would publish a suggested list price.

Now it was illegal to specify price even at that time. This was in 1940, 1941. But the pressure was exerted by suggested list price with the threat always possible of withdrawal of the franchise for the goods.

Now it strikes me that the rate process even as the suggested list price comes very close to violating the constitutional law as I understand it and existing antitrust law, but as I also pointed out I am not an attorney and on the constitutional question I would like to raise it. I answer it in my way, but I would turn it over to my legal friends to debate further.

I am aware of what Mr. Loevinger has said. I shan't quote him, but it is here in his statement. I thought he made a very good presentation.

Mr. KEITH. I am not an attorney either, Mr. Alger, so this will have to be a draw.

Mr. DINGELL. I know the gentleman is anxious to return to another committee.

Mr. Van Deerlin.

Mr. VAN DEERLIN. No questions.

I just want to say perhaps after having served for a brief period on the Ways and Means Committee our colleague is wise in being happy to return to this committee.

Mr. ALGER. I miss you.

Mr. DINGELL. The Chair notes the presence of a good friend of ours, a famous member of this body, our colleague, Mr. Hemphill.

I understand you have a constituent or friend.

Mr. HEMPHILL. Yes, Mr. Chairman. I have from the great State of South Carolina and the independent city of Charleston, Mr. John White, who is here to represent the National Oil Jobbers Council, quite a successful businessman and distinguished citizen of my State. I would like to recognize him at this time.

Mr. DINGELL. Mr. White, the Chair is very happy to welcome you to the committee on the recommendations and high statements of our friend and colleague. I assume you have a statement you would like to give. Because of the very brief time that is available to the committee to operate today, you might like to file your full statement and summarize its contents for the benefit of the committee.

STATEMENT OF JOHN H. WHITE, NATIONAL OIL JOBBERS COUNCIL

Mr. WHITE. Mr. Chairman and members of the committee, I appreciate the opportunity of appearing before your committee today to present our views. I am appearing on behalf of the National Oil Jobbers Council which represents some 34 State and regional associations of independent jobbers and distributors of petroleum products. These associations cover 41 States representing the great majority of the thousands of bona fide independent petroleum jobbers in the United States. I won't list all of them, they are in my prepared testimony.

I would like to say that I do have a prepared statement and in view of your prior remarks about the time element, I will file it with the committee.

I would like to say this, that in this testimony I have leaned heavily on the statement presented to this subcommittee last year by General Counsel, Mr. Otis T. Ellis on a bill similar to that now before the subcommittee for consideration.

Now there is one provision of the bill which we feel is a good point and that is bulk commodity products are exempt which includes kerosene, we assume, gasoline, fuel oils, and so forth. Also exempt is the provision for sale of products to Government exchange houses. We are concerned about that because in many instances we have trouble competing with that sort of competition.

We feel in summary, Mr. Chairman, that the bill to us is more or less a fair trade bill and our council has opposed this for years as a matter of principle and we just do not feel that a fair trade bill would work properly within the petroleum industry.

Mr. Chairman, in view of your request for time, I believe that——

Mr. DINGELL. We are anxious to hear a full summary of your statement, Mr. White, and I don't want you to feel pressed because of the problems that the Chair happens to face with time.

Mr. WHITE. We are concerned about the bill because it does provide for the owner of a brand name to impose either a fixed resale price or arrange the prices at our level of distribution on substantially all commodities other than bulk if that is true. We are concerned as I said before about the prices on the sale to Government of subdivisions there.

Another concern about the bill that we have in mind is the giving away of trading stamps. We are not sure of our interpretation of what the bill means about premiums and stamps. The service station operators continue to give trading stamps on items subject to the law in which the brand is imposed to fixed retail price. Many brand supplies of petroleum products as well as other related products that jobbers sell come substantially under the unbranded resellers and discount houses. This kind of competition is hurting the branch merchant very badly.

We are concerned about what the bill will do to curb this practice. We feel that it is not fair for a branded supplier to impose fixed prices on his brand to resellers while at the same time placing many at a competitive disadvantage who simply do not care for the brand although the quality may be the same.

Mr. Chairman, I have taken my statement at loose ends instead of reading it in full. It may be a little loose and disconnected.

Mr. DINGELL. You have done a fine job.

Mr. WHITE. Our main opposition to this is we feel it is fair for the manufacturer to be in a position to fix prices at the retail level.

Mr. DINGELL. Thank you, Mr. White.

Mr. Long?

Mr. LONG. No questions, Mr. Chairman.

Mr. DINGELL. Mr. Curtin.

Mr. CURTIN. Thank you, Mr. Chairman.

I presume, Mr. White, that in your industry you deplore the frequent price wars which occur at service stations.

Mr. WHITE. We do, sir,

Mr. CURTIN. How do you feel that this could be avoided?

Mr. WHITE. Offhand, I don't have an answer for that. I don't think anyone in the industry has had an answer for it. We have been plagued with these price wars for years and years and no one has seemed to have been able to come up with an answer to how to stop price wars.

Now most price wars it might be said are started by independent marketers of unbranded products. I don't believe that a branded jobber, the large majority of them, could be charged with starting price wars.

Mr. CURTIN. Do you not think that in the event that large producers of gasoline, for example, Gulf or Atlantic or Mobil, whoever it may be, should each tell all of their dealers in a certain geographical area, that the price for the brand name of its gasoline was a certain figure, that this would help to eliminate this abuse of price wars?

Mr. WHITE. No, sir; I don't, because there are many suppliers, independent refiners, that sell to unbranded accounts and in some cases how could a branded dealer compete with an unbranded service station operator that could sell 2 or 3 or 4 cents below his price? That is what is causing price wars, Congressman Curtin.

Mr. CURTIN. That is what happens all the time, the unbranded gasoline is several cents below the branded gasoline, is it not?

Mr. WHITE. Usually the differential is 2 cents.

Mr. CURTIN. But there is that differential.

Mr. WHITE. Yes; there is. In some cases it is 1 cent.

Mr. CURTIN. Do you agree that the fact that an unbranded gasoline is always sold at a price below the branded gasoline is no answer to the possible advantages of this pending legislation?

Mr. WHITE. I understand that fair trade provisions are contrived in several States: New Jersey, if I recall correctly, and it didn't seem to be successful there. I think in Pennsylvania it was tried and most of the suppliers withdrew from that practice of fair trade.

We just don't feel that a fair trade bill would entirely solve the problem of price wars and so you would have too many competitive levels within the industry.

Mr. CURTIN. How about tires? Don't you think that if the brand name tires were at a certain level that this would be of some help in the price wars on tires in the service stations?

Mr. WHITE. There again you have the same reason. Some manufacturers will use a concern; Goodyear will sell to a dealer, his branded distributor, and then he will sell the same tire only under a different brand to a discount house. We are concerned about what price will be established for the branded tires to those branded retail stores and what price will be established on the unbranded tires that are sold under a different name. We are competing against something like that every day now.

Mr. CURTIN. In your business do you find that the small independent service stations are gradually being eliminated?

Mr. WHITE. Yes, sir; we do.

Mr. CURTIN. In favor of the large chains of service stations run by the companies?

Mr. WHITE. We do, sir.

Mr. CURTIN. Do you think that is a good tendency?

Mr. WHITE. We don't think so, sir. A lot of independent chains have had to merge, sell out because of the competition that they just could not compete with in the price wars that have been existing for the past 2 years.

Mr. CURTIN. And the dealer who is hurt by the price wars in your industry is the little independent jobber, isn't he?

Mr. WHITE. He is a little independent jobber and not the branded so much. The branded service station operator is hurt too because he usually has to take a portion of any reduction in price on a percentage basis and his margin is curtailed during price wars.

Mr. CURTIN. He is hurt, but he is not hurt to the same extent as an independent.

Mr. WHITE. No.

Mr. CURTIN. Because he has a cushion to which he can look which the independent does not have?

Mr. WHITE. Yes, sir; that is correct, sir

Mr. CURTIN. You don't think this bill would help that independent dealer?

Mr. WHITE. No, sir; I don't.

Mr. CURTIN. That is all, Mr. Chairman.

Mr. DINGELL. Mr. Long.

Mr. LONG. No questions.

Mr. DINGELL. Mr. Van Deerlin.

Mr. VAN DEERLIN. When we talk about difference between branded and unbranded, we are talking about a difference in price. Are we also talking about a difference in quality?

Mr. WHITE. In some cases yes and in some cases no. Some suppliers sell the same product to an independent account that they sell to their own branded service stations.

Mr. VAN DEERLIN. So that is the same quality, just turning up under a different name.

Mr. WHITE. Yes. Due to the distribution of bulk products in terminals it is a little difficult to maintain separate products due to storage capacity. In many cases the product is the same as to quality.

Mr. VAN DEERLIN. Does this also apply to tires?

Mr. WHITE. I am not in a position to answer that. I do know that we are associated with a company, B. F. Goodrich, which we have a tire store in Charleston and they manufacture tires for other sellers, but as to the quality, I cannot answer for tires, only on gasoline.

Mr. VAN DEERLIN. Thank you.

Mr. DINGELL. Mr. White, I am particularly interested in a couple of points in the bill which I think you might be well qualified to discuss with us. I want to refer you to two sections of the bill.

The first is the language appearing on page 8, line 14, section (15), which says as follows:

> All rights and remedies provided in paragraphs (7) to (17), inclusive, of this subsection, to owners of a brand, name, or trademark, shall be also available to any owner of a brand, name, or trademark who, in the sale of goods identified by such brand, name, or trademark, shall compete, at any level of distribution, with any reseller offering such goods.

This, briefly stated, authorizes an individual who manufactures and markets in competition with wholesale and retail outlets to fix the price of those wholesale and retail outlets?

Mr. WHITE. Yes.

Mr. DINGELL. I wondered what your comment would be on that?

Mr. WHITE. We think that would be bad. We think it would be bad for any manufacturer to be in the position of fixed prices for resale to the consumer.

Mr. DINGELL. Particularly when he competes.

Mr. WHITE. When he competes. There is a lot of competition now within the industry to where a lot of suppliers are competing with their own jobbers by selling products at prices below what they sell to their jobbers, particularly in commercial consumer accounts which makes it impossible to compete with that kind of business.

Mr. DINGELL. Now, on page 8 of the bill, I would also like to refer you to the following language on line 3 of page 8.

> Each such currently established resale price and resale price range shall be uniform at each level of distribution within each marketing area determined by the owner of the brand, name, or trademark.

I wonder if you have any feelings or comments on the language on page 8, lines 3 to 6?

Mr. WHITE. Yes, I do. We are a little concerned about in what geographical area could this be established. If the supply is sold to the branded, that is one level; if he sold to a commercial account, that is another level of distribution. The unbranded marketers is another level, and certainly geographical areas could be under that division and that concerns us a little bit.

Mr. DINGELL. Let's construe this business of geographical price discrimination. Is it your opinion that this section authorizes geographical price discrimination between dealers situated in different parts of the country?

Mr. WHITE. Well, I cannot honestly answer that, sir, because I am not a lawyer and I am just not in a position to interpret this bill.

Mr. DINGELL. Assuming it is, would you regard that as being a wholesome thing and in the interest of your industry?

Mr. WHITE. No, sir; I do not, if that was the interpretation.

Mr. CURTIN. Would you yield?

Mr. DINGELL. Yes.

Mr. CURTIN. Do you think, then, that you could sell gasoline, for example, at the same price in some area of Alaska as you could sell it close to a production point in other States of the United States?

Mr. WHITE. I am sorry.

Mr. CURTIN. Do you feel that the price has to be the same in all geographical sections of the country?

Mr. WHITE. No, sir. Obviously, you could not have the same price in all States and areas.

Mr. CURTIN. Then that particular section of the bill is not objectionable to you?

Mr. WHITE. No. The only thing we object to is the level of distribution in distinguishing between whether it is a commercial account, a consumer account, or an unbranded account.

Mr. CURTIN. But you recognize that in different geographical areas there is going to have to be a price differential?

Mr. WHITE. We recognize that, but one thing that concerns us about the geographical area, if you have a disturbance or if you have a fixed price, let's say, in a city in North Carolina and the price level is higher in North Carolina than it is just over the line in South Carolina, where do you stop? It could go on from one area to another and if you had to extend it from North Carolina to the edge of the South Carolina line, then you would have to extend it right on down to the next level of distribution.

That has concerned us quite a bit. I know one company set up a zoning price policy of which they establish certain geographicel areas and they established differentials of, you might say, 3 cents in one area and 2 cents in the other one, but then it began snowballing and it had to be extended on out.

Mr. CURTIN. Thank you.

Mr. DINGELL. Thank you very much. The committee is very much appreciative of your being here this morning and for your very fine statement.

The committee will recognize Mr. Rothwell.

Mr. WHITE. Mr. Chairman, before I am excused, shall I present the copies of my testimony to you?

Mr. DINGELL. We have already received a copy of it, Mr. White. Your full statement will be inserted in the record.

Mr. WHITE. Thank you very much for the opportunity.

Mr. DINGELL. Thank you, sir.

(The statement referred to follows:)

STATEMENT OF JOHN H. WHITE ON BEHALF OF THE NATIONAL OIL JOBBERS COUNCIL, INC.

My name is John H. White. I am an independent oil jobber now operating my business under the name of Port Oil Co., at Charleston, S.C. I am appearing here today on behalf of the National Oil Jobbers Council.

The National Oil Jobbers Council is a trade association group composed of 34 State and regional associations of independent jobbers and distributors of petroleum products. These associations, covering 41 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, Inc.
California Petroleum Marketers Council (Jobber Division).
Colorado Petroleum Association.
Connecticut Petroleum Association.
Empire State Petroleum & Fuel Merchants Association, Inc.
Florida Petroleum Marketers Association, Inc.
Fuel Merchants Association of New Jersey (Jobbers Division).
Georgia Oil Jobbers Association.
Illinois Petroleum Marketers Association.
Independent Oil Marketers Association of Indiana, Inc.
Intermountain Oil Marketers Association (Idaho, Nevada, and Utah).
Iowa Independent Oil Jobbers Association, Inc.
Kentucky Petroleum Marketers Association (Jobber Division).
Louisiana Oil Marketers Association (Jobber Division).
Michigan Petroleum Association.
Mississippi Oil Jobbers Association.
Missouri Oil Jobbers Association.
Nebraska Petroleum Marketers Association, Inc.
Independent Oil Men's Association of New England (Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont).
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, Inc.
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 Association.
Wisconsin Petroleum Association.
Wyoming Oil Jobbers Association.

At the outset I would like to state that in the preparation of this presentation I have leaned heavily on the statement presented to this subcommittee last year, by our general counsel, on a bill similar to that now before the subcommittee for consideration.

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 transportation facilities and engages in the sale of petroleum products, primarily in bulk quantities, for delivery into bulk storage tanks. Most jobbers also sell tires, batteries and accessories, lubricating oils and greases, as well as antifreeze and other related items. In brief, the jobber sales, from one standpoint, are made in bulk quantities without wrappers or containers, while other commodities sold are in containers or wrappers, or are items which are not sold in bulk but are otherwise individually identified by trademark or by the nature of the product itself. Many jobbers own service stations which they lease to independent dealers and in turn sell products to these dealers both in bulk quantities and otherwise. The jobbers' 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 upon the definition of these terms. The independent jobber owns his own business properties and even though the majority of them sell the branded petroleum products of a major oil company, or the branded products of a supplier of tires, batteries, accessories, et cetera, 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 bulk 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 farms, 85 percent of home heating oils, and more than 50 percent of the residual or commercial-type fuel oils. In addition, jobbers sell to what is known in the trade as commercial consumer accounts. This type of account is, for example, a trucking company or business enterprise operating a fleet of trucks or automobiles and who purchases in bulk quantities for the fueling of such vehicles from their own tanks. This phase—the commercial consumer account—of the jobbers' business has been greatly diminished, due principally to the predatory pricing practices of many of the major oil companies. From this we can see that the jobber deals not only in the sale of petroleum products in bulk but also in the sale of tires, batteries, accessories, and other related items both to service stations, which sales would be at wholesale as well as sales to homeowners, farmers and commercial accounts, the latter group being sales at retail, since they are made to the ultimate consumer.

The marketing of petroleum products and these related items differs greatly from the marketing of most other products sold in this country in that the refiners or manufacturers of petroleum products engage in the wholesale distribution of well over 50 percent of the gasoline sold throughout the country and, to a large degree, also engage in the distribution of the related items used by vehicle owners. Most of these refiners are branded suppliers and all of them engage in some degree in retail distribution. Some of these branded suppliers utilize independent jobbers and commission distributors 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 generally 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 branded dealer (service station operator) may oftentimes be competing with an unbranded jobber or dealer who received its products out of the same tank and from the same supplier. The same situation exists as to tires, batteries, and other accessories.

I do not believe that anyone could successfully contend that any predatory pricing in the petroleum industry is attributable to branded wholesalers or by branded retailers to any significant degree. Predatory pricing in the petroleum industry has thus far been engaged in principally by some—I repeat, some—private brand marketers and 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 a jobber may not own or supply any service stations, he nevertheless,

for example, sells gasoline, diesel oil, motor oils, greases, and other accessories to farmers and in a limited degree 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 what I have said thus far that jobbers, from a competitive standpoint, must compete with other jobbers with major, intermediate, and small size integrated 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 contract agreement under the terms of which the branded supplier allocates to them a given geographical area for the handling of this brand. Unfortunately, some of these suppliers also sell to unbranded outlets in the same territory products of equal or substantially equal grade and quality at prices and under conditions that create difficult competitive situations for their own branded customers.

It should also be noted that the use of so-called private branded service sttaions has grown considerably in the past 20 years. As a result, branded suppliers, even though they may continue to supply unbranded or private brand outlets, nevertheless are engaged in a death-to-the-finish struggle to recoup the business taken by these private brand stations from branded stations, and as a result many areas in the United States have been plagued with price wars for almost 2 years, which price wars, if not stopped, are driving many jobbers and retail dealers toward bankruptcy.

I go into these explanations in detail for the purpose of laying the groundwork or background reasoning for your position in regard to H.R. 3669. This bill, to us, is nothing more than a fair trade bill, the likes of which we have vigorously opposed for years. We 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 price parallelism by these companies which would produce the same result. As a matter of fact, we do not think price maintenance for branded products as sold by petroleum jobbers and dealers would work in the petroleum industry even with collusion or parallelism of prices, due to the strong position of private brand marketers and discount houses, drugstores and department stores, many of which are now engaged in the sale of packaged items normally sold by oil jobbers or service stations. The strength of the private brand marketer, as well as the impact which the other category of resellers exerts on the marketing of such products, varies from one section of the country to another. As a matter of fact, fair trading of gasoline has been tried and ultimately 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 based on the following beliefs and conclusions:

First, oil jobbers are independent businessmen and view with suspicion 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 and his dealer customer of the ability to quickly respond to the competition in his market;

Second, the record of attempting to apply fair trade laws in the petroleum industry has served more to produce losses for jobbers and dealers as well as the promotion of litigation than it has served "to promote quality and price stabilization" or "to define and restrain certain unfair methods of distribution." This is particularly true where the supplier of a well-accepted product normally sold by branded jobbers and dealers, also sells for resale a product of equal or substantially equal grade or quality to discounting resellers;

Third, the bill is drafted in such a manner and with such wordage that when we attempt to relate this wordage to marketing within the petroleum industry, it leaves many questions unanswered and, in our judgment, creates confusion to such an extent that this wordage could only be clarified by extensive litigation which the independent jobber is financially unable to stand;

Fourth, the provisions of the bill 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 levels of distribution while at the same time competing with that jobber or dealer. Since the large integrated companies

have tax advantages on their crude oil production, these monetary advantages can be used to the competitive disadvantage of the jobber or dealer who must compete directly with the integrated company;

Fifth, this legislation, if uniformly applied by the 32 leading branded oil companies in the United States, could do one of two things: (1) It could either set prices at levels which would drive independent private brand marketers out of business, or (2) it could set the price of petroleum products, and the related products sold, 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 who support it, is to save the small businessman—certainly, this will not be achieved in the petroleum industry, but, rather, the reverse will be the result; and

Sixth, some of the supporters of the bill 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 usually handles only 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 most of his facilities were built and designed for branded operation as distinguished from the lower cost, unbranded type operation.

A very important change has been made in the bill now before this subcommittee, as contrasted to the original bill or resolution before the subcommittee last year. I refer to paragraph (16), subparagraph (A) which in substance states that the sale of bulk commodities when sold without wrappers or containers, would be exempted from the other provisions of the bill. It is our interpretation that this language means that sales of petroleum products such as gasoline, kerosene, diesel fuel, heating oils, lubricating oils, greases, et cetera, when sold in bulk either by delivery into the tank of an automobile or the bulk storage facilities of a reseller or consumer, are exempt. If this interpretation is correct, we jobbers offer a loud "Thank you" to the Congressman or Congressmen responsible for this change. If this interpretation is wrong, I would be most grateful if a member of the subcommittee would so advise me at this time so that the record would reflect the accuracy or inaccuracy of our interpretation. If our interpretation is correct, then some of the statements I have made up to this point, as well as some of the observations I will make from this point forward, will not be applicable to this type of sale but would only be applicable to the petroleum products and other commodities which are sold in wrappers or containers or clearly bear a trademark in such a manner that they are subject to the provisions of this bill. Further, if our interpretation of the exempting language is correct, then my comments with reference to bulk sales of petroleum products can be construed as having been made in support of this exempting language and otherwise can be construed as applying to the other packaged petroleum products or related items normally sold by jobbers.

I would like to ask some pertinent questions which this legislation does not answer for me but which we feel should be answered in the language of the bill itself or at least in the report of this subcommittee so as to indicate the intended meaning of the language by the Congress.

1. Let us assume that Esso imposed a retail price on its branded regular gasoline of 31.9 cents per gallon. Would it be a violation under this bill for the retail dealer or jobber selling at retail to sell gasoine 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 or jobber be prohibited from giving a normal discount for payment in cash as distinguished from the charge made for a credit sale?

2. If, for example, Esso imposed a resale retail price on its regular grade of gasoline of 31.9 cents per gallon and a resale retail price of 60 cents per quart on its branded, packaged, all-weather motor oil, would this mean that Esso jobber customers must charge this price to their farmer or commercial consumer customers who purchase this regular grade gasoline and this type of motor oil in bulk or volume quantities? Certainly, this is a retail sale, since it is made to the ultimate consumer and not for resale. 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 cents to 6 cents per gallon over the current price and the average price charged for such lubricating oil would be several cents per quart over the amount now charged to a farmer who buys such oil in case lots.

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 act if Esso sold direct, in bulk quantities, to a truckline or other commercial consumer account at a lesser price? Obviously, this type transaction is also a retail sale. If the answer to this question is "Yes," this will increase the price of gasoline to this category of consumer—the commercial consumer—from 2½ cents to 5 cents per gallon.

4. Could Esso, for example, establish a fixed resale price for its service station customers on either petroleum products sold without wrapper or container, or petroleum products sold in wrappers or containers but at the same time be within the law in stating that such retailer resale prices did not apply on sales made by Esso or by Esso jobber customers to farmers and commercial consumer accounts?

5. In paragraph (14), subparagraph (D), the owner of a brand, name, or trademark is apparently given the right to establish resale prices at each level of distribution within each marketing area and "determined by the owner of the brand, name, or trademark." This language poses several questions for the petroleum industry. For example, what are the levels of distribution contemplated by the language; are sales to the ultimate consumer by the brand owner to be construed as a different level of distribution than such sales by the brand owner or his jobbers or commission distributors to a service station operator; does this language give to the brand owner the right to arbitrarily establish a marketing area which imposes one resale price while imposing a higher resale price or lower resale price in an adjacent marketing area, arbitrarily determined by the brand owner; since the Federal Trade Commission has been unsuccessfully seeking, for years, to get accurate and reliable guidelines from the courts on the geographical limits of a competitive marketing area, does this language now mean that the right to arbitrarily establish such marketing areas is vested in brand owners who seek to impose resale prices under the authority of this bill? If the answers to these questions are "Yes," then a scrambled mess will result and, further, the price discrimination features of the Robinson-Patman Act can be rendered useless by the arbitrary determination of marketing areas, and resale prices therein, by the owner of a brand, name, or trademark.

6. Under paragraph (16), subparagraph (E) the language provides that sales to or by Federal, State, or municipal governments or their political subdivisions or agencies are exempt from the provisions of the bill. From this I assume that no fair trade or fixed resale price could be imposed on such sales. Post exchange service stations, selling branded products, have for many years now been seriously affecting jobbers and dealers. Why should a facility of the Federal Government engaging in a commercial activity in competition with taxpaying merchants, be exempt from the provisions of this law? Independent merchants have enough trouble now in paying taxes to and filling out forms for Government agencies, without having to be subjected to competing with the Government in a commercial arena where the Government is permitted to wear brass knuckles while the merchant is required to wear 18-ounce boxing gloves filled with foam rubber. We would recommend that this language be amended so that the exemption would only apply on sales to the Government on commodities which were not purchased with the intention of the purchaser to resell same in competition with commercial enterprises. Obviously, resale by the Government of used or obsolete equipment, commonly referred to as "surplus property," should be exempt.

7. Let's assume that I purchase a Ford truck subject to a resale price dictated by the Ford Motor Co. and after using this truck in my business for 5 years, I attempt to either resell it or trade it in on another truck. Can the Ford Motor Co., after following the requirements of the bill with reference to written notice, et cetera, impose on me a resale price or trade-in value of this vehicle. If the answer to this question is "Yes," then we most seriously object to vesting such a right in any owner of a brand, name, or trademark, and further feel that such right would impose absurd conditions in the marketplace. If it is not the intention of Congress to convey this right, then we think the right of imposing resale prices, or a range of resale prices, should be limited to the first original sale to the user or consumer.

8. It often happens in the petroleum industry that a jobber has developed such a good business in his allotted geographical area that the supplier would like to take over this business and sell directly to the jobbers' customers but the supplier cannot do so because of the tenure of the jobber's contract. Would it not be possible for such a supplier to force the jobber out of business by imposing fixed resale prices on him which would require the jobber to sell at a loss? Certainly, such a potential should not be permissible with legal sanction.

These are but a few of the questions which this bill poses or does not completely answer. There will undoubtedly be hundreds of other questions which will arise and can only be resolved by costly litigation. There are no jobbers or retailers of my acquaintance who are able to afford this in the face of the vast resources of the large oil companies. The branded jobber or retailer of petroleum products is for all practical purposes a "one-brand reseller." What rights, of consequence, does such a jobber or reseller have under this bill? We do not deny that a brand owner is justified in insuring that 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 resale customer from acts which actually devalue the brand in the eyes of the consuming public. We are unaware, however, of any significant number of instances where branded resellers of petroleum products have been guilty of such acts.

The language in 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 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 farmers' business because his sales were limited by a fixed price, imposed with legal sanction by his supplier. In brief, this legislation 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 would 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 most of the major oil company representatives for equitable implementation of the provisions of this bill, then I can assure you that your beliefs are founded on an unsound basis.

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 brand owners themselves. I sincerely doubt if 1 single representative of the Nation's 32 leading, branded oil companies will appear before this subcommittee in person and ask for the passage of this bill. I doubt that any who appear or who may approach this subcommittee or other Congressmen privately are motivated by a concern over quality stabilization, but, to the contrary, are motivated by their own desires to have vested in them the right to fix prices. It is rumored that some independent refiners and private brand resellers are quietly urging passage of this bill. If such is true, it is my opinion that their real purpose is this: they hope that if the bill is passed,

the branded oil companies will 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 the purpose of stabilizing quality or restraining unfair methods of distribution. We certainly hope that no member of this subcommittee will believe or think 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 speak for. Admittedly, small merchants throughout the United States are facing difficult times in trying to meet the competition of discount houses, chain stores, and similar types of merchandisers.

We, too, face that difficulty but we do not believe that this legislation is 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.

In conclusion, I reiterate that if our interpretation about the exemption of our bulk sales not in wrappers or containers is correct, we feel this is a significant change which has been made by the subcommittee. Further, if such is correct, then the greater portion of my remarks in this statement are directed (1) in support of this exemption, and (2) in opposition to the bill as it relates to our other sales of nonexempt petroleum products or other commodities. I appreciate your consideration of our viewpoints.

Mr. DINGELL. The Chair will recognize Mr. Thomas Rothwell.

Mr. JOHN LEWIS. Mr. Rothwell had to return to New York, but he will be down tonight.

Mr. DINGELL. The Chair will recognize Mr. Maurice Mermey of the Bureau for the Advancement of Independent Retailing, 640 Fifth Avenue, New York.

The committee is happy to welcome you back again.

STATEMENT OF MAURICE MERMEY, DIRECTOR, BUREAU FOR THE ADVANCEMENT OF INDEPENDENT RETAILING

Mr. MERMEY. I am going to summarize my statement. I will try to answer any questions you may ask.

My name is Maurice Mermey. I appear here as director of the Bureau for the Advancement of Independent Retailing, a nonprofit corporation organized under the auspices of the National Association of Retail Druggists and supported by voluntary contributions from all segments of the drug industry of the United States—retailers, wholesalers, and manufacturers.

I wish to register the unequivocal support of the bureau in behalf of H.R. 3669—the quality stabilization bill introduced by the distinguished chairman of the Committee on Interstate and Foreign Commerce, Representative Oren Harris—and of the substantially identical bills introduced on a completely nonpartisan basis by many other Members of Congress.

I should like to express the opinion, and I think it is a sound opinion, that the overwhelming majority of the 2 million retailers in the United States, and particularly all of the smaller ones, together with large numbers of manufacturers and wholesalers, endorse and support the principles and objectives of the Harris bill which are set forth in the bill 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 brands, names, or trademarks, and for other purposes.

Enactment of H.R. 3669 would result in the implementation of what is surely national public policy, mainly to help small business—the independent business proprietor who constitutes numerically the biggest segment of the 4.7 million business units in the country. This policy is reflected in the activities and programs of the Senate Select Committee on Small Business, the House Select Committee on Small Business, the Small Business Administration, and I am sure of every Member of the Congress.

Now it has been said that research is a wonderful thing but that one need not employ a whole corps of research chemists to learn that there is salt in the ocean. In the same vein, I don't think it is necessary to undertake a vast research program to discover that the independent business proprietor and more particularly the independent retail store owner needs help if he is to survive and to prosper.

There are increasing reports of the death of the independent retailer. A good friend of mine, E. B. Weiss by name, said, in a talk before the Minneapolis Advertising Club on January 24 of this year:

> Yes, the independent retailer is doomed—as an independent, that is. Within no more than 10 years, 75 to 90 percent of total retail drug volume will be divided between corporate and independent drug chains; 75 to 90 percent of total retail hardware volume will be divided between corporate and independent hardware chains. Ditto for the furniture outlets, the appliance outlets, and other major forms of general merchandise retailers.
>
> In brief, the world of marketing faces a distribution future in which most manufacturers of presold brands, in most mass-consumed merchandise categories, will find that 75 to 90 percent of their total volume is moving through: (1) corporate chains, and (2) independent chains.

I don't mean to associate myself with that point of view. I don't happen to agree with it. I think there may be some independent chains, but I think the independent is apt to die before he can produce a great many chains, absent the kind of assistance that independent retailers are looking to this committee for.

H.R. 3669 would give consumers the very kind of price protection that they have insisted on for more than three-quarters of a century, and I say this in the knowledge that statements have been made from time to time that the enactment of the quality stabilization bill would cause the consumers to pay X billion dollars per year more for the things they would buy than they would pay, absent such a law.

It is often said, and accurately, that everybody loves a bargain. But is there a consumer who does not resent paying more for a particular article than her neighbor paid for precisely the same item? Every consumer, including your wives, wants to be protected against paying more than somebody else for the same thing.

I suggest that under this bill, in the case of those items that are submitted to quality stabilization by their manufacturers, by the owners of the brands, those consumers will be protected against being outshopped, outbargained by their neighbors.

The demand for this type of price protection goes back to the middle of the 19th century, when the retail store in the United States was little more than a polished version of the oriental bazaar. The customer would haggle with the clerk over the price of an article, and she was very happy indeed when she discovered that her bargaining skill

was so great that she paid less for an item than her next-door neighbor paid. But when she paid more, that is when she called the clerk or the proprietor a cheat, profiteer, or whatever other condemnatory word that would come to her mind and lips. That is also when she began to demand that the store operate on a one-price-to-every-customer policy.

Today, no reputable store would ask Mrs. Smith to pay a higher price than Mrs. Jones for a particular brand of aspirin tablets or a particular brand of washing machines. Nor would one outlet of a chain ask Mrs. Smith in, say, Washington, D.C., Northwest, to pay a higher price for a given article than another outlet of the same chain, located in another part of Washington, D.C., would ask Mrs. Jones to pay for the same article at the same time.

Stores which charge different prices to different customers for the same branded article at the same time do not enjoy reputations for fair dealing. Shoppers stay away from such stores because they resent being price discriminated against.

Now then, this one-price-to-every-customer policy, is, to my mind, a good way to characterize what would happen under the quality stabilization bill. This one-price-to-every-customer policy is far from unique in this country. You will find it in house-to-house selling. There are manufacturers who sell through canvassers, sell about $2 billion worth of goods per year. No canvasser is allowed to sell, as Mr. Keith, I believe, said with respect to insurance policies, no canvasser is allowed to sell a consumer at a lower price than the manufacturer ordered him to charge. There is absolute uniformity of price in house-to-house selling.

You have the same in consignment selling where, technically, the manufacturer retains title not alone to the brand which is his, but also to the tangible goods until such time as the retailer pays for those tangible goods.

Then there is forward integration. Goodrich owns outlets of its own, and I suggest that Sears, Roebuck could very well be considered a case of forward integration since Sears is a retailer with manufacturing facilities or a manufacturer with retailing facilities. Sears does $4.2 billion worth of business a year and 95 percent of that $4.2 billion is done in Sears' own brands. There is no price cutting on Sears brands because through all of Sears' outlets the price on a particular branded product is exactly the same—absolute uniformity—in any given marketing area.

Further, $20 billion worth of business in this country is done each year on private brands, which are brands owned or controlled by retailers, usually giant retailers. There is no price cutting of any private brand by the brand owner because he also owns or controls the means of distribution. In the bill that we are talking about here—the Harris bill—we are dealing with manufacturers who do not own or control the means of distribution of the products identified by their brands. The means of distribution consist of retailers—large and small—including the independent proprietors.

Now, H.R. 3669 offers the American consumer a one-price-to-every-customer policy with respect to national brands. For H.R. 3669 permits a manufacturer to apply this policy to his branded property.

But he can avail himself of this provision only, as the bill says, "if 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 are in free and open competition therewith."

Mr. DINGELL. I notice you have been reading. I wonder if you have copies for members of the committee.

Mr. MERMEY. I have given copies to Mr. Williamson. I assume they were distributed. I gave copies the other day.

Mr. DINGELL. Very well. We will get them.

Mr. MERMEY. In other words, the branded product of the manufacturer availing himself of the provisions of H.R. 3669—which he need not avail himself of if he does not choose to do so—are competing every minute of every day with (1) every brand identifying similar goods which are also using the provisions of the quality stabilization bill; (2) every brand identifying similar goods which are not being sold under the terms of the quality stabilization bill; (3) similar goods not identified by brand; and (4) all goods and services competing in the entire American economy for the consumer dollar.

Now then, it is argued by opponents of the Harris bill that H.R. 3669 would destroy free competition. I don't believe that is so by any definition of free competition that I understand. A whole host of statutes testify that competition in the United States does not mean "free" in the sense of unbridled.

Planned operations in the red to destroy competitors is a classic violation of the antitrust laws. Impairment of competition through certain types of merger are likewise banned by law. The Federal Trade Commission Act addresses itself to unfair competition. The Robinson-Patman Act makes unlawful discrimination by manufacturers in their selling prices to distributors.

H.R. 3669 not only gives the American consumer the price protection afforded by the one-price-to-every-customer policy, it gives her, too, relief from deceptive price advertising and merchandising practices. I refer here to price juggling, loss leadering, and consumer bait techniques used by certain retailers.

The fool-the-public process is set forth in the news article in Home Furnishings Daily, dated April 11, 1963, by Alvin M. Winters. I am not going to read this, but I am merely going to say that this article points out that national brands, according to discounters, have a serious drawback. A recognizable brand can easily be "knocked off"—met or beaten in price—by competition. And with the lust for traffic often resulting in lower prices, discounters sometimes find their profits are pinched in their prime asset, the national brand. This, by the way, is what is happening to the small independent retailer.

For this reason private brands are gaining in importance. Another reason for the inroads of private labels is that they stir repeat business through identification and so on.

But national brands, even the stanchest supporters of private brands agree, are essential in the first few years of a discount store's operation to create images of reliability, quality, and price. In other words, selective price cutting of national brands, the most popular items in the marketplace, would continue to go on, and it is one of the purposes of this bill to prevent that.

Would H.R. 3669 add to the consumers' cost of shopping? We have appeared here many times before and presented price surveys one after the other that have demonstrated conclusively in our judgment that there is no increase in the price to the consumer, that the overall bill that the consumer pays in the non-fair-trade States of the country is no different than in the fair trade States of the country.

Whatever variations there are in margins in different types of stores in various sections of the country do not reflect the absence or presence of fair trade. In other words, the selective shopping surveys that have been done have consisted of going into certain stores to buy certain items at certain times at then bargain prices for those items. By then taking the figures and projecting them to a total national volume, the surveyors have come up with ideas that fair trade has cost the American people as much as $12 billion a year. We know this is impossible because fair trade merchandise at its peak didn't account for more than $20 billion of the Nation's sales and the total net profit from these sales was vastly less than $2 billion.

It is a fair statement that the overwhelming majority of independent retailers are firmly and fully convinced that enactment of the Harris quality stabilization bill would promote the advancement of independent retailing by providing the opportunity to compete on the basis of skills, devotion, and energy rather than, as at present, almost exclusively on the basis of dollar power.

The independents, by and large, do not have the kind of reputation that permits them to establish their own private brands—as the giant retailers can and do. Consequently, they must rely for their bread and butter on their ability to sell the presold national brands—the very brands that the price jugglers are price cutting in order to get a reputation for being the consumer's best friend.

The enactment of H.R. 3669 would give the independents new hope and renewed courage.

You have deep interest in the welfare of the producer; you have deep interest in the welfare of small business. We happen to live in an age where there is wide concern over bigness. Certainly part of that concern arises from the fact that large numbers of independent proprietors in America are not earning a living wage. There are may reasons for this state of affairs. I would not suggest that the quality stabilization bill would solve all their problems, but Congress has it in its power to eliminate one of these reasons, the most cogent one, the independents believe. It can curb the unfair competitive practices to which H.R. 3669 addresses itself by enacting the Harris-Humphrey bill.

I hope the subcommittee will take the first step toward what the independent proprietors of this country hope will be passage by the 88th Congress of the Quality Stabilization Act.

Mr. DINGELL. Mr. Long.

Mr. LONG. Mr. Mermey, on page 5 of your prepared statement you make the point that no reputable store would ask a person in, say, Northwest Washington to pay a higher price for a given article than another outlet located in another part of Washington, D.C., would ask the same lady to pay for the same article at the same time.

Mr. MERMEY. That is right.

Mr. LONG. To carry that situation further in separated points from points in Washington, D.C., to an illustration we were using here yesterday, from Washington, D.C., to Richmond, Va., would this bill allow that same reputable chain to charge this same lady a different price?

Mr. MERMEY. Let's forget the bill for a moment. As I understand it today, without reference to the bill, chains in various marketing areas of the country, as they define them, will on occasion find it necessary to charge a different price for the same article but I am sure that no chain in its right mind and no manufacturer in his right mind would create a price variation in the same marketing area. Whether Richmond, Va., is in this marketing area, I could not say, but if you want me to answer your question, I will say to you, sir, that on the basis of the principle that nothing is eternally impossible, certainly it is possible for a manufacturer with or without this bill to do that. By "with or without this bill" I mean the manufacturers who today own or control their systems of distribution can do that without reference to anything, and under this bill he would likewise be permitted to do that. Whether he would do that is quite another question.

Mr. LONG. Yes; but under the bill he would have more of a legal basis then he does now, merely on the basis of competition.

Mr. MERMEY. He has a complete legal basis right now, assuming that he owns or controls the means of distribution. This bill is offering manufacturers not a single thing that he can't do now if he will only own or control that means of distribution. There is not a single thing in this bill that gives the manufacturer a greater right in pricing than Sears already has on its own private brands.

Mr. LONG. I don't argue that, but you are imposing another condition in this with respect to ownership of outlets.

Mr. MERMEY. That is right.

Mr. LONG. This is one I am not including in my question. If you care to change my question around——

Mr. MERMEY. I am sorry. I have tried to answer your question, but I am also trying to say to you that the Congress is not being asked to enact anything that is unique or alien to the marketplace.

Mr. LONG. That is all, Mr. Chairman.

Mr. DINGELL. Mr. Curtin.

Mr. CURTIN. No questions.

Mr. DINGELL. Mr. Van Deerlin.

Mr. VAN DEERLIN. The statement that you had in regard to surveys on the effect of this legislation, of this type of legislation on retail prices, is somewhat at variance with previous testimony from Lee Loevinger, from the Attorney General's Office. He said here on Tuesday that the Department of Justice has found by economic surveys that consumers in States with so-called fair trade laws pay from 19 to 27 percent higher prices than in States without such laws.

Do you have reference to these Government surveys?

Mr. MERMEY. Yes, I am familiar with the study. I am saying to you, sir, that that consists in selecting certain items that are advertised or sold at certain prices in certain stores at certain times. This is selective shopping. This may have been done, I don't know the techniques that were used. I am sure that the techniques used by

the Department of Justice were perfectly proper techniques, but you cannot assume a declaration of cost or lack of cost to the American people as a whole on the basis of that type of one-shop buying. On that basis I can come here and show you that the discount houses of America have overpriced the American people by billions of dollars. I myself have made surveys of discount houses for not their best bargains but their worst bargains and I have bought items that represented a 300 percent markup on the delivered cost to the discount house. One cannot develop a sound conclusion on that basis.

Mr. VAN DEERLIN. Do you think there might be more reliable statistics available from the Bureau of Labor Statistics?

Mr. MERMEY. No, sir, I don't think so. I don't believe the subject has been studied that way. I have indicated that we have ourselves in times past introduced to this distinguished committee and to the comparable committee in the Senate, the Senate Commerce Committee, a mass of statistics.

We have done many surveys. We have had A. C. Nielsen & Co., the largest independent marketing agency in the country.

Mr. DINGELL. If the gentleman will yield, I recall Nielsen is in some slight difficulty.

Mr. MERMEY. I am glad you mentioned that, Mr. Chairman. What I assume you were referring to is radio and TV ratings.

Mr. DINGELL. What you are telling us then is when they perform surveys for you they are indisputably correct, but when they perform surveys for radio and TV they might err.

Mr. MERMEY. This concept I hope I am not projecting. What I am trying to say to you is that Nielsen for many years has had what they call the Nielsen Index. That is a straight marketing survey covering 50 classifications of drug and food products. This survey is paid for by the clients that get it. A. C. Nielsen has a great number of researchers in the field who cover a presumably accurate sample of drugstores and foodstores. Every 2 months the Nielsen survey on analgesics for example is presented to the various clients, the manufacturers who buy that particular index.

Now there is a little difference between that index and the ratings to which the chairman refers; namely, that every single manufacturer has his own check on the reliability of that index because his own products are included in the study.

Let us take Anacin as an illustration if by chance the survey reports certain sales for Anacin in a 2-month period that are sharply at variance with what Anacin knows its sales to have been, I am sure that Nielsen would lose a client.

We had A. C. Nielsen on three different occasions take the figures that it developed for its own index and put those figures back into the IBM machine in order to draw information that they had not required in the index. We wanted to know the weighted average price of each of those famous brands of analgesics or whatever other categories we had.

We had analgesics, we had laxative, dentifrices, and I think shaving creams. I am not sure of the four, the first two I am.

They put their data back in the IBM machine to find the weighted average price of each item in a 6-month period, and covering the entire United States rather than a half dozen or a dozen stores.

Mr. DINGELL. The Chair would very much like to hear a discussion of A. C. Nielsen & Co., but another subcommittee has held rather extensive discussions about the Nielsen methods and I believe this subcommittee has to take notice that Nielsen's methods have been tried and found wanting. So if you will address yourself to something more pertinent, it would be appreciated by the Chair.

Mr. MERMEY. Mr. Chairman, you are familiar with all the studies we have presented and I would be glad to present this committee with a complete statement of all the studies we have done.

Mr. DINGELL. I think we would like to dedicate ourselves to a study of this and with a more responsible source of information than the Nielsen people. If you will please address yourself to that, I will very much appreciate it. We have a number of other people. I have tried to be courteous to you, but I am frankly not interested in the Nielsen people surveys. If you address yourself to other phases of this bill, it would be much appreciated.

Mr. MERMEY. Without reference to Nielsen, we have three or four studies that have taken the price of drug products over a long period of years and shown the increase of the prices of those products as against the increase of the Consumer Price Index, and so on.

Mr. DINGELL. Are these Nielsen surveys?

Mr. MERMEY. No, sir, not Nielsen, or the three I have told you about. I would be glad to get all that material together and sent it to the committee. It would be a pleasure.

Mr. VAN DEERLIN. I just wanted to ascertain that the subcommittee as yet has no reliable statistics in your opinion as to the effect of this type of legislation on retail prices.

Mr. MERMEY. Dun & Bradstreet some years ago made the statement that is a rather difficult thing to do. In the first place you don't know how much quality stabilization or fair trading there has been, the total volume; you can only guess at it at the very best, knowing that you still would have great problems. For example, it is virtually impossible to determine the effect of fair trade pricing on all other prices in a given store.

I don't mean to try to impeach anybody's figures; I merely say that so far the job has not been done.

Mr. VAN DEERLIN. Thank you, Mr. Mermey.

Mr. DINGELL. Last year you submitted to the committee a list of contributors to the Bureau of Education and Fair Trade which was the predecessor organization of your organization.

Mr. MERMEY. That is right.

Mr. DINGELL. The Chair would very much like to have for this hearing not just a list of contributors, which I assume you can give to us, but also the amounts that were given by these contributors to your organization.

Mr. MERMEY. They have varied from year to year.

Mr. DINGELL. Well, I would like to have that information.

Mr. MERMEY. We would be pleased to do so.

(The following material was subsequently received for the record:)

BUREAU FOR THE ADVANCEMENT OF INDEPENDENT RETAILING,
New York, N.Y., May 17, 1963.

Hon. HARLEY O. STAGGERS,
Chairman, Subcommittee on Commerce and Finance, Interstate and Foreign Commerce Committee, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN: At the request of your subcommittee, made during the course of my testimony in respect of H.R. 3669, the Harris quality stabilization bill, I am sending you herewith a statement of consumer price studies made by, or for, or compiled by the Bureau for the Advancement of Independent Retailing, formerly the Bureau of Education on Fair Trade.

I was also asked to furnish a list of contributors to the bureau. No such list is available for the fiscal year beginning July 1, 1962, for there has been no solicitation of contributions nor have any contributions been made to the bureau. In the previous fiscal year, July 1, 1961, to June 30, 1962, contributions were solicited from a limited group, who contributed a total of some $66,000. Those who contributed toward this total are: Abbott Laboratories; Bauer & Black, division of the Kendall Co.; Becton, Dickinson & Co.; Bristol-Myers Products Division; Burroughs Wellcome & Co., Inc.; Carter Products, Inc.; the Chattanooga Medicine Co.; Chesebrough-Pond's, Inc.; the Gillette Co.; Hoffman-LaRoche, Inc.; Johnson & Johnson; Lederle Laboratories; Eli Lilly & Co.; Mead Johnson & Co.; the Mentholatum Co.; Merck & Co., Inc.; the Murine Co., Inc.; Parke, Davis & Co.; Chas. Pfizer & Co., Inc.; Plough, Inc.; A. H. Robins Co., Inc.; Schering Corp.; G. D. Searle & Co.; Smith, Kline & French Laboratories; E. R. Squibb & Sons; Sterling Drug, Inc.; Vick Chemical Co.; Warner-Chilcott Laboratories.

I should add that the bureau made no solicitation of funds in the previous fiscal year, July 1, 1960, to June 30, 1961. In this period, contributions in the sum of $568 were received.

Sincerely,

MAURICE MERMEY, *Director.*

CONSUMER PRICE STUDIES, BUREAU FOR THE ADVANCEMENT OF INDEPENDENT RETAILING

What the American consumer in general pays for the brands she buys is determined by a complex of factors. The Harris bill, if enacted, would prevent some shoppers from buying certain brands in some stores at some times at less than the retail price established by the manufacturer under H.R. 3669. But there is no scientific basis for concluding that the American consumer in general, as distinguished from individual shoppers, will pay more for all the brands she buys because the products identified by some of them are sold at uniform prices established by the brand owner through resale or direct price maintenance.

In this connection, it is of course a fact that the American people are very much worried about inflation. The Bureau of Education on Fair Trade—now the Bureau for the Advancement of Independent Retailing—has made a study to determine the relationship, if any, between fair trade prices and inflation.

In this study, fair trade prices, as available, were examined primarily for a 10-year period, 1949–58. The behavior of these prices was compared with that of non-fair-trade prices of similar products and with total price behavior as reflected in the Consumer Price Index of the U.S. Bureau of Labor Statistics. The study also incorporates findings of previous studies, notably in the drug and hardware fields, which go back to 1931 and 1942, respectively.

For the purposes of this study, individual companies whose products were fair traded were approached at random and asked to furnish appropriate price data covering their own products. It is recognized that, in many cases, true price comparisons between 1949 and 1958 could not be made because of the changes which many products underwent during this 10-year period. It is noted, however, that in all cases where changes took place, the products available to consumers in 1958 were substantially improved over 1949.

The study also examined the Consumer Price Index of the U.S. Bureau of Labor Statistics for 20 individual cities over the period 1947–58 to determine whether any difference could be noted in the index pattern for cities in fair trade States from that for cities in non-fair-trade States.

The study of price behavior was confined to prices established under fair trade. No examination was made of retail prices established by brand owners under direct price maintenance.

DRUG PRICES

More information is available on the price history of drug products than of any other class of products.

The first known study of the effect of fair trade on prices was made in the drug field. Prof. H. J. Ostlund of the University of Minnesota's School of Business Administration, and C. R. Vicklund, of Minneapolis, undertook to determine the effect which the introduction of fair trade had on retail prices. They compared the 1939 fair trade prices of 50 leading drugstore products with the pre-fair-trade depression retail prices of these same products. Their study covered the entire country, State by State.

Ostlund and Vicklund found that the fair trade retail prices of these 50 products averaged, in 1939, 1 percent lower than the pre-fair-trade depression prices of these identical products.

Period 1939–47

A second study projected retail price behavior in the drug field from 1939 to April 1947. This study was made by the National Association of Chain Drug Stores and covered 7,334 drugstore products, some fair traded and others not. The study found that—

1. As to this entire group of products, an overall price increase of 15.4 percent was recorded. By comparison, the overall cost of living increased 59.3 percent during the same period, 1939–47.
2. As to those of the 7,334 products which were fair traded, their fair trade prices rose 3.1 percent over the period, compared with 15.4 percent for the entire group.

Period 1947–58

A number of studies have been made since 1947 to determine the effect, if any, of fair trade on the prices of drugstore products. In the absence of reliable data on retail price behavior, McKesson & Robbins, Inc., was asked to examine the movement of wholesale prices—fair trade and nonfair trade—of representative drugstore products. In the opinion of Herman C. Nolen, chairman of the company and a former professor of marketing at the Ohio State University, the movement of these wholesale prices reflects also the movement of retail prices of representative drugstore products.

The first McKesson studies covered the period January 1, 1947, to January 1, 1952. Its most recent study, in 1959, covered the period January 1, 1952, to January 1, 1959. Each of the studies covered the same 201 representative drugstore products—some fair traded, others not—except for such few substitutions as the passage of time required. The products were typical items which, in 1959, represented more than 25 percent, or approximately $106 million of McKesson's annual drug sales. Further, the four categories they cover—represented more than 80 percent of the items most frequently sold in drugstores.

Recapitulation of these results follows:

Increase in wholesale prices (Jan. 1, 1959 over Jan. 1, 1947)

[In percent]

	Fair trade	Nonfair trade	Total
Pharmaceuticals		40.2	40.2
Proprietaries	21.3	27.4	25.6
Toiletries	19.8	42.3	31.0
Sundries	38.6	62.6	56.6
Grand total	24.8	41.2	36.5

No entry is shown in the above table for "pharmaceuticals, fair trade." Over the period 1947–52, fair trade wholesale prices of pharmaceuticals increased 11.3 percent, while non-fair-trade wholesale prices of pharmaceuticals increased 27 percent. Since 1952, fair trading at the wholesale level was discontinued on all the pharmaceuticals covered in the earlier studies. The reason lies in a

decision of the U.S. Supreme Court which many pharmaceutical firms selling direct to retailers, as well as through wholesalers, interpreted as possibly applying to them.

The findings of the McKesson studies are that over the period January 1, 1947–59:

1. There was an increase of 24.8 percent in the wholesale prices of drugstore products fair traded at the wholesale level, compared with an increase of 41.2 percent in the wholesale prices of drugstore products not fair traded at the wholesale level.

2. In each of the four categories of products, the increase in fair trade wholesale prices was lower than that of non-fair-trade wholesale prices.

1949, 1951, and 1958—Nielsen data

This report includes data disclosing what consumers in general, as distinguished from some individual shoppers paid for famous name brand drugstore products which were (*a*) fair traded in the States having effective fair trade laws, and (*b*) sold at retail prices fixed by individual retailers in the other States. The data were supplied to the Bureau by A. C. Nielsen & Co.

To establish what consumers in general pay for specific brands, it is essential that a price study cover—

(*a*) A substantial period of time, rather than individual shoppings;

(*b*) A large number of stores, rather than a relatively few individual stores selected either at random or for reasons known to the surveyor;

(*c*) Not only specific prices paid, but also volume sold at each price, in order to establish weighted average prices.

The Nielsen data cover continuous 6-month periods, as follows: (1) July–December 1949; (2) March–August 1951, immediately prior to and during the famous, or infamous, price wars of that year; (3) January–July 1958. The 1949 and 1951 data cover all the drugstores in the United States through a national sample. The 1958 data cover all the drugstores and all the foodstores in the United States through a sample of 2,350 stores (750 drugstores, 1,600 foodstores). These stores include rural and urban, chain and independent, supermarket and small outlet.

The price information was gathered in the course of Nielsen's normal activities entirely unrelated to fair trade. As part of its regular service to clients, this market research agency collects a variety of market information, including price information, on the competitive status of items in some 50 product classifications. To obtain the data reported here, it was only necessary to reprocess the price information already recorded. For this purpose, the country was divided into two areas: (a) The fair trade States, as one area, and (b) the non-fair-trade States, as the other area. The retail prices reported are weighted average prices. They are the prices paid by consumers in general, as distinguished from what some individual shoppers paid for one or more of these popular, fast-selling brands when purchasing them in certain stores at certain times. In both 1949 and 1951, the overall weighted average price of famous brand products (included in the studies) was slightly lower in drugstores in the fair trade area of the United States than in the non-fair-trade area. The difference in favor of consumers in general, living in the fair trade area, was perhaps statistically insignificant. It was significant, however, that the weighted average prices in the non-fair-trade area were not lower than those in the fair trade area, notwithstanding the fact that retailers in the non-fair-trade area were not required to respect the minimum retail prices for these products applicable in the fair trade area.

Table I, appendix, lists the price data compiled by Nielsen for the period January–June 1958. The famous brands included in the study are identified by number. Examination of the table shows that—

1. Most differences in weighted average price in the 45 price comparisions are of the order of one-third of 1 percent to 1 percent—a statistically insignificant difference.

2. The weighted average price of 8 of the 15 brands was slightly lower in the fair trade area; and for 5 of the brands it was slightly lower in the non-fair-trade area. Consumers in general, in both areas, paid exactly the same weighted average price for two brands.

3. Of the 45 price comparisons shown, 22 favor consumers in general in the fair trade area, while 18 favor those in the non-fair-trade area. In five cases, the weighted average price is identical for both areas.

4. Eighteen of the thirty drugstore-foodstore price comparisons show drugstores charging slightly less than foodstores. Nine show foodstores charging slightly less than drugstores, while the weighted average price is the same in the remaining three price comparisons.

1947–58—Consumer Price Index

Additional light on the prices of drugstore products is shed by the Consumer Price Index of the Bureau of Labor Statistics, U.S. Department of Labor. The Consumer Price Index covers some 300 goods and services in a number of categories, including medical care. In the medical care category, the index covers such items as physicians' fees, hospital rates and prescriptions and drugs. Taking the 1947–49 average as equal to 100 percent, it is found that the price increases, in percentages, of individual items making up the medical care basket in the general Consumer Price Index are as follows:

[1947–49=100 percent]

	1947	1958	Percent increase
Consumer Price Index (all items)	95.5	123.5	29.32
Medical care (all items)	94.9	144.4	51.74
Hospital rates	87.4	198.0	125.51
Physicians' fees	96.8	137.0	42.56
Prescriptions and drugs	96.1	120.7	25.59

The item of prescriptions and drugs shows the best performance in the above table. Its rate of increase over the period 1947–58[1] has been slightly less than that of the Consumer Price Index as a whole (with an even lower rate of increase prior to 1947).

Thus, the only full studies of the prices of drugstore products—covering large numbers of items and long periods of time—show that—

(*a*) Prices in the medical care basket in the United States increased between 1947 and 1958 by 42.56 percent while the general price level increased by 29.32 percent.

(*b*) Prices of prescriptions and drugs in the United States increased, between 1947 and 1958, by 25.59 percent whereas medical care increased by 42.56 percent and the overall price level by 29.32 percent.

(*c*) Prescriptions and drugs increased less than any other item in the medical care category of the Consumer Price Index with the exception of surgeons' fees, which increased by 22 percent and optometric examinations, which increased by 14 percent between 1947 and 1958.

(*d*) The above evidence demonstrates that prescriptions and drugs increased less than the general price level of other items in the medical care basket.

Summary of findings

The Ostlund-Vicklund study showed that the advent of fair trade in the United States did not increase the retail prices of leading drugstore products. This fact takes on added significance because fair trade came into being in 1931, at the bottom of the depression, when overall prices were lower than at any time since.

The study by the National Association of Chain Drug Stores covered a period of sharply rising prices. In this period, 1939–47, fair traded drugstore products held the price line better than non-fair-traded drugstore products and very much better than prices generally.

The McKesson studies, covering the period 1947–58 inclusive, show that fair trade wholesale prices of drugstore products rose substantially less than nonfair trade wholesale prices of competing products.

The Nielsen data, encompassing 6-month periods in 1949, 1951, and 1958, demonstrate that the consumer in general—as distinguished from individual shoppers—whether she lives in the fair trade or non-fair-trade area of the country, pays about the same weighted average prices for typical famous name drugstore products. This is so notwithstanding the use of such brands as price bait

[1] See table II, appendix 6.

by retailers seeking, through development of a reputation for underselling, to destroy their small, independent competitors.

Finally, the Consumer Price Index of the U.S. Department of Labor for the years 1947 and 1958 shows that prices of prescriptions and drugs—a substantial percentage of which were fair traded—resisted inflationary pressures better than most items.

Conclusion

Insofar as drugstore products are concerned, fair trade has served the American consumer very well. Over the entire period of fair trade, few classes of products or of services have resisted inflation as well as drugstore products.

HARDWARE PRICES

The only continuing study of hardware prices known to the Bureau has been made by the Salt Lake Hardware Co., Salt Lake City, Utah. The study, which deals with wholesale prices exclusively, began in March 1942, when the company undertook to "determine as nearly as possible the effect increased prices have had upon our total volume of business." The company prepared a stock of staple items which are carried in the average hardware store and which group of items is representative of volume-producing items in each of the principal departments of the company's business. This stock, or "dealer's order," consists of 420 typical hardware items divided into classifications indicated below:

	Items
Department A:	
Small tools	107
Contractor's supplies and agricultural implements	48
Steel and heavy hardware	16
Department H: Plumbing items (not including enamelware)	20
Department D: Electrical wiring supplies	25
Department E: Machinery items	7
Department G: Automotive accessories and supplies	10
Department P: Paints, oil and glass	18
Department B: Builder's hardware	39
Department C: Housewares	75
Department F:	
Cutlery (excluding pocket knives)	9
Guns, ammunition, and accessories	10
Athletic equipment	6
Bicycles and supplies	8
Fishing tackle	13
Total	420

Quantities of the individual items specified, on this typical dealer's order, are as nearly average as the company could accurately determine; and each quantity is in relation to its experienced sales volume. The same quantity of the various items was first priced (at wholesale) as of March 1942, which represents the period when prices were frozen by OPA. The company has from time to time thereafter figured the identical list of merchandise in order to establish the aggregate value of the same order as of the respective dates when the calculations were made.

The value of the "order"—i.e., the aggregate wholesale price of the 420 items—was thus established on 29 occasions, beginning March 1, 1942. The value on selected dates follows:

	Value of order	Percent increase over 1942	Percent increase over 1948
Mar. 1, 1942	$2,872.89		
Jan. 15, 1948	3,753.60	30.8	
Apr. 13, 1959	5,684.91		51.4

To test the price increase of various groups of merchandise according to departments, further price analyses were made, with value on selected dates shown below:

Classification	Value of order		Percent increase over 1948
	Jan. 15, 1948	Apr. 13, 1959	
Department A	$1,498.42	$2,537.41	69.3
Department H	169.88	218.44	29.0
Department D	221.23	275.37	24.4
Department E	239.10	360.72	50.6
Department G	250.86	384.34	53.6
Department P	93.31	122.30	31.2
Department B	233.92	368.79	57.9
Department C	540.14	716.60	32.6
Department F	506.74	700.94	38.3
Total	3,753.60	5,684.91	15.4

In 1959, the Bureau asked the Salt Lake Hardware Co. to isolate from its 420-item list those items, if any, which were fair traded, and to record the prices of each of the fair-traded items, by departments, as at January 15, 1948, and April 13, 1959.

It was found that the fair-traded items numbered 27, or 6.4 percent of all 420 items. On the basis of wholesale sales value, the fair-traded items represented 12.1 percent of the total at January 15, 1948, and 11.4 percent of the total at April 13, 1959. In other words, the list as a whole had risen in price slightly more than had the fair-trade portion of the list. Here are the results:

Fair-traded items only

Department	Number of items	Price at—		Percent increase, 1960 over 1948
		Jan. 15, 1948	Apr. 13, 1960	
C	14	$127.76	$172.91	35.4
F	9	264.18	388.08	47.0
G	4	72.30	89.55	19.1
Total	27	464.24	650.34	40.1

Comparison of Departments C, F, and G as shown in the table above with those shown in the table on the preceding page discloses that—

1. The prices of the fair traded items in two of the departments rose slightly more than did those of all items in these departments, while they rose substantially less than did all items in the third department (G).
2. The aggregate of prices of the fair traded items in the three departments rose 40.1 percent, compared with a rise of 38.7 percent for all items in the same three departments.
3. The aggregate of prices of the 27 fair traded hardware items were 40.1 percent higher in 1959 than in 1948, whereas the aggregate of prices of all 420 items covered by the Salt Lake study were 51.4 percent higher.

Conclusion

The only continuing and comprehensive history of price behavior of hardware products shows that almost 90 percent of such items are not fair traded at the wholesale level; yet they show a slightly higher percentage of price increase, 1959 over 1948, than the remaining items which have been fair traded at the wholesale level. There is nothing in this price history which suggests in even the remotest degree that fair trade has in any way been responsible for raising the level of wholesale hardware prices.

MISCELLANEOUS PRICES

In order to establish a history of price behavior for other products, the Bureau wrote to manufacturers, selected at random, who were believed to have fair traded one or more of their branded products. In many instances, e.g., cigars and watches, it was impossible to make valid comparisons because of the changes in the products and/or in the brand names identifying them. Even as to the items referred to below, the product in 1958 was often superior to that in 1948, and in no case inferior. Here are the reports which were received:

Men's underwear

Union Underwear Co., Inc., New York, N.Y., manufactures underwear for men and boys under the license bearing the Fruit of the Loom trademark. This product has been fair traded in all States were fair trade laws are effective. Here is the company's listing of the fair trade retail price of each garment in 1948 and in 1958:

Item	1948 price	1958 price
Men's knitted cotton athletic shirts	$0.49	$0.49
Men's knitted briefs	.59	.69
Men's woven shorts	.79	.69
Men's knitted cotton tee shirts	.79	.69
Men's union suits	1.89	1.59
Boys' knitted cotton athletic shirts	.39	.39
Boys' knitted briefs	.49	.49
Boys' woven shorts	.59	.59

"You will notice that the only increase appeared in the men's knitted briefs," the company writes. "These have been improved by reinforcing all bindings with nylon and by special cellophane packing and by adding greater weight. The price of the briefs was changed on October 2, 1950, to 69 cents each and has remained at that price. All other items you will notice, either remained the same or were lowered in price."

Pyrex ware

Corning Glass Works, Corning, N.Y., furnished a list of the Pyrex items which were sold in 1948 and which were still in the line in 1959, together with the fair trade retail prices of each item for each of these years. A composite of one each of these items shows an overall price increase of 23.8 percent for this period.

The list of prices is shown in the following table:

Pyrex item No.	Description	1948 price	1959 price
462	Custard cup	$0.05	$0.10
463	do	.075	.10
464	Pie dish	.10	.15
465	do	.15	.19
622	1-quart casserole	.79	.89
623	1½-quart casserole	.89	1.00
624	2-quart casserole	.98	1.19
626	3-quart casserole	1.19	1.79
682	1-quart casserole	.79	.89
683	1½-quart casserole	.89	1.00
684	2-quart casserole	.98	1.19
228	9-inch pie plate	.59	.79
229	10-inch pie plate	.69	.89
208	8-inch pie plate	.35	.35
209	9-inch pie plate	.39	.39
210	10-inch pie plate	.45	.49
231	6½-inch by 10½-inch utility dish	.69	.89
232	8½-inch by 12⅜ inch utility dish	.89	1.00
233	9-inch by 14-inch utility dish	.98	1.49
221	Round cake dish	.59	.79
222	Square cake dish	.69	.89
508	8-ounce measuring cup	.25	.29
516	16-ounce measuring cup	.50	.59
532	32-ounce measuring cup	.75	.89
58N	8-ounce nursing bottle	.20	.20
54N	4-ounce nursing bottle	.15	.20
	Total	15.045	18.63

Electric toasters

McGraw-Edison Co., Toastmaster Division, Elgin, Ill., provided price figures for one of its most popular two-slice toasters, model 1B14, as well as for model 1B16. In the case of the former, prices were shown not only for the years 1949 and 1958 but also for a number of other years. In the case of model 1B16 Powermatic toaster, this de luxe model was introduced in 1953, and prices are shown for the years 1953 through 1959.

"It is apparent," says the Toastmaster Division, "in looking at the pricing trend of the 1B14 toaster that, during the fair trade years of 1949 through 1957, this toaster was slightly increased in price and then reduced—with the result that it is evident the prices of this toaster did not increase while it was fair traded. However, when fair trade was removed in February 1958 the prices on this toaster moved forward—and I believe that this has been typical of the prices on many other competitive electric housewares products. The same pattern is noticeable in the pricing of the 1B16 Toastmaster Powermatic toaster."

Analysis of price changes of Toastmaster toasters

MODEL 1B14 TOASTMASTER 2-SLICE AUTOMATIC TOASTER

Year	Date price was in effect	Fair trade retail price	Fair trade wholesale price
1947	Aug. 1	$19.96	$13.13
1949	July 15	21.50	14.14
1950	Sept. 18	23.00	14.72
1955	Jan. 1	19.95	13.90
1956	Jan. 3	17.95	12.12
1957	July 8	18.95	12.79
1958	(1)	[1] 18.95	[1] 12.79
1959	Jan. 5	[1] 19.95	[1] 13.47
1959	July 13	[1] 21.00	[1] 14.23
MODEL 1B16 TOASTMASTER POWERMATIC TOASTER (2-SLICE)			
1953	Jan. 15	$27.50	$17.60
1956	June 28	27.50	17.32
1958	July 7	[1] 29.95	[1] 19.47
1959	July 13	[1] 29.95	[1] 20.22

[1] Both retail and wholesale prices after February 1958 were suggested prices, due to removal of fair trade.

Fountain pens

The Parker Pen Co., Janesville, Wis., provided the following on the retail-fair-trade prices of the models it sold in 1949 which were also selling in 1958, as follows:

	Retail-fair-trade price	
	1949	1958
"51" Presidential (gold cap and barrel):		
Pen	$175.00	$150.00
Pencil	100.00	75.00
Set	275.00	225.00
"51" Insignia (gold-filled cap and barrel):		
Pen	27.50	27.50
Pencil	15.00	12.50
Set	41.46	40.00
"51" Flighter		
Pen	19.75	19.75
Pencil	10.00	10.00
Set	29.75	29.75
"51" Custom (gold-filled cap):		
Pen	16.46	18.75
Pencil	9.00	10.00
Set	24.79	28.75
"51" Deluxe (Lustraloy cap)		
Pen	13.50	12.50
Pencil	6.75	7.50
Set	19.75	20.00
"21"		
Pen	5.00	5.00
Pencil	3.75	3.95
Set	8.75	8.95

NOTE.—Substantial product improvement has been made here in both pen and pencil.

Men's shirts

Phillips-Van Heusen Corp., New York, N.Y., furnished the following information for two of its staples for the years 1949 and 1958:

	1949		1958	
	Wholesale per dozen	Retail each	Wholesale per dozen	Retail each dozen
Century 100	$29.50	$3.95	$29.00	[1] $4.00
Century 400	36.09	4.95	34.80	5.00

[1] 3 for $11.85.

As can be seen, during this period, there has been essentially no change at retail other than the leveling off of our prices from $3.95 and $4.95 to $4.00 and $5.00. On the other hand, you will also note that, there has been a decrease in the wholesale price.

Housewares

General Electric Co., Housewares and Radio Receiver Division, Bridgeport, Conn., wrote as follows:

"The introduction of new products and the changes in existing models over such a span of time present difficulties in making valid comparisons between a sizable number of the many different products this division now manufactures and sells. However, I have attached a list of 12 illustrative products which were sold to our wholesale distributors in September 1949 and compared the less-than-carload lot unit selling prices to wholesalers for these products to the comparable prices in July 1958. Prices to wholesalers have been used because of our inability to ascertain the accurate retail prices for the two periods involved.

"In all instances the compared products reflect demonstrable improvements during the period involved. For example, the 1958 version of the highly popular steam-and-dry iron has improved steaming characteristics, lighter weight, more water capacity, and larger ironing surface. The 1958 standard toaster, too, is far superior to its predecessor in performance, appearance, and quality. The twin- and double-bed size automatic blankets have an entirely new and better electrical circuit, improved controls, and blanket fabric.

"These superior consumer values at lower or substantially the same prices were achieved in the face of rising material and labor costs. Unfortunately, we do not have for the compared years the per unit raw material and labor figures. We do know, however, our average labor rates on the toasters and irons have increased over 60 percent in the 9-year period.[2] Prices have been kept low because of new, improved materials, designs, manufacturing facilities and methods, lower distribution costs, better sales and promotional techniques and greatly increased volume. As Mr. MacCuaig repetitively testified at the hearings on fair trade legislation, we believe this price record shows that the fair trading of our products has never been synonymous with excessive margins or inflated retail prices."

[2] Unfortunately, similar figures are not available for material costs but obviously such costs have also risen substantially.

General Electric Co., housewares and radio receiver division

Product	September 1949 wholesale distributor		July 1958 wholesale distributor unit cost, less than carload
	Unit cost	Less than carload product	
129T81 toaster	$11.67	T32	$11.13
129F23 automatic iron	6.49	F34	5.85
129F30 steam iron	9.75	F60	9.95
AVC 815 vacuum cleaner	50.37	C6	35.57
PB12A1 double bed blanket, 1 control	24.42	A22	20.52
PB12A2 double bed blanket, dual control	29.86	A23	26.40
PB12A4 twin-bed blanket	21.71	A21	17.59
FM10S61 10-inch desk fan	8.42	S107	10.18
FM12S41 12-inch desk fan	15.73	S125	16.11
FM16V21 16-inch heavy-duty fan	27.56	V164	29.56
PS7A2 heating pad	4.05	P25	3.09
PS7A3 heating pad	4.59	P16	3.61

Carpet sweepers

Bissell Carpet Sweeper Co., Grand Rapids, Mich., sent the following listing of the retail prices of its carpet sweepers:

Retail prices, July 1, 1949:		Retail prices, July 1, 1959 (Comparable model):	
Kentwood	$9.95	Grand Rapids	$16.95
Flight	9.45	Capri	14.95
Vanity	8.45	Flight	10.95
Grand Rapids	6.95	Reliance	9.95
Silver Streak	6.45	Sterling	7.95
Reliance	4.95	Little Queen	3.95
Little Queen	2.45		

It is difficult to specifically compare the sweepers model by model because the entire line has been restyled so completely.

In this 10-year period the company's labor costs have increased 193 percent and its material costs have increased 37 percent.

OTHER PRICE DATA

Selective shopping surveys have been made on occasion which give a distorted view of price behavior under fair trade. Such surveys consist of one-time purchases of selected items in certain stores at certain times. By the selection of brand, store, and time, surveys such as these can prove what the surveyor intends to prove. They can prove that some individual shoppers can buy certain famous name brand products at substantially less than value—i.e., fair trade prices—if they shop at certain times in stores which use customer bait merchandising techniques. They can prove that the same individual shoppers, or other individual shoppers, can pay prices which reflect 200 and 300 percent markups over delivered cost, if they buy unfamiliar brands, or private brands, in the very same stores which offer famous brands as comeon bargains.

The customer bait bargains do seriously affect the ability of small, independent merchants to compete with their larger, more powerful rivals. But they do not provide a basis for assaying the effect of fair trade on the American consumer—i.e., consumers in general. As Dun & Bradstreet has pointed out, it is virtually impossible to establish the precise effect, if any, of fair trade laws on the consumer's pocketbook. Even if the volume of fair-traded goods were known, it would still be necessary to determine the effect of fair trade prices on all other prices—a chain reaction effect—in individual stores and in every retail establishment in the country. We know of no way in which this can be done.

There is no evidence that fair trade—its existence or absence—has in any way affected the total price mix—i.e., the average markup or margin—of any type of retail store. There is no scientific evidence that a diversified store—department store, supermarket, discount house, chainstore—located in a fair trade community charges less or more in its overall pricing than its opposite number in a non-fair-trade community.

There is included in this report the Consumer Price Index of the U.S. Bureau of Labor Statistics for 20 large cities. Some of these cities—Houston, Kansas City, St. Louis and Washington, D.C.—have never had fair trade. Other of these cities—Baltimore, Boston, Chicago, Los Angeles, Minneapolis, New York, Philadelphia, Pittsburgh, San Francisco and Scranton—have had fair trade continuously from 1947 through 1958. The remaining cities—Atlanta, Cincinnati, Cleveland, Detroit, Portland, Oreg., and Seattle—have had fair trade part of the time and, because of a court decision, have not had fair trade part of the time.

There is nothing in the pattern of the Consumer Price Index for each of these cities which suggests any influence on the index that reflects the existence or absence of fair trade. The figures in table III, appendix, show no evidence of such influence.

RETAIL GROSS MARGIN STUDY

Another study, originating in the United Kingdom, sheds further light on the effects of resale price maintenance on prices. This study, the only one of its kind of which I have knowledge was inspired by assertions of opponents of resale price maintenance—and of fair trade and, presumably, H.R. 3669—that gross margins under resale price maintenance are unnecessarily high and that abolition of resale price maintenance would, by substantially reducing gross margins, yield lower prices and savings of untold billions of dollars per year by consumers.

The authors of the study—Fair Trade-Resale Price Reexamined—are P. W. S. Andrews and Frank A. Friday, both of the United Kingdom. Mr. Andrews is general editor of the Journal of Industrial Economics, and official fellow of Nuffield College in the University of Oxford where he is also a university lecturer in economics. Mr. Friday, an economist, is a Fellow and was, for many years, a member of the United Kingdom Council and Chairman of the Education Committee of the Association of Incorporated Statisticians.

The study compares official statistics on retail gross margins in Canada—available in the biennial studies of the operating results of retail outlets published by the Dominion Bureau of Statistics—with comparable statistics for the United Kingdom, which are found in the censuses of distribution compiled by the board of trade. It should be noted that resale price maintenance was prohibited by law in Canada as of December 29, 1951. In the United Kingdom, resale price maintenance is lawful and was for the period covered by the study. For Canada, the retail gross margins of independent shops in 1956 are compared with 1950 and the margins for chain stores in 1957 with 1951. Alongside are shown the gross margins for similar kinds of shops in the United Kingdom for 1957 and 1950.

"There is no evidence in the following table of a general downward pressure on gross margins after resale price maintenance was prohibited in Canada," the authors observe. "In fact, margins have risen to a similar extent in Canada as in the United Kingdom. For all of these shops, the gross margin in Canada increased on the average by about 1.9 percent of the retail price, compared with 1.7 percent in the United Kingdom.

"It is clear," the authors conclude, "that the basic assumption of opponents of resale price maintenance that the practice raises gross margins is quite wrong. The general claim that abolition of resale price maintenance will benefit consumers by reducing the price level and will improve distribution by lowering margins is just a great illusion."

Retail gross margins compared

[In percent]

Kind of business	Canada			United Kingdom		
	1950 or 1951	1956 or 1957	Change on 1950 or 1951	1950	1957	Change on 1950
1. Grocery:						
Independent	14.4	14.8	+0.4	14.3	14.4	+0.1
Chain	15.5	15.5	.....	18.1	17.3	−.8
2. Meat:						
Independent	16.1	19.6	+3.5	20.3	19.4	−.9
Chain	15.8	20.2	+4.4	23.6	23.0	−.6
3. Confectionery and tobacco: Independent	17.9	18.9	+1.0	12.8	14.6	+1.8
4. Greengrocers and fruiterers: Independent	17.5	19.4	+1.9	18.4	19.1	+.7
5. Men's clothing:						
Independent	28.3	29.5	+1.2	28.5	31.9	+3.4
Chain	28.8	32.1	+3.3	24.1	27.9	+3.8
6. Women's clothing:						
Independent	27.9	30.1	+2.2	23.8	27.6	+3.8
Chain	28.3	34.4	+6.1	24.2	26.1	+1.9
7. Footwear:						
Independent	29.7	31.5	+1.8	25.4	26.5	+1.1
Chain	31.6	34.0	+2.4	26.7	31.3	+4.6
8. Hardware: Independent	26.4	26.4	.....	25.8	26.0	+.2
9. Furniture:						
Independent	27.1	26.1	−1.0	26.2	28.7	+2.5
Chain	30.7	36.7	+6.0	31.5	36.7	+5.3
10. Radio and electrical: Independent	27.8	25.6	−2.2	27.8	28.5	+.7
11. Chemists:						
Independent	31.2	31.6	+.4	30.6	28.5	−2.1
Chain	33.7	34.3	+.6	32.2	33.5	+1.3
12. Jewelry: Independent	40.3	42.5	+2.2	30.2	32.4	+2.2
13. Variety stores: Chain	37.8	38.6	+.8	27.3	31.6	+4.3

TABLE I.—*Comparison of consumer selling price, fair trade versus non-fair-trade States, 6 months—January 1958 through June 1958*

Brand number	Food stores		Drugstores		Food and drugstores	
	Fair-trade States	Non-fair-trade States	Fair-trade States	Non-fair-trade States	Fair-trade States	Non-fair-trade States
1	$0.684	$0.677	$0.674	$0.673	$0.678	$0.676
2	.649	.648	.650	.649	.650	.648
3	.557	.560	.550	.548	.554	.556
4	.251	.252	.250	.251	.251	.252
5	.250	.251	.250	.250	.250	.250
6	.340	.341	.343	.343	.341	.342
7	.580	.588	.575	.574	.578	.584
8	.492	.492	.493	.494	.493	.494
9	.438	.439	.433	.436	.436	.438
10	.363	.360	.364	.363	.364	.361
11	.690	.678	.690	.684	.690	.679
12	.514	.515	.499	.513	.511	.514
13	1.190	1.186	1.190	1.185	1.190	1.186
14	.466	.467	.433	.462	.455	.466
15	.510	.508	.495	.501	.506	.506

Source: A. C. Nielsen & Co.

TABLE II.—*Consumer price index, United States*

[1947-49=100]

	All items	Medical care	Prescription and drugs
1947	95.5	94.9	96.1
1948	102.8	100.9	101.2
1949	101.8	104.1	102.7
1950	102.8	106.0	103.9
1951	111.0	111.1	106.9
1952	113.5	117.2	107.9
1953	114.4	121.3	108.9
1954	114.8	125.2	110.1
1955	114.5	128.0	111.2
1956	116.2	132.6	113.7
1957	120.2	138.0	116.7
1958	123.5	144.6	120.7

Source: Bureau of Labor Statistics, U.S. Department of Labor.

TABLE III.—*Consumer Price Index, 20 cities*

[1947-49=100]

	1947	1948	1949	1950	1951	1952	1953	1954	1955	1956	1957	1958
Atlanta	95.8	102.2	102.0	103.5	113.3	116.0	117.1	116.8	[1]116.3	[1]118.1	[1]121.4	[1]124.5
Baltimore	95.4	102.4	102.2	102.9	110.4	113.5	114.7	115.1	115.2	116.9	121.0	124.5
Boston	95.2	94.5	103.0	101.8	103.2	110.0	112.4	113.2	113.8	117.1	121.2	124.8
Chicago	94.5	102.8	102.7	103.8	111.9	114.4	115.4	117.2	117.9	119.5	123.3	127.0
Cincinnati	95.7	103.1	101.2	102.2	110.1	112.5	114.1	114.1	113.7	116.0	119.6	[1]122.0
Cleveland	95.3	103.2	101.5	102.5	110.7	113.3	114.2	115.3	115.6	118.0	122.1	[1]124.8
Detroit	94.4	103.0	101.7	103.4	111.6	[1]114.3	[1]116.2	[1]116.7	[1]116.5	[1]118.7	[1]122.2	[1]123.9
Houston	[1]94.8	[1]102.8	[1]102.5	[1]105.6	[1]114.0	[1]115.4	[1]116.8	[1]116.7	[1]115.9	[1]117.8	[1]121.5	[1]123.6
Kansas City	[1]95.2	[1]102.9	[1]101.8	[1]103.4	[1]111.2	[1]114.5	[1]115.0	[1]115.5	[1]115.7	[1]117.5	[1]121.1	[1]124.1
Los Angeles	95.5	102.4	102.1	102.8	111.5	114.5	115.7	115.6	115.6	117.4	121.2	125.4
Minneapolis	94.6	103.2	102.2	103.2	110.8	114.4	115.6	116.8	116.8	117.0	121.1	124.3
New York	96.0	102.6	101.4	102.1	109.6	111.5	112.1	112.8	112.2	113.9	117.6	121.1
Philadelphia	95.0	102.9	101.7	102.3	111.8	113.9	114.5	115.7	115.5	117.0	120.8	123.1
Pittsburgh	95.8	102.8	101.4	102.2	110.8	112.8	113.6	114.6	113.8	116.5	120.2	124.0
Portland	94.7	103.2	102.1	103.9	112.4	114.8	115.5	115.2	115.1	[1]118.0	[1]121.7	[1]124.4
St. Louis	[1]95.6	[1]102.8	[1]101.6	[1]102.8	[1]111.3	[1]114.9	[1]116.0	[1]116.5	[1]116.0	[1]117.2	[1]121.2	[1]124.7
San Francisco	95.6	102.3	102.1	102.2	110.4	114.3	116.2	116.4	115.6	118.4	123.1	127.5
Scranton	96.7	102.3	101.0	101.7	109.8	112.5	112.7	112.5	111.4	112.9	116.9	120.2
Seattle	94.9	102.8	102.3	103.8	111.9	114.7	116.0	116.1	116.7	118.1	123.1	125.8
Washington, D.C	[1]96.2	[1]102.0	[1]101.9	[1]103.2	[1]110.2	[1]113.2	[1]113.8	[1]113.8	[1]113.6	[1]114.9	[1]118.3	[1]121.1

[1] In years shown, indicates fair trade did not exist or had been rendered ineffective by court decision.

Source: Bureau of Labor Statistics, U.S. Department of Labor.

Mr. DINGELL. Now the next thing with regard to one particular item in the legislation which is before us is the section which permits area discrimination in pricing. I wonder if you would like to make a comment as to why you favor permitting manufacturers to fix prices at different levels in different parts of the country.

Mr. MERMEY. I favor it because we are dealing with a great market, a market of infinite complexity requiring infinite flexibility. I have indicated that I think the price variations will not appear over broad areas, that you would have a uniform price. I am not prepared to say that you would have a uniform price over the country. I have indicated that I agree with you that the possibility exists that there could be. But I am suggesting to you that the only way you will find out whether that particular provision of the bill would impose hardships on consumers or retailers or anybody will be to enact the bill. I am sure that if this bill after its enactment, and I hope it will be, turns up instances of grievances, hardship, injustice, I am sure the Congress will address itself to that.

Mr. DINGELL. As a matter of fact, you don't view this as being an indispensable part of the bill, do you, because you indicate to the committee that you have no experince with this particular device and therefore you feel that it should receive a trial; but if the committee in its wisdom were to determine that we were not going to afford this particular device a trial, you don't feel the bill then would be hurt, do you?

Mr. MERMEY. On the contrary, sir.

Mr. KEITH. I believe it was, or Mr. Curtin asked the question, Do you think, sir, that the price of gasoline in Alaska should be the same price as it is close to the source of production? Obviously it could not be, and I think you have got to recognize the common market called the United States is a vast market; populationwise, economicswise and geographicwise.

We are not able here to determine, in my judgment, whether a product shall be priced the same in every area of the country because of a lot of factors, freight, and so on. I think that most of the products will be so priced, nevertheless.

Mr. DINGELL. Now, Mr. Mermey, you have indicated to us that you feel that the prices will be substantially identical across the country. Assuming that you were a small businessman on one side, let's say, of the Potomac River, and were to find that your competitors on the other side of the Potomac River had their prices fixed at a different and competitive level, what would be your feeling?

Mr. MERMEY. I would scream.

Mr. DINGELL. Precisely.

Mr. MERMEY. I would scream. I will suggest to you it will never happen that way, it could not.

Mr. DINGELL. It is a danger though, is it not?

Mr. MERMEY. Yes; I agree.

Mr. DINGELL. When you vest in a manufacturer the power to fix prices in different parts of the country, that is very definitely a position in which the small businessman might find himself.

Mr. MERMEY. I think the greatest protection the small businessman has there is the operation of this wonderful free enterprise system. He would not last long operating that way, the manufacturer would not.

Mr. DINGELL. We have the Robinson-Patman Act against discrimination and the practice still exists.

Mr. MERMEY. I cannot say to you, sir. You mean the different prices, yes, I know that.

Mr. DINGELL. In different parts of the country.

Mr. MERMEY. I know that.

Mr. DINGELL. And is this factor destructive to the small businessman?

Mr. MERMEY. I don't think so.

Mr. DINGELL. You indicated you would scream if you were to find yourself in that kind of circumstance and now you are telling the committee——

Mr. MERMEY. The circumstance that you suggested, sir, was that I am in Texarkana on one side, Arkansas, and the other side is Texas, I am saying to you that is a single marketing area; if any manufacturer

sought to effect two prices, I would scream and every other retailer would scream, and I cannot imagine any court saying that such pricing came within the intent of this bill.

Mr. DINGELL. There is no language in the bill which says it is not. As a matter of fact, the specific language says:

> Each such currently established resale price and resale price range shall be uniform at each level of distribution within each marketing area determined by the owner of the brand, name, or trademark.

This authorizes the owner of the brand name or trademark to fix prices any way in those marketing areas.

Mr. MERMEY. Subject to the rule of reason.

Mr. DINGELL. And fix the boundaries in any manner he determines to fit them, am I correct?

Mr. MERMEY. I have agreed with you, sir. I said there is a possibility, anything is possible, but I am trying to say to you, sir, that I think there is such a thing as an overriding rule, and that is a rule of reason.

Mr. DINGELL. You prefer, then, to rely on the blind faith that this will not happen. Sir, I represent a number of small businessmen and I choose not to place them in the tender mercies of your good hopes and faith.

Thank you, Mr. Mermey, for your very fine statement.

Mr. MERMEY. Thank you, sir.

Mr. DINGELL. Your full statement will be inserted in the record.

(The statement referred to follows:)

STATEMENT OF MAURICE MERMEY, DIRECTOR, BUREAU FOR THE ADVANCEMENT OF INDEPENDENT RETAILING

Mr. Chairman and gentlemen, my name is Maurice Mermey. I appear here as director of the Bureau for the Advancement of Independent Retailing, a nonprofit corporation organized under the auspices of the National Association of Retail Druggists and supported by voluntary contributions from all segments of the drug industry of the United States—retailers, wholesalers, and manufacturers.

The aims and purposes of the bureau are as follows:

To advance and promote the general welfare by encouraging and fostering independent retailing as a method of distribution based upon honest, economic, and efficient service to the consumer;

To gather and correlate information respecting independent retailing and its contributions to the public interest, including the interest of the American free enterprise system;

To carry on education in the economic and social concepts implicit in independent retailing;

To distribute publications and publicity of every kind, nature, and description touching upon the values and contributions of independent retailing;

To foster and encourage the improvement of standards of service and of operation in independent retailing;

To develop public understanding of the problems of independent retailing as a basis for lawful constructive actions, both public and private, that will contribute to the advancement of independent retailing.

I wish to register the unequivocal support of the bureau in behalf of H.R. 3669, the quality stabilization bill introduced by the distinguished chairman of the Committee on Interstate and Foreign Commerce, Representative Oren Harris—and of the substantially identical bills introduced on a completely nonpartisan basis by many other Members of Congress. The overwhelming majority of the 2 million retailers in the United States, together with large numbers of manufacturers and wholesalers, endorse and support the principles and objectives of the Harris bill which are 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 brands, names, or trademarks, and for other purposes."

Enacement of H.R. 3669 would result, also, in the implementation of what is surely national public policy; namely, to help the independent business proprietor—constituting a large majority of retail trade which itself is numerically the biggest single segment of the 4.7 million business units in the United States. Surely it can be said that the Select Committees on Small Business of the House of Representatives and of the Senate want to do all they can to help the independent proprietor remain a significant and useful segment of American life. The policy of helping this proprietor is reflected in the national pltaforms of the Democratic and Republican Parties and in the Government's efforts in behalf of small business.

It has been said that research is wonderful but that one need not employ a corps of research chemists to learn that there is salt in the ocean. In the same vein, I do not believe it is necessary to retain a whole school of statisticians to discover that the independent business proprietor, and more particularly the independent retail store owner, needs help if he is to survive and prosper.

Indeed, reports of the death of the independent retailer are appearing, with increasing frequency, in the press. For example, E. B. Weiss, a marketing consultant, said in a talk before the Minneapolis Advertising Club on January 24, 1963:

"Yes, the independent retailer is doomed—as an independent, that is * * * within no more than 10 years, 75 to 90 percent of total retail drug volume will be divided between corporate and independent drug chains; 75 to 90 percent of total retail hardware volume will be divided between corporate and independent hardware chains. Ditto for the furniture outlet, the appliance outlet, and other major forms of general merchandise retailers.

"In brief, the world of marketing faces a distribution future in which most manufacturers of presold brands, in most mass-consumed merchandise categories, will find that 75 to 90 percent of their total volume is moving through (1) corporate chains, and (2) independent chains."

In other words, we'll have two private clubs, according to this view. I suppose freedom of entry—as exists in the marketplace today, albeit with substantial hazards to the entrant—would be severely limited.

There are many who disagree with this view. They include the independents themselves. They include, too, Members of the House of Representatives and of the U.S. Senate who believe that enactment of H.R. 3669 would enable the efficient, the hard working, the imaginative independents of the country to compete with the giants—department stores, chainstores, supermarkets, mail-order houses and what have you.

H.R. 3669 would give consumers the very kind of price protection that they have insisted on for more than three-quarters of a century. It is often said—and accurately—that everybody loves a bargain. But is there a consumer who does not resent paying more for a particular article than her neighbor paid for precisely the same item? Every consumer—including your wives—wants to be protected against paying more than somebody else for the same thing.

This demand for protection goes back to the middle of the 19th century when the retail store in the United States was little more than a polished version of the oriental bazaar. Customer would haggle with clerk over the price of every article which the customer sought to purchase. And customer was very happy, indeed, when she discovered that she paid less for an item than her next door neighbor. But when she paid more—that's when she called the clerk, or the proprietor, or both, a cheat, profiteer, or whatever other condemnatory word that would come to her mind and lips. That is also when she began to demand that the store operate on a one-price-to-every-customer policy.

Today, no reputable store would ask Mrs. Smith to pay a higher price than Mrs. Jones for anything from a particular brand of aspirin tablets to a particular brand of washing machines. Nor would one outlet of a chain ask Mrs. Smith in, say, Washington, D.C., Northwest, to pay a higher price for a given article than another outlet of the same chain, located in another part of Washington, D.C., would ask Mrs. Jones to pay for the same article at the same time.

Stores which charge different prices to different customers for the same branded article at the same time do not enjoy reputations for fair dealing. Shoppers stay away from such stores because they resent being discriminated against pricewise.

You will find in today's marketplace widespread application of the one-price-to-every-customer policy. You will find it in—

1. *House-to-house selling.*—Manufacturers who sell through canvassers account for some $2 billion of sales per year. Each brand carried is sold on a one-price-to-every-customer policy—a price fixed by the manufacturer which his canvassers must charge.

2. *Consignment selling.*—Brand owners set the retail price which their consignees (dealers) must charge for their branded products.

3. *Forward integration.*—A large volume—in the billions—of sales is accounted for by manufacturers who sell their own retail outlets. No price cutting on their own brands in the various outlets they own or control.

4. *Private brands.*—These are brands owned by retailers—giant retailers usually—and sold in their own stores. Perhaps $20 billion of sales per year are accounted for by such private brands; and the volume is going up each year as rampant price cutting on national brands reduces retailers' profit opportunities and, therefore, their incentive to stock and sell the national brand.

H.R. 3669 offers the American consumer a one-price-to-every-customer policy with respect to national brands. For H.R. 3669 permits a manufacturer to apply this policy to his branded product. But he can avail himself of this provision only, as the bill says, "if 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 are in free and open competition therewith."

In other words, the branded product of the manufacturer availing himself of the provisions of H.R. 3669—and he need not avail himself of its provisions if he doesn't choose to do so—are competing every minute of every day with: (1) Every brand identifying similar goods which are also using the provisions of the quality stabilization bill; (2) every brand identifying similar goods which are not being sold under the terms of the quality stabilization bill; (3) similar goods not identified by brand; (4) all goods and services competing in the entire American economy for the consumer dollar.

Now, then, it is argued by opponents of the Harris bill that H.R. 3669 would destroy free competition. This is nonsense. Moreover, a whole host of statutes testify that competition in the United States does not mean "free" in the sense of unbridled. Planned operations in the red to destroy competitors is a classic violation of the antitrust laws. Impairment of competition through certain types of merger are likewise banned by law. The Federal Trade Commission Act addresses itself to unfair competition. The Robinson-Patman Act makes unlawful discrimination by manufacturers in their selling prices to distributors.

H.R. 3669 not only gives the American consumer the price protection afforded by the one-price-to-every-customer policy. It gives her, too, relief from deceptive price advertising and merchandising practices. I refer here to price juggling, loss leadering, consumer bait techniques used by certain retailers. This consists of offering selected national brand best sellers at low, low—often bankruptcy—prices in order to make for the price cutter a reputation for low pricing and thus to attract shoppers who will inevitably buy other, less familiar items, in which the price cutter's profits are carefully hidden.

The fool-the-public process is set forth in a news article in Home Furnishings Daily, April 11, 1963, by Alvin M. Winters, a staff writer. Here is the article in full:

"SAYS BRANDS VITAL TO DISCOUNTERS

(By Alvin M. Winters)

"Brands are nearly as important as customers for discounters in most home furnishings categories.

"For the discounter, the ability to advertise national brands at a discount price has long been the most important part of his hard goods operation. The big brand at a low price convey value and establishes a true 'discount' identity.

"The full power of nationally recognizable merchandise is wielded particularly

in big ticket home goods such as major appliances, television, radio, and stereo.

"Brands have been playing a greater role than ever on discounters' gondolas.

"With the financial climate considerably less than desirable, many discounters with sound backing are solidifying their images with increased use of brands.

"Discount chains with soft goods backgrounds have been moving more into the hard goods realm not only for added sales and one-stop shopping atmosphere but also for the reputations they can establish through brands.

"BIG ASSORTMENTS

"Discounters also are growing more aware of the need for vast assortments in traffic-pulling departments like electric housewares, and they find brands—even those that are fair traded—vital to maintain complete departments.

"Closed-door discounters—although they have a reasonably captive clientele—are among the most brand conscious retailers. They find brands are necessary to the closed-door image of quality.

"Both open- and closed-door discounters are very much aware that consumers have great confidence in nationally advertised merchandise and that customers often look upon private brands with suspicion of quality.

"Moreover, the ability to obtain national brands in most home furnishings categories is no problem. Manufacturers welcome the added inroads to new mass markets.

"A BIG DRAWBACK

"But national brands, discounters note, have a serious drawback. A recognizable brand can easily be "knocked off"—met or beaten in price—by competition.

"And with the lust for traffic often resulting in lower prices, discounters sometimes find their profits are pinched in their prime asset, the national brand.

"For this reason, private brands are gaining in importance in categories such as household chemicals, bedding, curtains and draperies, and some housewares items.

"Another reason for the inroads of private labels is that they stir repeat business through identification, or as some in the trade say, in "marrying" the store to the customer.

"But national brands, even the stanchest supporters of private brands agree, are essential in the first few years of a discount store's operation to create images of reliability, quality, and value."

Would H.R. 3669 add to the American consumer's cost of shopping? It is curious that this question is never asked about the several other pricing systems under which a one-price-to-every-customer policy is put into effect. And it is certainly true that in the absence of H.R. 3669—and of State fair-trade laws in the 24 States in which they are in effect—selective shopping surveys can be made, as they have been made, to prove that quality stabilization would penalize consumers. These surveys consist in buying certain selected items in certain stores at certain times; fast-moving national brand items which are being used to create for this or that giant retailer a "discounter image" as the Home Furnishings Daily writer said. But these selective shopping surveys cannot be accepted for, at best, they are too narrowly conducted, and at worst they are nothing more than a careful shopping for statistics to support a preconceived conclusion.

Quality stabilization pricing does not affect in any way the total price mix, i.e., the average markup or margin, of any type of retail store. A diversified store—department store, supermarket, discount house, chainstore, independent—does not have a higher or lower average markup by reason of the presence or absence of quality stabilization pricing.

It is a fair statement that the overwhelming majority of independent retailers are firmly and fully convinced that enactment of the Harris quality stabilization bill would promote the advancement of independent retailing by providing the opportunity to compete on the basis of skills, devotion, and energy rather than, as at present, almost exclusively on the basis of dollar power. The independents, by and large, do not have the kind of reputation that permits them to establish their own private brands—as the giant retailers can and do. Consequently, they must rely for their bread and butter on their ability to sell the presold national brands—the very brands that the price-jugglers are using to get a reputation for being the consumer's best friend.

The enactment of H.R. 3669 would give the independents new hope and renewed courage. It would enable the independent proprietor to continue as a useful member of his community; to contribute in time, talent and money to the Community Chest, the PTA, the church and the scores of other activities that add up to community life. These are contributions which the absentee owner rarely makes or is even in a position to make in the tens or scores or hundreds or thousands of communities in which he has established retail operations.

To manufacturers, H.R. 3669 says, "here is national quality stabilization, use it if you wish; but don't use it if you don't care for quality stabilization."

Past experience shows that large numbers of manufacturers will prefer to get along without quality stabilization. That's fine. It represents their individual decisions. But there are many others—and their numbers are growing because the price-footballing which their branded products have been subjected to has caused retailers, large and small, to lose interest in pushing their national brands; and has caused the larger retailers and chains to develop competing private brands with substantially larger profit margins.

CONCLUSION

Your committee has a deep interest in the welfare of the consumer, as do the supporters of H.R. 3669.

You have a deep interest in the welfare of the producer, whose ability to market his output determines whether many Americans will earn the income that enables them to be consumers.

Your deep concern for small business and your interest in the advancement of independent retailing are matters of public record.

We live in an age in which there is wide concern over bigness. Certainly part of the concern arises from the fact that large numbers of independent proprietors in America are not earning a living wage. There are many reasons for this state of affairs. Congress has it in its power to eliminate one of these reasons—the most cogent one, the independents believe. It can curb the unfair competitive practices to which H.R. 3669 addresses itself by enacting the Harris-Humphrey bill (Senator Hubert H. Humphrey has introduced a quality stabilization bill in the Senate).

By recommending H.R. 3669 to the full Committee on Interstate and Foreign Commerce, your subcommittee will take the first step toward what the independent proprietors of this country hope will be passage by the 88th Congress of a Quality Stabilization Act.

Mr. DINGELL. The committee will stand adjourned until the call of the Chair.

(Whereupon, at 11:15 a.m., the subcommittee recessed to reconvene subject to the call of the Chair.)

AFTERNOON SESSION

Mr. DINGELL (presiding). The Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce will come to order.

We are honored to have with us the distinguished Chairman of the Federal Trade Commission who will testify on the quality stabilization bill. We will be glad to hear from you at this time.

There are a number of bills. I want to give to you the warm welcome of our chairman, Mr. Harris. And I want, also, to express to you my personal warm welcome in my own name. And to express to you the very high regard which I have for you as a distinguished, dedicated, and devoted public servant.

STATEMENT OF HON. PAUL RAND DIXON, CHAIRMAN, FEDERAL TRADE COMMISSION; ACCOMPANIED BY JOHN WHEELOCK, EXECUTIVE DIRECTOR, AND J. V. BUFFINGTON, ASSISTANT TO THE CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. DIXON. Mr. Chairman and members, I think you for those kind words.

May I introduce to you our Executive Director of the Commission, Mr. John Wheelock, to my left, and to my right, my able assistant, Mr. J. V. Buffington.

Mr. DINGELL. You are both very welcome, gentlemen.

Mr. DIXON. Mr. Chairman, I do not have a prepared statement here today. There was submitted to the Commission copies of H.R. 457 and H.R. 3669. As of late last night the Commission finally arrived at its views on H.R. 457 and they were sent down to the Budget Bureau which duly read them and approved them.

And as I stated, they had no objection to this submission of the views expressed in the letter which I hand delivered here. And if it meets with your purposes, I would like to read this letter, sir, and then offer it for the record, and then I will point out the very insignificant differences between H.R. 457 and H.R. 3669, although we have not as yet officially sent our letter up on H.R. 3669.

Mr. DINGELL. This will be acceptable, Mr. Dixon.

Mr. DIXON. This letter is addressed, of course, to the chairman, Mr. Oren Harris (reading):

FEDERAL TRADE COMMISSION,
Washington, D.C., April 24, 1963.

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

DEAR MR. CHAIRMAN: This is in response to your letter of February 15, 1963, requesting a report on H.R. 457, 88th Congress, 1st session, entitled, "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, 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 Federal Trade Commission is opposed to the enactment of this bill into law.

H.R. 457 defines the "trade and public goodwill" associated with a distinguishing brand, name, or trademark as property of the owner. Under this bill, the owner has the right to protect such property even after the sale or transfer of the products to which the brand or marks relate. When goods usable for the same general purpose are available to the public from sources other than the owner of a distinguishing name, brand or trademark, the right of any person (wholesaler or retailer) to resell the goods identified by said distinguishing mark can be revoked by the owner of such mark, on written notice, if (among other things) the person reselling the goods has advertised, offered for sale, or sold such goods at prices other than those established currently by the owner of said name, brand, or trademark. In this respect, the instant bill would establish a Federal resale price maintenance law.

The Commission opposes resale price maintenance legislation, including specifically H.R. 457, on several grounds, including the following bases:

1. The effects of resale price maintenance are prejudicial to the interests of consumers. Where resale prices are fixed by suppliers, the consumer is deprived of the benefits of price competition among distributors, and denied the benefits of the incentive for distributors to lower costs and operate on smaller merchandising margins. Government studies have shown that retail prices on

fair trade articles are higher in States which enacted resale price maintenance laws than in non-fair-trade States.[1]

Proponents of resale price maintenance contend that the practice does not prevent retailers from competing in services they give. This, however, begs the question. Potential customers may be indifferent to extra services, whereas they would be satisfied with the original amount of service at a lower price. It is this significant alternative which resale price maintenance stops the retailer from providing.[2]

Since the cost of distribution represents a considerable part of the consumer's dollar, legislation which removes that element of the consumer price from the pressure of competition can restrict the efficient working of a competitive system and increase the cost of living. When merchants are forbidden to compete in prices, the result is money out of the consumer's pocket without necessarily any increase in the quality or quantity of the product.

2. The practice of resale price maintenance may facilitate and make more effective open or tacit horizontal agreements among manufacturers. The same distributors usually handle the products of rival manufacturers; on the other hand the manufacturer is free to enter a resale price agreement with any distributor. Effects identical with those in cases of direct collusion follow if each manufacturer establishes, in contracts with his distributors, retail prices and discounts similar to those which these distributors are bound to observe by their arrangements with other competing manufacturers. Moreover, retail price maintenance may function as an essential complement to agreements among manufacturers, since it would be useless for them to fix prices at the manufacturing level if price competition at the retail level disturbs the whole arrangement.[3]

Horizontal agreement by distributors in a market to sell a substantial part of their goods at not less than certain prices would be regarded as an illegal interference with competition. Logically, the law should apply to vertical arrangements which have the same effect of fixing irreducible retail prices. The uniformity of the price would be identical with that of a rigid horizontal price-fixing conspiracy.

3. In arresting competition in price at the distributor levels for identified goods, the bill can place the small retailer at a competitive disadvantage vis-a-vis the large chain. The small businessman in many retailing fields, including food or drug, will be forced to sell the branded products at resale prices fixed by the packers in competition with customers' labels (private brands) selling at lower prices set by his large competitors.

The bill is not optional in actual practice except for the manufacturer. If this bill becomes law, numerous small unincorporated retailers may be forced to accept the prices set by the owners of trademarks and brand names, usually large, integrated manufacturers. Of the approximately 2 million retailers in the Nation, about 80 percent are unincorporated, and about 80 percent have stores in only 1 location. Also, of the approximately 165,000 merchandise wholesalers, about 91 percent are unincorporated, and 75 percent have establishments in only 1 location.[4] These small businesses will not have the option to refuse to accept the prices of well-known, heavily advertised brand names, since they cannot exist selling unknown brands. The individual small wholesaler and retailer lacks the countervailing power to bargain with the big-brand-name manufacturers. The small businessman may also lack sufficient capital to stay in business over a sustained period of time if his sales drop due to consumers' initial reluctance to try lesser known brands. Consequently, the small merchant will accept the prices set by the manufacturer rather than face the loss of business.

The Commission's staff report on the "Economic Inquiry into Food Marketing, part II," scheduled for submission to Congress next month, reveals that an increasing share of total frozen food sales are marketed under customers' labels. The 10 largest chain stores sell annually over 60 percent of the total private label frozen food products sold in the United States. These chains sell only about 20 percent of the packer label frozen food total, whereas the remaining 80 percent

[1] See, for example, hearings before a subcommittee of the Committee on Commerce, U.S. Senate, "Quality Stabilization," 87th Cong., 2d sess., 1962, p. 83 and pp. 394–395.
[2] Board of Trade (British white paper), "A Statement on Resale Price Maintenance," June 1951, p. 5.
[3] Committee to Study Combines Legislation (Canada), "Interim Report on Resale Price Maintenance, Ottawa, 1952," p. 68.
[4] Congressional Record (statement by Mr. Randall), Aug. 23, 1962, p. 16268.

under packer label were sold primarily to small retailers through wholesale distributors.

These statistics indicate that passage of H.R. 457 may hinder the small businessmen. Resale prices will be fixed under this bill on products sold under the manufacturers' brand by the small independents, but the large retail chains with capital to buy similar products under their own brands are left free to sell their private branded products at prices of their own choosing. The bill bars the independent from effective competition with the chain, since the independent cannot lower prices on the price-maintained items to compete with the lower prices of the chain's private brands.

4. When measures of enforcement are involved, resale price maintenance establishes a private system of law. In H.R. 457, the owner of the trademark or brand name, and not a disinterested third party, court of justice, or public authority, determines when to revoke the right of the wholesaler or retailer to resell the controlled product. Under this bill, a private concern will decide a violation of a Federal law and have the right to bring a civil action against the reseller. Paragraph (10) of the bill provides that if the retailer or wholesaler continues to effect resale of the goods after his right has been revoked, he "shall be deemed to have committed 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."

The reseller, in such civil action by the owner, can only use, as a defense to the charge of unfair competition, proof that the owner has not used due diligence in revoking the right to all other parties in substantial competition with the reseller who are known to the plaintiff (owner) to be "committing any of the acts set forth in subparagraphs (a), (b), and (c) of paragraph (8)" of the bill. The phrases "due diligence," "substantial competition" and "known to the plaintiff" are involved legal terms, the conflicting interpretations of which can occupy the time of jurists for years to come. And this is the sole defense open to the many small wholesalers and retailers with neither a legal staff nor money to engage in lengthy litigation.

5. The system of fair trading employed pursuant to the McGuire Act in States with fair-trade laws exempts from the Federal antitrust laws fair-trade contracts only if the product sought to be traded "is in free and open competition with commodities of the same general class produced or distributed by others." (Federal Trade Communications Act, sec. 5(a)(2).) The "free and open competition" proviso serves to prevent fair-trading manufacturers from fixing resale prices when there is no effective competition in the markets to keep fair-trade prices at realistic levels. Even this little protection of price competition is eliminated under H.R. 457 which applies whenever "goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark," regardless of whether these goods are in open competition with other products.

6. State laws enacted pursuant to the McGuire Act authorized price maintenance only if the manufacturers, who fixed retail prices, did not themselves sell their goods in competition with retailers whose prices these manufacturers fixed. This protection is not contained in H.R. 457, pursuant to which, in paragraph (14) thereof, a producer with retail outlets could prevent any competing retailer from selling the same goods at a lower price.

Paragraph (14) appears designed to negate the effects of the Supreme Court's decision in *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1956). At the time of the appeal, McKesson was the largest drug wholesaler in the United States and also manufactured its own line of brand-name drugs. McKesson's manufacturing division had fair trade agreements with independent wholesalers, most of whom competed with McKesson's own wholesale divisions. The Government challenged McKesson's price-fixing agreements with wholesalers with whom it competed, and McKesson claimed such contracts were exempted from the Sherman Act by the Miller-Tydings Act and the McGuire Act.

The Supreme Court held in the *McKesson* case that if the contracting parties compete with each other, the Miller-Tydings and McGuire Acts do not permit them to fix resale prices. Both acts contain the proscription against price-fixing agreements "between persons, firms, or corporations in competition with each other." The Court reasoned that since McKesson competes "at the same func-

tional level" with independent wholesalers with whom it has price-fixing agreements, the proviso bars these agreements from falling within the statutory exemption. However, paragraph (14) of H.R. 457 provides that "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." It would appear that, pursuant to the bill, a manufacturer owning a brand and who is integrated forward into the levels of distribution could set prices on the goods for his wholesale or retail competitors.

The Commission reaffirms its opposition to resale price maintenance as a manifestation of a restrictive practice on a free economy. Resale price maintenance represents a real restriction on competition by private agreement and it tends to discourage economic efficiency.

The Commission shares the concern expressed in the bill's preamble regarding unfair competitive practices in the chain of distribution. The practice of bait merchandising (nowhere defined in the bill) or any loss-leader device are aggressive weapons to attract customers for a whole range of products by selective price cutting. However, legislation withdrawing from the retailer the right to make any price reduction is a costly way of reaching the loss-leader device. Resale price maintenance makes no distinction between price competition that is unfairly used to eliminate weaker competitors, and price competition in the public interest.

The Commission wants to assist, encourage, and protect small business. The burden of providing competition substantially rests on independent small business enterprises. Small business units need an equal chance to obtain supplies and to continue in business without being injured by the discriminatory prices of large rivals. Small business also needs the chance to survive without being absorbed by large firms. In large measure, therefore, remedies for the pressures on small business are found in vigorous enforcement of the antitrust laws.

The Commission is very concerned over predatory pricing in all forms. Congress, through the enactment of the Robinson-Patman Act and the Federal Trade Commission Act, and the Commission, through the enforcement of these acts, have taken action to prohibit and ameliorate adverse competitive effects of such pricing practices as below cost sales and loss-leaders. The Supreme Court recently has reaffirmed the constitutionality of section 3 of the Robinson-Patman Act. *U.S.* v. *National Dairy Products Corp.* (S. Ct. No. 18: W. D. Mo. No. Cr. 20542). The Court in the *National Dairy* decision concluded that the Robinson-Patman Act prohibition on purposefully anticompetitive sales at unreasonably low prices reaches sales below cost for the purpose of destroying competition.

In conclusion, the Commission is of the opinion that H.R. 457 is contrary to public policy expressed by Congress in the antitrust laws. For the reasons stated in this letter, the enactment of the proposed legislation would be contrary to the public interest.

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 24, 1963, and on that date the Bureau advised that there is no objection to the submission of this report from the standpoint of the administration's program.

JOSEPH W. SHEA, *Secretary.*

Mr. DIXON. Now, Mr. Chairman, although I have had nothing to say about H.R. 3669, I think that these observations are in order, although, as I stated to you, our official letter will be prepared and will be submitted to this committee through the Budget Bureau in very short order, but I do think that these short observations should be made, and they are as to the fundamental differences, if any, between H.R. 3669 and H. R. 457.

H.R. 3669 does not provide that a violation, as does H.R. 457, of any of the provisions constitutes an act of unfair competition.

H.R. 3669 does have, as does H.R. 457, provisions for civil remedies and injunctive relief for violations of its provisions.

Also, H.R. 3669 exempts from its provisions drugs, medicines, and devices. H.R. 457 does not contain such exemption.

H.R. 3669 grants an additional defense to a reseller who is accused of violating its provisions, which is not contained in H.R. 457. It is to the effect that the reseller may also establish, by way of defense, that the owner of the brand name has sold goods of like grade and quality to another person similarly situated, under more favorable terms or at lower prices than that afforded to the defendant reseller.

Also, H.R. 3669 provides that, for the brand owner to have the rights and powers conferred by the bill, the products on which the brand appears must be "in free and open competition" with goods usable for the same general purpose which are available to the public from other sources.

H.R. 457 does not require the branded goods to be "in free and open competition."

I think those differences were in order to point out, Mr. Chairman, because I think that the statement I have read fundamentally has the same application to H.R. 3669.

Mr. DINGELL. We appreciate very much this very fine statement. The Chair will recognize Mr. Keith.

Mr. KEITH. Thank you, Mr. Dingell.

I appreciate your statement very much, Mr. Dixon, and I have no argument with many of its conclusions. However, I am troubled a little bit by a situation with which I am somewhat familiar.

As a life insurance agent I was given a rate book with stipulated premiums. If I sold a contract at a rate other than that prescribed, I would be found guilty of "rebating" and would have suffered, probably, the loss of my license in many States.

Would you explain to me the difference between the price control that the insurance company has and that provided for within this legislation?

Mr. DIXON. When I answer you, sir, this is my answer and in no way binds the other four Commissioners, although they have concurred in what I have heretofore read.

There is considerable difference between the field of insurance and the field of commerce, generally. With very rare exceptions, anyone cannot sell insurance unless duly licensed and registered to so serve. For 150 years, within the history of this country, this was considered entirely to be within the purview of our States.

After the *Southeastern Underwriters* case established that insurance was in commerce within the meaning of the Sherman Act, and subject to the antitrust laws, Congress passed the McCarran Act. It is called Public Law 15. That Act declared a moratorium during which time each of the States was offered the opportunity to adequately regulate insurance.

Since that time there has been a uniform law passed by each of the respective States. The Federal Trade Commission, in a very simple aspect of this insurance business, moved into the field of health and accident insurance.

We were told by the Supreme Court quite succinctly that the very passage of a State law was enough to take it out of our domain, but this obviously did not apply to those situations that were purely mail-order insurance, which were not regulated.

Now to come back to life insurance; life insurance is, probably, one of the most regulated features in our way of life. I think you are talking about something that, primarily, within our way of thinking, is a State function.

The rest of this commerce that we are talking about here—those things that have not been whittled out and placed in other exemptions to the law—is what these bills are aimed at. In my opinion this is the backbone of our free enterprise economy. The blessings, our way of life, in my humble opinion, have flowed from this insistence on free and equal opportunity in competition.

Granted, sir, there are many problems that come to the small businessman. The antitrust laws are not miraculous. We do the best we can with what we have. Due process does take considerable time.

Also, we have another thing here in your example. The sale of insurance is a direct sale through an agent and the company fixes its own price. That agent is working for that company. It is master and servant. On the other hand, when a wholesaler buys something, it is his product. And when the retailer buys something, it is his product. He is not an agent of anyone. He is a freeman.

Mr. DINGELL. Would you say that an insurance salesman is engaged in a private practice——

Mr. DIXON. No, sir; I do not.

Mr. DINGELL. Engaged in a private brand practice?

Mr. DIXON. It is an agency deal, sir. I heard a gentleman just before noon make the statement that this bill would do no more than what could be done directly by the brand owner himself if he went all the way to the consumer.

That is true. If any manufacturer in the United States wanted to impose upon himself all of the costs, and all of the attendant risks, and all of the labor problems that would come with it, and the investment of capital, he could sell directly to consumers at any price he chooses. But when he sells it to a wholesaler, title passes. And when the wholesaler sells it to the retailer, title passes.

The wholesaler or retailer should be free to elect how and on what terms and conditions he chooses to sell at.

Mr. KEITH. With reference to the agency relationship, that is true—the majority of life insurance is sold through the agents of the companies involved, but there are a great many brokers, and others who represent the buyer rather than the seller. To get back to the closing remarks you made, is it not possible in our free enterprise system to sell something without a clear title?

Mr. DIXON. These are consignments, yes, sir. There are many ways under legitimate consignment arrangements, that is true. But you must remember that you are holding and retaining title under consignment.

Mr. KEITH. Pardon?

Mr. DIXON. Under a consignment arrangement you consign the goods to me. I have not paid for them. I have merely to pay for them when I sell them, under conditions of the consignment. We are talking about where the title passes here.

Mr. KEITH. This legislation allows the manufacturer or his agent, in selling the product, to have a right to a restraining clause, stating

that in the event the product is not sold at the price as stipulated by the manufacturer that the title reverts, in effect, to the seller.

Mr. DIXON. That is the argument that is put forth as the basis for this, sir. I warn you, and I point out and reiterate as an individual it has been my observation, after some 25 years in this field, that one of the principal problems that is growing in this country today is the use of private labels.

If you have enough money——

Mr. KEITH. I do not quarrel with your conclusions with reference to the private brands. I do not think that the bill is going to be as helpful as many proponents feel that it will be, but it does seem to me that there are some constitutional questions as well as individual ones.

Mr. DIXON. This is a decision that the Congress can make in its judgment. We are here as experts. And you have the right to depend on us for our own honest opinions, based upon our expertise and advice.

Mr. KEITH. Thank you.

Mr. DINGELL. There are a number of points you raised in your very excellent statement today. The first of which is one that has to do with the burden of proof. And that is, it has to be assumed by the small retailer with regard to showing the actions of others in selling at less than the fixed price.

For instance, that has to be shown by the small retailer. That appears on line 17, page 6 of the bill. I wonder if you want to make a comment in regard to the burden of proof that has to be borne by the small businessman to prove knowledge and intent.

Mr. DIXON. I would really have to reiterate what we said in the statement on that point. I think there would be a considerable burden of proof upon him.

Mr. DINGELL. Also, on page 8, it sets forth:

each such currently established resale price and resale price range shall be uniform at each level of distribution within each marketing area determined by the owner of the brand, name, or trademark.

Mr. DIXON. You are talking about H.R. 3669?

Mr. DINGELL. Yes, H.R. 3669. That is on page 8 of the bill, line 3, which has the words:

each such currently established resale price and resale price range shall be uniform at each level of distribution within each marketing area determined by the owner of the brand, name, or trademark.

I was wondering if you wanted to comment on the impact of this authorization?

Mr. DIXON. It looks to me like the purpose of that would be to maintain two functional levels here, sir. It would say, in effect, that—

Each such currently established resale price and resale price range shall be uniform at each level of distribution—

in other words, I would assume that if he was going to set a price, to maintain a price at wholesale, it would have to be uniform, and then down to the next level, to the retailer, it would have to be uniform.

The "within each marketing area determined," would, also, permit him to discriminate between areas if he wanted to.

Mr. DINGELL. What is the impact on the small businessman or on the retailer?

Mr. DIXON. Well, geographically——

Mr. DINGELL. That is, geographically.

Mr. DIXON. One price under that authority could be maintained where he would make very little, whereas in another, he would, probably, maintain it where he would make a lot more. It would be like what we call, under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, a primary line price discrimination—an area price discrimination.

Mr. DINGELL. As a matter of fact, you had considerable difficulty or have had in the milk case, did you not, on price?

Mr. DIXON. We are having considerable difficulty in that field, sir. A great deal of our resources are used in investigating this type situation.

Mr. DINGELL. What is your finding as to this kind of variable price discrimination—well, with regards to different retailers who are afflicted by the practice?

Mr. DIXON. It could be said in all area price discrimination cases that the small, localized competitor can be driven right to the wall because he operates only in one region, whereas a large national manufacturer may be operating in all of the United States.

And in this one area, where there is one competitor, he could lower the boom, so to speak, and the price goes down there. Under this bill that could be done.

Mr. DINGELL. Let us relate the language on line 3 we have just been referring to, to the language on line 14 of the same page where it states:

> All rights and remedies provided in paragraphs (7) to (17), inclusive, of this subsection, the owners of a brand, name, or trademark, shall be also available to any owner of a brand, name, or trademark who, in the sale of goods identified by such brand, name, or trademark, shall compete, at any level of distribution, with any reseller offering such goods.

This offers the manufacturer, the trademark owner, the opportunity to not only fix different prices in different geographical areas, but to control the prices of all of his competitors in all of these areas, and further it permits him in the process of such control to engage in area price discrimination, does it not?

Mr. DIXON. I agree with that conclusion.

Mr. DINGELL. What is the impact of the combination of these two sections on the small businessman who might be differently situated in one area or another?

Let us say, particularly with reference to the drug wholesaler. The manufacturer might be able to fix the retailer's profit margin in one area at a low profit margin, so low in one area that he would not be able to stay in business and handle this particular commodity; am I correct?

Mr. DIXON. It could be under that.

Mr. DINGELL. In this particular section, or, under it, he might also be able to utilize this to achieve control of the wholesale market in a particular area, might he not?

Mr. DIXON. He could, sir.

Mr. DINGELL. And having so done, he then would be able to have control of the market, to dominate the market, and to continue the discrimination, pricewise on area lines, and different prices in different parts of the country, and so, ultimately, achieve control of the whole of the wholesale distribution of large parts of the wholesale pharmaceutical industry, might he not?

Mr. DIXON. That is correct, sir. One of the primary things that I see wrong with this whole approach is that this is a turnover, a delivery to the trademark owner, justifiable rights, to do pretty well as he sees fit. He can play it like a piano or a pipe organ anyway he wants to play it.

Mr. DINGELL. In other words, under these two statutes he can destroy any small retailer or small wholesaler if he chooses to do so, might he not?

Mr. DIXON. Anyone in his line, he can destroy them and eliminate them.

Mr. DINGELL. And he might, conceivably, destroy the whole line, might he not?

Mr. DIXON. If he was in concert, we would hope that we would be able to discover that and that action would be taken under the Sherman Act or the Federal Trade Commission Act.

We have an increasingly difficult time determining when people are in concert. What constitutes agreement, conspiracy, collusion, is one of the hardest problems in antitrust enforcement.

Follow the leader; acting independently. The law says collusion, conspiracy: there must be evidence from which a common plan can be inferred. But if you happen to act independently, just like somebody else, you may get the same results.

Mr. DINGELL. I would like you to refer to another section of the bill which your comments bring to mind, that is, the language on page 2 of H.R. 3669, line 12, which reads, "If goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark," et cetera. We had a colloquy on this point yesterday with one of the witnesses, wherein our discussion lead us to a consideration of a number of items, in the marketing of a particular commodity which raised a question of a certain small segment in relationship to the commodity problem which we have in the manufacturing end.

There might be as many as eight and as few as four. I wonder what your comments are on this particular section.

Mr. DIXON. If there are only three or four in open competition, is this, Mr. Chairman, your question, your observation?

Mr. DINGELL. With regard to what constitutes free and open competition. It occurs to me if we have four manufacturers who produce 80 to 100 percent of the commodity on the market, we do not have free and open competition. Is that your construction of that?

Mr. DIXON. It certainly restricts them. The economists use the words that it has the characteristics of an oligopolistic type of competition. If anything, it is not monopolistic, but it has all of the characteristics of oligopoly. It is not truly competitive, either. It is rather limited.

Mr. DINGELL. That would be your statement that it does not constitute free and open competition?

Mr. DIXON. It is a very serious question.

Mr. DINGELL. In the market?

Mr. DIXON. It certainly is a very serious question, sir. It is not classical competition. It is very different from classical competition.

Mr. DINGELL. As a matter of fact, it is your feeling that it should be most strictly construed?

Mr. DIXON. I think that it should be, sir, because our laws, the antitrust laws are very hard to apply in the oligopolistic situation. To open this kind of a door to this type of situation, could eliminate price competition, and permit sellers to follow and move along on a horizontal level. Then you would have four people moving right straight down the line, marching together.

Mr. DINGELL. I recognize my good friend, Mr. Van Deerlin.

Mr. VAN DEERLIN. No questions.

Mr. DINGELL. We are very grateful to you for your presence here today. I presume you will want to submit then other comments on behalf of the Federal Trade Commission with regard to H.R. 3669, am I correct?

Mr. DIXON. We are preparing those now. They will come in due course. I am rather chagrined that they are not here now so that I would be freer and more erudite in the questions that you have put to me, because we had just gotten through with H.R. 457, and I would finish on H.R. 3669.

Mr. DINGELL. I am sure that your comments will be equally pointed. I am very grateful to you. I hope you will accept the thanks of not only myself, but, also, of those present for the help you have given us.

Mr. DIXON. Thank you very much.

Mr. DINGELL. The Chair will now recognize Mr. John A. Gosnell.

STATEMENTS OF JOHN A. GOSNELL, GENERAL COUNSEL, AND FRANK M. CRUGER, CHAIRMAN, NATIONAL SMALL BUSINESS ASSOCIATION, WASHINGTON, D.C.

Mr. GOSNELL. Mr. Chairman and members, I am John A. Gosnell, and I have with me Mr. Frank M. Cruger, of Indianapolis, who is chairman of the board of the National Small Business Association. He is, also, president of the Indiana Manufacturers Supply Co. of Indianapolis and he is past president of the National Industrial Distributors Association, of which he has been a member a long time.

My statement is primarily addressed to the legal points, but Mr. Cruger, with a long background on distribution, may be able to throw some light on the current problems.

Mr. DINGELL. You are both welcome.

Mr. GOSNELL. Thank you.

Mr. DINGELL. Do you desire to read your full statement?

Mr. GOSNELL. In view of the sequence of the argument, Mr. Chairman, I think that I will be almost required to follow the written text generally. It is not too lengthy.

Mr. DINGELL. Very well.

Mr. GOSNELL. My name is John A. Gosnell. I am engaged in the general practice of law in the partnership of Gosnell & Durkin, 1145 19th Street NW., Washington, D.C. I am appearing here today as general counsel of the National Small Business Association of Washington, D.C.

We appreciate the opportunity to further discuss the merits of this proposed legislation, the quality stabilization bill, H.R. 3669. At this stage of the proceedings all of us have the advantage of a degree of perspective on what has been said during the previous hearings. I assure you that I will not burden the committee with a repetitive summary of what has already been said. We have made an earnest effort to at least begin an objective and detached analysis of the problem before you. We hope that these reflections will throw constructive light on points which have not been examined at all, as well as those which obviously require deeper consideration.

The testimony presented to this committee by an impressive number of responsible and informed witnesses does establish one uncontrovertible fact—that a serious problem does exist—and that, for one or more reasons, there is trouble in a major segment of the competitive environment. As you gentlemen well know, no amount of persuasion or promotion could generate the volume and quality of testimony presented here unless there was in fact real and widespread concern over a genuine problem. It behooves us therefore, and particularly this committee, to thoroughly understand, not only the visible aspects of the problem, but to isolate and analyze the underlying pressures which have generated so much complaint from certain segments of distribution, and resistance by certain governmental agencies, to a legislative proposal which is relatively mild and restrained in scope.

First, let me clear up some basic questions about what would happen if this proposal were enacted, and a company sought injunctive relief under the act. There is no difficulty with respect to such practices as bait merchandising, misrepresentation, and product substitution. In the case of these acts, you are merely extending the scope of the common law of unfair competition to cover modern offenses which are developed in the marketplace. The Federal Trade Commission acknowledges that these practices constitute unfair competition within the purview of section 5 of the Federal Trade Commission Act, but there is no reason why Congress should not also make available a private remedy in this area. This joint jurisdiction would interfere in no way with the function of the Federal Trade Commission in policing unfair acts of competition for the public good. In fact, they now operate under precisely the same condition with respect to those acts of unfair competition recognized by the Federal common law as actionable in private suits, and which are also violations of section 5 of the Federal Trade Commission Act. It would be impossible for the Federal Trade Commission to efficiently police the entire market, especially since it has no intrastate jurisdiction; furthermore, the Commission will not, as a matter of policy, attempt to seek redress for private wrongs. In fact, the Federal Trade Commission could not possibly handle the volume of private offenses in interstate commerce even if their force were doubled.

In the case of a petition for injunction against price violations there appears to be a complete misunderstanding, both of the factual situation and of the operation of the legal process under this bill. In the first place, the public interest cannot be injured by efforts to maintain resale prices of national brands except in case of a monopoly product, and this bill has a specific provision preventing its use by the brand name manufacturer of a monopoly product. (That is in par. 8 of H.R. 3669, lines 12–15, p. 2.) The practical reason that the public cannot be injured under the quality stabilization bill is that competition forces prices to be competitive, and any manufacturer attempting to establish or maintain an arbitrary high price would soon be out of the market entirely. The bill does not interfere in any way with the thrust of the antitrust laws relating to horizontal price fixing, monopolies, restraints of trade, or price discrimination. Our Federal judges certainly are not stupid, and the structure of the suality stabilization bill would require close scrutiny by the court of such application for an injunction. No company could enforce a price policy if there was indication of a monopoly situation—nor if there was evidence or suspicion of collusive pricing of competing products—nor if there was indication or suspicion of any other possible violation of the antitrust laws. Bear in mind that the court would not have to be convinced of an antitrust violation. It could, and no doubt would, deny injunctive relief under the quality stabilization bill if not entirely satisfied that competition did exist, and that collusive parallel pricing, or other antitrust violation did not exist.

You could hardly provide better assurance against antitrust abuses under the cloak of this bill. In my opinion, it is a gross misrepresentation for opponents to say that this bill authorizes price fixing, or that Congress is abdicating to industry its duty to regulate interstate commerce.

In order to get at the roots of this problem it is necessary to be fully informed on the present state of distribution of trademarked goods. It does not appear to be realized that an increasing percentage—some say about 40 to 50 percent—of the total sales volume of branded merchandise is sold under controlled house brands. And these figures do not include foreign goods made for American distributors and sold under house brands. These are the trademarks owned by large distributing units, whether chains, mail-order houses, discount houses, giant wholesalers, cooperative buying units, or any other type of distributive organization.

These are normal trademarks in every way except that, generally speaking, house brands are owned by distributing organizations rather than by manufacturers. In some cases these large distributors may own the manufacturing plant which produces the goods bearing the trademark; nevertheless, for purposes of this discussion such marks will be referred to as "controlled house brands". Most of these are either national in scope, or rapidly approaching national distribution.

Now, why the term "controlled"? Again, generally speaking, these distributors have bridged the gap between the manufacturer and the retail customer. They maintain control of both the pricing structure and the geographical location of the outlets, so that in fact the merchandising policy is fully controlled by the owners of the trademark.

There are some exceptions, but generally speaking, this is the fact.

This is not a new process—it has been slowly developing for the past 60 years, and this development brings into focus a most important point which should be considered here. If these establishments have full control of the pricing policy on a vertical basis, why have they not arbitrarily set up an administered pricing policy, at artificially high levels, to the detriment of the consumer?

The answer is very simple. Although this method of distribution covers every conceivable product in food, hardware, household goods, and others, there is probably not a single item sold under a house brand which is not faced with intensive competition from other brands. This is one of the reasons why the consumer is enjoying now the most favorable market in the world in terms of price, quality, and availability.

Now, this distribution formula has been closely scrutinized by the enforcement agencies from time to time over the years, and in view of the huge expansion of this type of distribution of branded merchandise, it is self-evident that they have found no basic conflict with our traditional antitrust concepts.

With respect to quality, it is a well-known fact that the owners of these house brands maintain a very strict policing policy. With respect to pricing policy, these house brands are in close competition with other house brands, as well as with the nationally advertised products, which are sometimes, but not always, distributed through the same channels.

Where do these products come from? As mentioned, some of the house brand items are imported, and some small manufacturing plants are owned by these distributing organizations. But the substantial volume of house-branded merchandise comes from the very same companies which own the nationally advertised trademarks. As a matter of fact there are only about 800 manufacturers large enough to enable them to promote their trademarks by means of national advertising. At least half of these produce goods under house labels for these large distributing organizations. As indicated, the volume of this class of production—that is, of the controlled house brand merchandise—is increasing by leaps and bounds. The result is that these manufacturers may be facing the decision of whether to abandon their nationally advertised trademarks. There is sound reasoning behind this, because in so doing they would be relieved of the national advertising burden.

Although a substantial volume of branded merchandise is moving under these controlled house brands, you will find few, if any, of the owners of the house brands complaining about bait advertising, switch merchandising, and predatory price cutting.

Why is this so? Again, the answer is that the flow of this merchandise is controlled with the result that merchandise bearing house brands virtually never gets into the hands of irresponsible price cutters, or those who resort to questionable trade practices.

Now, we begin to come down to the significant point.

You may well ask, "What is so different about the house brand method of distribution?"

There is no violation of the antitrust laws; there is no horizontal price fixing; there is no collusion among dealers. There appears

to be little or no unfair competition—the consumer is getting a fair deal—good quality, competitive prices, and widespread distribution. There is one important distinguishing point, and I do not believe that it has been called to your attention—generally speaking, there is no intrabrand competition within the house brand system of distribution. This result has been achieved legitimately, with no suggestion of antitrust violation.

Why did this system of distribution develop? It is both axiomatic and elementary that cutthroat competition between dealers in the same trademarked product is suicidal, and ultimately will bankrupt both dealer and manufacturer.

Admittedly no company which controls the flow of trademarked goods from manufacturer to the ultimate consumer would ever adopt the nonsensical policy of establishing too many retail outlets in the same geographical area, and at the same time give them the right to compete with each other pricewise. The house brand system of distribution avoids conflict with the antitrust laws, because the owner of the trademark controls the manufacture, the pricing structure, and the geographical distribution of his product, through his own employees. Yet when this product is sold under a national brand through traditional channels of distribution, there is strong regulatory resistance to efforts to implement what would be a normal and sensible price and merchandising policy if the company were vertically integrated all the way from manufacture through retail distribution. A major segment of the distributing industry has already met this problem, over the years, and is 25 years ahead of legislative and enforcement policy, as well as the courts.

Ever since the Sherman antitrust law was passed in 1890, the Government enforcement agencies, and the courts, have been preoccupied with a theoretical notion that the antitrust concept of competition should include competition between dealers in goods bearing the same trademark. In practice, business long ago found out that the pressures of intrabrand competition—that is, competition between dealers in goods bearing the same trademark—defeat a major purpose of the competitive process with adverse economic effect on individual operations as well as the national economy. No manufacturer, wholesaler, or retailer can compete with himself and survive. The competitive system is predicated on reward for quality, efficient service, and productive merchandising effort. This means product against product—not a house divided against itself. Each necessary stage of production and distribution must at least have the opportunity for reward commensurate with efficient performance. This is the backbone of our system, and it should be obvious that senseless intrabrand price cutting defeats the main purpose—under such a system no management can even pay the basic costs of the services required to produce the goods, and deliver them to the consumer.

This appraisal of enforcement policy is no mere opinion on my part—even a casual inspection of current enforcement litigation in the Federal courts will reveal that Government agencies are making a determined effort to obtain judicial support for strict enforcement of intrabrand competition as to nationally advertised, trademarked goods.

Let us assume that they are successful. What do they propose to do about the fact that a growing volume of branded merchandise is moving through controlled channels, and that this distribution legitimately avoids the disruptive practices at which the quality stabilization bill is aimed.

In controlled channels where there is no intrabrand competition, both consumers and distributors are benefited. Despite this benefit, are there valid reasons why the Government should not proceed also to literally enforce the unsound doctrine of requiring competition—between dealers in goods bearing the same trademark—in the area of controlled house brands?

If they do, they will surely produce a chaotic state in the other half of the distributive economy. Why then this dedication to the unsound concept of intrabrand competition? Is it merely ignorance, or is there some obscure design here? Is it possible that they are unaware of these vast transitions in the distributive economy? Or is it prejudice against the national trademarks, and their national advertising programs?

It should now be clear that we have narrowed this problem to the distribution of nationally advertised trademarked goods.

Mr. DINGELL. Right there, you are not indicating that this committee is engaging in any political maneuvers or making any political obeisance in that direction, are you?

Mr. GOSNELL. Not in any reprehensible way.

Mr. DINGELL. Are you suggesting that we are doing it in any other way?

Mr. GOSNELL. I am saying that it has to be done in order to survive in politics. And I am not saying that facetiously. I do not want to get off on the wrong track.

Mr. DINGELL. I seem to be on a track I do not care for here.

Mr. GOSNELL. I am afraid you do not understand me, Mr. Chairman.

Mr. DINGELL. I am afraid I understand you altogether too clearly.

Mr. GOSNELL. What do you mean by that?

Mr. DINGELL. Just the clear concept of your words is that those who oppose this bill are making a political obeisance rather than an effort to serve the public interest.

Mr. GOSNELL. No, sir.

Mr. DINGELL. You are sure that that is not what you mean?

Mr. GOSNELL. No, sir; that is not what I mean.

Mr. DINGELL. As long as we have a clear understanding on that.

Mr. GOSNELL. Yes.

I was going to point out that over the years here all of the legislation addressed to this area has been centered around consumer protection. Now, we may be getting to the state in our economy where we need to begin to worry a little about profits. And this is the direction of my comment. It was not meant to be critical at all.

Every necessary service in connection with the manufacture and distribution of goods is entitled to payment of its costs, plus a reasonable profit. If there is in fact effective competition, then the consumer benefits as a result of the efficiency of all the components of the competitive system.

Consumers are enjoying the results of intensive competition, mass production, automation, and rapidly advancing technology.

On the other hand, industry is struggling with a heavy tax load, arbitrary wage increases not related to production, competition with Government, and with tax-favored organizations such as cooperatives and educational institutions, in addition to an ever-increasing amount of Government regulation, and a growing deluge of imports. The power of the purse has left this country, and our currency situation is probably more precarious than it ever has been in the history of the country. It is high time then that we openly face the grim fact that if our economic system is to survive, it is absolutely necessary that we recognize our dependence on profits.

Let it be remembered that profit is the backbone of our economy and the Federal revenue.

You will recall that Commissioner Dixon in his testimony on this bill last year made the somewhat facetious remark that he might be willing to approve this legislation if the Government could control the consequent pricing structure. This is not so fantastic as it may seem, because this very thing has already happened in England. The Union Shop Distributive and Allied Workers (USDAW) in Manchester, England, in supporting resale price maintenance by individual manufacturers, made the following statement:

> The union does not believe that unrestricted competition is a solution of the problem acceptable to Socialists. It believes that the trading instability which would follow would seroiusly endanger shopworkers' living standards without any material advantage to the public.
>
> In these circumstances, the union believes that with appropriate safeguards, the individual producer should have the right to enforce resale prices on his branded goods * * *.

The safeguards referred to consisted of product registration, establishment of quality standards and price regulation by a Government pricing authority.

Now, what would happen if the Government did attempt to regulate prices in this country?

You know as well as I that the political pressures involved would require our legislators to provide a reasonable profit for the manufacture of goods, and for each stage of distribution. The inevitable consequence would be that the consumer would not fare nearly as well as under the present system.

Furthermore, the cost of the Government regulation would be added to the tax burden.

It now appears that your committee is in a rather peculiar position. Since a substantial part of the total volume of branded merchandise is now moving through distributor-controlled channels, and is thus avoiding the damaging effects of intrabrand competition, failure to come to the rescue of the manufacturers of national brands may add impetus to this growing trend and further force the manufacturers of national brands into expansion of their less costly production of distributors' house brands.

Now, this may be an inevitable and evolutionary phase of market development in this country and you can, of course, take that position. But if you do it will be with express knowledge of the unfair competition in the distribution of national brands, and with the knowledge that distribution of controlled house brands enjoys a legitimate immunity from an unsound regulatory concept.

Finally, gentlemen, I wish to make a few comments directed to the objections raised by the enforcement agencies, and these comments are certainly not intended to be impertinent. We refer a good number of small business problems to the Federal Trade Commission, and we always receive the most courteous cooperation. Results are hard to come by, but I am fully aware of the workload, the ponderous machinery of bureaucracy, the difficulties of proof, and the natural inclination to pursue the spectacular issues as opposed to the plodding problems of the marketplace.

While I do not often agree with Chairman Dixon, we are products of the same law school. I know him favorably and well, and no one can question his sincerity and integrity.

Nevertheless, it is my opinion that this committee last year was not given, by either Chairman Dixon or Judge Loevinger of the Department of Justice, the full facts concerning the marketplace, nor a thoroughgoing analysis of the economic and legal principles involved here.

Let us briefly consider the specific objections which have been submitted to this committee:

1. It was contended that this bill would result in substitution of arbitrarily fixed prices for open competition. If my statements today have not made it clear that such result cannot happen under this bill, then I do not know how to explain it to you. The elimination of unfair competition, and the establishment of an orderly market through avoidance of intrabrand competition, is a far cry from general establishment of fixed prices. Intensive open competition with other national brands and with house brands still would continue to control the consumer price just as it does today.

2. Another objection to the bill, heard last year from governmental witnesses, was that this bill would place sellers under Federal supervision for possible price infractions. This bill merely provides an optional private remedy. The Federal Trade Commission and the Department of Justice would be under no duty to enforce the provisions of this act as to private violations by a reseller of the brand owner's product. This is consistent with their present policy against redress for private wrongs, so there is no factual basis for this allegation by the Government.

3. With respect to the establishment of artificially held price lines tending toward a pronounced inflationary effect, I believe that I have demonstrated that this condition very definitely has not resulted in connection with distribution of goods bearing controlled house brands.

4. As to elimination of States' rights in this area, you have had some experience on this point. Congress has the duty and the responsibility for regulation of interstate commerce, and any relaxation in favor of the States is very likely to produce chaos, as you well know.

5. It was contended that this bill will flood the Federal courts with price litigation. I venture to predict that very few of these cases will reach the point of actual litigation. No relief can be sought until a violator is caught in the act, so to speak, and at this point he will not have enough grounds for defense to justify the expense of litigation.

6. With respect to possible reduction of the incentive for better quality, increased standards, or better values, let me point out that the

present situation is now causing this condition. We can give you many examples from our own files where the present chaotic state of this segment of the market is not only forcing impairment of quality, but has forced many distributors to close their doors.

7. It was also contended that this bill will stifle private initiative, and deprive small distributors of their essential competitive weapon: price. I believe I have demonstrated that the progressive small independent has long since allied himself with some form of distributive organization which provides him with a full line of house brands to meet every price level. Although he has plenty of price competition with other brands, he is not forced to compete with other retailers handling the same brands. I can give you many specific examples of this situation, but time does not permit at this point.

8. This committee was asked by the Government to believe that this bill will create an advantage for large manufacturers who are able to pay for private enforcement. Let me comment only that any manufacturer who owns a national trademark, subject to the current abuses in the marketplace, will be fully able, indeed will be eager, to protect himself. Large distributors, who own controlled house brands, could not care less about this bill. They probably will not use it at all, much less at the expense of small manufacturers and distributors.

9. The allegation made about possible arbitrary establishment of distributive margins akin to subsidies, determined privately and paid for by the consuming public, as far as I am able to tell, is just a sequence of words, with absolutely no relation to what actually will take place. The interplay of competition, particularly with house brands, will fully control this situation, and I believe I have fully explained the safeguards against the possibility of horizontal agreements among competitors. The number of distributor-controlled house brands covering almost every consumer item in food, hardware, and household goods, would make it impossible as a practical matter to arrange collusive price control. Furthermore, even if this were possible of accomplishment, it would be so obvious, that it would draw immediate attention and prosecution under the antitrust laws.

We have given objective attention to the other statements of opposition to the bill and find little, if anything, that is worhy of comment. These are mostly unsupported conclusions; statements based on obvious prejudice; statements based on lack of knowledge of the economic and legal considerations involved; and self-serving statements which provide no basis for relevant analysis.

There are a few points that have been mentioned in the course of other testimony that has been presented here which I should like to cover very briefly if I might do so. It will take but a minute or so to do it.

Reference was made during part of the testimony to the number of business failures. I have before me the official figures of the U.S. Department of Commerce which appeared in the June 1962 Survey of Current Business. And these figures show that there was a net increase in total business starts over the years 1957 through 1961, and that the smallest net gain was 41,000 in 1961 and 76,000 in 1959.

I would also like to say that in the past 7 years the National Small Business Association has received hundreds of communications about small business problems of all kinds. And the curious thing is that

not one has involved a problem arising out of so-called dual distribution.

In the first place, price discrimination in this area would be a suicidal business policy from an economic standpoint.

The Robinson-Patman provisions against price discriminations are unaltered by this bill.

Furthermore, under the "clean hands" doctrine, no trademark owner could avail himself of the protection of this bill, even if he was pursuing an unfair or unethical pricing policy, whether or not his pricing formula was a violation of Robinson-Patman.

As an attorney I happen to know the facts about two large operations which distribute through company-owned channels as well as through independent channels, and I know that the pricing policy in these two cases is uniform throughout. In fact, I know of some instances where the independents receive discounts which are not available to the company outlets.

Now, reference was also made to one of our opinion polls inserted in the Congressional Record by Senator Javits on January 18, 1960. Such polls are conducted on a continuing basis by the association for the purpose of formulating our legislative policy. This particular poll showed that 52 percent of the membership was opposed to fair trade, and that 43 percent was in favor.

We have known for years that our membership was about evenly split on fair trade, so we took no position on that matter, at least during my tenure of office.

When this quality stabilization bill was introduced, we did not hastily jump on the bandwagon. We distributed information on both sides of the question and took action only after a long period of deliberation, and after a poll of the membership in 1961 indicated a 60-percent majority in favor of the bill.

I wish to point out that when we poll a matter it is done on a perfectly fair basis, with full information on both sides of the question.

Mr. Chairman, we have had some independent studies made at various universities. These have been slow coming in. And one arrived this morning. These are prepared by experts on economic and marketing aspects of this question. And I would like to have permission to insert one in the record at this point as an appendix.

Mr. DINGELL. The committee will be very happy to receive it for the files, and will review it and give consideration to inserting it in the record.

(The material referred to will be found in the files of the subcommittee.)

Mr. GOSNELL. That is all, Mr. Chairman.

Mr. DINGELL. Mr. Van Deerlin, do you have any questions?

Mr. VAN DEERLIN. On the 60 percent favoring, does that mean that 40 percent were against?

Mr. GOSNELL. No, there was a lesser percentage—I believe I have that summation right here—because a certain number do not answer, you know.

I do not seem to have it. I thought I did.

Mr. VAN DEERLIN. Is there any intention to poll again?

Myself, I am getting regularly the answers to these polls that are going on in your organization.

Mr. GOSNELL. Here it is. I have found it. I will give you that percentage.

For the bill there were 59.8, and 34.44 against.

No, we had not planned to continue the poll. Obviously there are so many complicated economic and legal questions involved here. We came to the conclusion that probably we had about as good a cross section as you could get on the subject. So we had not planned to make any repetitive effort in that direction.

Mr. DINGELL. You indicate here in your statement on page 16 that it is your feeling that:

> The number of distributor-controlled house brands covering almost every consumer item in food, hardware, and household goods, would make it impossible as a practical matter to arrange collusive price control.

Mr. GOSNELL. I think it would be extremely impractical in view of the number of competing products under house brands and national brands to get them together.

Mr. DINGELL. If you were the president of company A and I was the president of company B, and we wanted to arrange a little collusive control under this bill, it would be possible for us to meet at lunch and agree that we would price our competing lines at the same level, would it not?

Mr. GOSNELL. It would be under one condition, provided you and I could cut up the entire market.

Mr. DINGELL. Not necessarily; if we could cut up a substantial portion of the market we could do it, could we not?

Mr. GOSNELL. Well, that is not affected by this bill. If they had a monopoly prior to this bill, they would have a monopoly after this bill.

Mr. DINGELL. I recognize that. But we could arrange collusive control?

Mr. GOSNELL. In a monopoly situation.

Mr. DINGELL. So under this bill collusive control is possible, is it not?

Mr. GOSNELL. Not under the bill, in my opinion.

Mr. DINGELL. Well, under the circumstances that would prevail under the bill, collusive price control is possible?

Mr. GOSNELL. I do not see how.

Mr. DINGELL. I do not want to engage in an argument, I just want to get some simple answers here.

As a matter of fact, the answer is that we could arrange to cut up the market, could we not?

Mr. GOSNELL. If we had a monopoly situation.

Mr. DINGELL. If you had a monopoly situation, or if you just controlled a substantial amount of the market, or a substantial amount of the market in a particular area?

Mr. GOSNELL. That is substantially monopoly, as I recognize it.

Mr. DINGELL. Yes.

You also said something that concerns me here, and that is this:

> No relief can be sought until a violator is caught in the act, so to speak, and at this point he will not have enough grounds for defense to justify the expense of litigation.

Now, it is always a concern to me that we should never take away the last defense of a man. And I wonder if this bill is so drawn that an individual who is caught has no defenses that he can assert. And that is what I derive from your statement on this point.

Mr. GOSNELL. I am not quite sure that I understood that, Mr. Chairman.

Mr. DINGELL. I am quoting your statement here. You say:

At this point he will not have enough grounds for defense to justify the expense of litigation.

Mr. GOSNELL. I meant by that that in the case where—in the situation where there is an aggregated case of one of these unfair acts covered by the bill, that it will be so obvious, after so much notice, that if a suit is brought it would certainly not be very practicable or very profitable to waste much money trying to defend against it, because the evidence will have already been collected.

Mr. DINGELL. In other words, you are saying then that the defenses in the bill really do not amount to much for a small businessman who is caught for a violation of the act; is that right?

Mr. GOSNELL. The bill will help the small businessman, that is why there are so many here supporting it.

Mr. DINGELL. I am talking about the small businessman that is going to be sued under this bill.

Mr. GOSNELL. Well, he will be a price cutter or someone who practices unfair competition, would he not? He would have to be.

Mr. DINGELL. You are an attorney, and you know that a man who is being sued is not necessarily guilty of anything; is that not right?

Mr. GOSNELL. That is right. But you would have a hard time getting into court under this bill unless you had a pretty good case.

Mr. DINGELL. I want to discuss with you something else. I think this is a particularly important point here.

On page 6 of the bill, line 17, defendant has to prove that the plaintiff knew others who had been violating the provisions of paragraph (8).

Is this one of the reasons for your comment with regard to the fact that a small businessman would not have enough defense, enough ground for defense to justify the expense of litigation?

Mr. GOSNELL. A defendant would have to prove what, Mr. Chairman?

Mr. DINGELL. The defendant would have to prove that the trademark or brand owner knew that other persons were violating the fixed price. Is that one of the reasons for your comments?

Mr. GOSNELL. I do not follow that at all, sir.

Mr. DINGELL. The defendant, under this bill, the section that I cited to you, has to prove that the plaintiff knew that others were violating paragraph (8).

Mr. GOSNELL. I will have to give that point some study. I cannot answer that offhand, Mr. Chairman.

Mr. DINGELL. Let's return to another section of the bill here.

Page 8, line 3:

Each such currently established resale price and resale price range shall be uniform at each such level of distribution within each marketing area determined by the owner of the brand, name, or trademark.

Now, first of all, this authorizes the brand owner, trademark owner, name owner, to establish marketing areas, does it not?

Mr. GOSNELL. It would appear to, to the extent that he can establish prices, yes.

Mr. DINGELL. And fix differing prices in those marketing areas where it suits his purposes, could he not?

Mr. GOSNELL. How could he do that under the Robinson-Patman Act?

Mr. DINGELL. You are asking me a question. I am asking you a question.

Mr. GOSNELL. I will change the nature of my answer then; I will say that he could not do that under the Robinson-Patman Act.

Mr. DINGELL. Under this statute, which was passed subsequent to the Robinson-Patman Act, it authorizes him to divide the country into marketing areas, does it not?

Mr. GOSNELL. Yes.

Mr. DINGELL. It authorizes a man to cut the country into marketing areas, right, under the language of the bill?

Mr. GOSNELL. It appears to.

Mr. DINGELL. The next thing it does, it authorizes him to charge, under the language of this bill, differing prices to the differing areas of the country, does it not, in these different marketing areas that he has authority to establish?

Mr. GOSNELL. It appears to.

Mr. DINGELL. Now, having established this, we then find ourselves in the situation where a businessman in one marketing area will be compelled to charge, by mandate of his manufacturer, a different price than his competitor in adjacent areas; is that not correct?

Mr. GOSNELL. In my considered opinion, it does not authorize that.

Mr. DINGELL. The language of the bill is very clear on the point, is it not?

Mr. GOSNELL. Not to me; not with that meaning.

Mr. DINGELL. The language of the bill says:

Such currently established resale price and resale price range shall be uniform at each level of distribution within each marketing area—

Right?

Mr. GOSNELL. Yes, that means a uniform price.

Mr. DINGELL. That means he gets to establish uniform prices in marketing areas, and if he gets to establish uniform prices in marketing areas, he can cut the country up into marketing areas, right?

Mr. GOSNELL. That is done now legally.

Mr. DINGELL. But this sanctifies it. And in the present circumstances this is a violation of Robinson-Patman.

Mr. GOSNELL. I do not get that meaning out of it, Mr. Congressman.

Mr. DINGELL. The language in the statute is very clear, is it not?

Mr. GOSNELL. I find nothing in the language that would authorize a price discrimination, if we are talking about one——

Mr. DINGELL. I am not saying "price discrimination." I am saying differing prices in different parts of the country. I will come around to that in a minute.

Mr. GOSNELL. I do not think that per se amounts to price discrimination.

Mr. DINGELL. I did not say it becomes price discrimination, I just say it authorizes him to fix different prices in different parts of the country.

Mr. GOSNELL. Well, I would find nothing wrong with that provided there was no price discrimination involved.

Mr. DINGELL. Now, where is there protection in this bill against price discrimination?

Mr. GOSNELL. Because——

Mr. DINGELL. Do not give me a "because"; where in the bill is there protection against price discrimination?

Mr. GOSNELL. It does not in any way, in my opinion, abate the Robinson-Patman Act.

Mr. DINGELL. I do not see anything in the bill that has any savings clause with regard to the Robinson-Patman Act. You show me the savings clause with regard to the Robinson-Patman Act in this bill.

Mr. GOSNELL. On the other hand, it does not——

Mr. DINGELL. Tell me, now, where is there a savings clause with regard to the Robinson-Patman Act in this bill?

Mr. GOSNELL. Frankly, I had not considered that one was needed.

Mr. DINGELL. You tell me where one is.

Mr. GOSNELL. Well, the absence of it does not necessarily indicate that a savings clause is needed on the point, does it?

Mr. DINGELL. Just a minute.

At least we have a very ambiguous situation, am I correct? You and I sit here discussing this point, and we do not know whether a savings clause is necessary, and we do not know what the courts are going to do with this when they get it, do we?

Mr. GOSNELL. I can say with certainty that there was no intent to open that door, and if the language needs to be sharpened to cover the point, I think that can very easily be done.

Mr. DINGELL. In other words, you feel, then, that it is important that this committee take some action to protect the little businessman from price discrimination under their particular section; am I correct?

Mr. GOSNELL. Well, the purpose of the bill is to produce——

Mr. DINGELL. This is your bill, and I am just asking you a very simple question. I want you to tell me what the purpose of the bill is, and I want you to tell me whether or not it is important we put something in here—now, you are representing little businessmen, I assume.

Mr. GOSNELL. Yes, that is right.

Mr. DINGELL. And when we have this kind of a dangerous ambiguity, I begin to be concerned about my little businessmen and wonder whether or not we ought not to protect them from the jeopardy that they apparently are faced with here.

Mr. GOSNELL. I apparently had not considered that the bill needed a savings clause in that direction or I would have suggested it myself.

Mr. DINGELL. Does it not appear in view of our colloquy that, perhaps, it may very well now?

Mr. GOSNELL. It may well need to be explored.

Mr. DINGELL. Well, I would not say it needs to be explored; in fact, does it not need it?

Mr. GOSNELL. I would like to reflect on it a little further and make my comments later.

Mr. DINGELL. You are here as an expert witness, you are an attorney, I assume you have studied the bill.

Mr. GOSNELL. I certainly have.

Mr. DINGELL. It is a very simple question, and you have found here that there is a dangerous ambiguity; have you not?

Mr. GOSNELL. No; it did not seem so to me. Because I had considered that there was no question about price discrimination.

Mr. DINGELL. Now, you tell me where in the bill there is anything that either acts as a savings clause for the Robinson-Patman Act, or anywhere in this statute there is anything that says that a man may not engage in price discrimination.

Mr. GOSNELL. Before you need the savings clause, you have to be convinced that one is needed.

Mr. DINGELL. All right, you tell me where in the bill there is anything that outlaws price discrimination.

Mr. GOSNELL. There is none.

Mr. DINGELL. There is none.

Mr. GOSNELL. No.

Mr. DINGELL. And at least on the face of it this statute conflicts with Robinson-Patman; does it not?

Mr. GOSNELL. On the other hand, it seems to me——

Mr. DINGELL. Just a minute.

At least on the face of the statute this bill conflicts with Robinson-Patman; does it not?

Mr. GOSNELL. Not to me.

Mr. DINGELL. It authorizes different prices in different geographic areas; does it not?

Mr. GOSNELL. Yes, but that may not be price discrimination.

Mr. DINGELL. Just a minute.

Robinson-Patman outlaws price differentials in different geographic areas; does it not?

You are an attorney, and I am sure you must have read Robinson-Patman.

Mr. GOSNELL. I am very familiar with it.

Mr. DINGELL. Robinson-Patman is that price discrimination in different areas is outlawed; is that not right?

Mr. GOSNELL. To the same class of customers.

Mr. DINGELL. To the same class of customers. That is forbidden under Robinson-Patman.

Now, this authorizes to the same class of customers situated differently, geographically, different prices to be fixed by the manufacturer; am I correct?

It is very simple. The answer is "Yes."

Mr. GOSNELL. It may be, but the point——

Mr. DINGELL. It is not the maybe, it is simply yes, is it not?

Mr. GOSNELL. The point had not occurred to me, but if that door is open, then it should be closed.

Mr. DINGELL. As a matter of fact, to protect the little businessman, it must be closed; must it not?

Mr. GOSNELL. Yes.

Mr. DINGELL. Thank you very much.

Mr. CURTIN. With respect to this recent discussion, under the Patman Act there can be a different price in different localities if you take into consideration the transportation costs. It is well known that in Honolulu you can sell a product for probably three times what you can sell it in Philadelphia or New York City for. Now, that is not price discrimination, as I understand it. Is that your understanding?

Mr. GOSNELL. That is correct, sir.

Mr. DINGELL. But this bill does not say that, does it; this bill says nothing about transportation. It just says you can fix different prices in different geographic areas; is that correct?

Mr. GOSNELL. Yes. You have a point there.

Mr. CURTIN. Mr. Witness, is it not also true that the term "price" is used without saying this price includes so much for the cost of the product and so much for the cost of transportation? So that the general price that is asked for a product in different localities must differ because of geographical location?

Mr. GOSNELL. Right.

Mr. CURTIN. That is all, Mr. Chairman.

Mr. DINGELL. Thank you. We appreciate it.

(The following letter was later received from Mr. Gosnell:)

NATIONAL SMALL BUSINESS ASSOCIATION,
Washington, D.C., May 6, 1963.

Hon. JOHN D. DINGELL,
Commerce and Finance Subcommittee, House Committee on Interstate and Foreign Commerce, House Office Building, Washington, D.C.

DEAR MR. DINGELL: Pursuant to the commitment made during any testimony on the quality stabilization bill, I have given further serious and objective attention to the question of whether the definition of "currently established resale price range" insofar as it relates to the establishment of resale prices "within each marketing area determined by the owner of the brand, name, or "trademark" is a relaxation of the probihitions of the Robinson-Patman Act against price discrimination (lines 4, 5, 6, and page 8 of bill).

The question, therefore, is whether the language of the bill requires a so-called saving clause to make it clear that there is no congressional intent to place any limitation on Robinson-Patman proscription against price discrimination which is predatory in nature or which may injure competition. It is my considered opinion that the tone of the whole bill makes it abundantly clear that there is no intent to abate Robinson-Patman, and it seems to me that this would be clear to any court.

My opinion in this respect is partly based on the language beginning on line 20 of page 6, which provides that it shall be a defense for any defendant "(B) to establish that the plaintiff has sold the same kind of goods of like grade and quality as the goods involved in such proceeding to another person similarity situated under terms more favorable or at lower prices than those under which the plaintiff sold such goods to the defendant."

I fully realize that this language merely set up a defense and does not probihit the establishment of resale prices on a market-area basis; nevertheless, it does provide a significant form of reference to any court required to construe the bill.

It is a well-known fact that, generally speaking, normal market-area price differentials unaccompanied by antitrust violation have not been challenged. It is an accepted fact, also, that there are sound practical cost and competitive reasons why a different marketing area may be established "just across the river," without involving antitrust violation. Factors affecting this merchandising decision may include consideration of the nature of the goods sold, the competitive conditions of the market, lower operating costs, and other cost factors such as scattered outlets, credit, and delivery service, and market factors such as concentration of population, level of income, tastes, and buying habits of con-

sumers, etc. The practical effect of these marketing forces are observable right here in the Washington area.

Any attempt toward literal enforcement of Robinson-Patman under such circumstances would certainly react against the best interest of consumers generally. It is significant that the pricing policies which have evolved in these situations have rarely run afoul of the antitrust laws except where there was an unmistakable predatory intent. There are very solid practical reasons why a trademark owner will not permit his market-area pricing policy to disrupt his distribution system. It seems to me that this is a point which has been overlooked in this legislation. One is apt to conclude that because this legislation confers certain rights upon owners of national trademarks that it can be identified as big business legislation. But one is confronted by the undeniable fact that thousands of small independent distributors are solidly behind the bill. Self-interest is the only possible motive that could generate this much support. They see in this measure not only some degree of protection against unethical pricing, but a chance of stabilizing their margins, at least to the same degree that this can be accomplished by the distributors of house-branded goods. Actually the primary benefit to the manufacturer is protection of his distribution system, and it should be noted that the finest trademark in the world has no value unless it can be moved through a distribution system which is economically and competitively sound.

As to when the establishment of resale prices on the basis of marketing areas would tend to become predatory or result in damage to competition, this is an exhaustive subject. Nevertheless it is not at all difficult to detect the presence of predatory intent. The method may assume many different guises (which is the fact that defeats statutory definition), but the fundamental nature of the antitrust offense remains the same and can be pinpointed by the courts with relative ease.

I am sure that there was no intent in the drafting of this bill to crack the armor of Robinson-Patman. As far as I personally am concerned, I see no benefit nor any harm in making it clear that while the establishment of resale prices on a fair and uniform basis in selected marketing areas is not to be construed as a violation of Robinson-Patman, there is no intent to abate the full force and effect of Robinson-Patman (or any other antitrust statute) with respect to possible violations in setting up marketing areas, or arising out of related acts, which tend toward monopoly, or which tend to damage the competitive environment. This could be fully covered in the committee report without adding surplusage to the bill.

Sincerely,

JOHN A. GOSNELL, *General Counsel.*

Mr. DINGELL. Is there anyone here who desires to file his statement?

Mr. CRUGER. Mr. Chairman, I do not have a statement to file, but I have some very brief remarks that will take about 2 minutes. May I make them?

Mr. DINGELL. Would you not like to submit them for the record? I hate to foreclose you, but we are short of time.

Mr. CRUGER. I just wanted to comment as a small businessman, and not as a professional witness.

Thank you very much.

(The statement of Mr. Cruger follows:)

STATEMENT OF FRANK M. CRUGER

Mr. Chairman, I appear before your committee as a small businessman of considerable experience gained as president of the Indiana Manufacturers Supply Co., Inc., of Indianapolis, Ind. I am also past president of the National Industrial Distributors Association of Philadelphia, and as you know, I am chairman of the board of the National Small Business Association of Washington, D.C.

I do not pretend to be an expert on the legal aspects of this legislation, but I certainly have plenty of first-hand practical knowledge of the problems affecting the distribution industry generally. I would like to point out first that industrial distribution does not follow the traditional pattern of manufacturer to

wholesaler to retailer. Industrial distribution generally moves from the point of origin, or manufacturer, to the distributor, and from the distributor to the ultimate purchaser, which is usually a manufacturer, or other industrial purchaser.

The product line includes many types of light machine tools, industrial equipment and supplies, and it is necessary for many of our salesmen to have training and experience in engineering. Obviously, therefore, this area of distribution does not have the usual retail complexion. For the past 10 years this industry has suffered declining profits, and I believe in 1962 the average profit for the Nation in industrial distribution amounted to less than three-fourths of 1 percent after taxes. As a rule, our manufacturer-suppliers do not deviate from their quoted prices to distributors.

The real tough competition exists among the distributors of industrial goods. Again, generally speaking, the manufacturers who supply the goods we handle make satisfactory profits. The distributor on the other hand, due to severe competition at the selling level, has almost no profit, as indicated above.

I would like to call your attention to the fact that so far as I am aware, this area of distribution is not beset by any of the types of unfair competition which appear in retail distribution, and which have been complained of during this hearing. Industrial distributors have naturally concentrated their efforts on efficiency of operation, minimum personnel, and modern methods of material handling, but despite this effort price cutting has reduced net profits to a very unhealthy basis.

I should mention here that, particularly in the last decade, the National Small Business Association has paid close attention to the distress which has appeared in distribution and wholesaling. We have received many complaints about manufacturers terminating their relationships with distributors who have represented them for years: also complaints that distributors' margins have been cut by increasing costs and competitive pressures to the point of distress. We have given each complaint the closest attention, and it has been very frustrating to find that almost in every case we have examined there is no violation of either law or ethical trade policy.

The association has also closely followed every suggestion made to alleviate these distribution problems, such as the legislative proposal to establish functional discounts, and so forth. We had some independent studies made of the subject, and after considerable deliberation, came to the conclusion that no function or service required in the manufacture and production of goods ought to be subsidized merely for the purpose of perpetuating that particular form of service. We believe that within our competitive process evolutionary improvement should be permitted to operate freely without any paternalistic effort to influence the direction of progress, or to interfere with trends toward more efficient methods of manufacture and distribution.

Now, we come to the real reason why we are in favor of this bill. We are convinced after close attention to the potential effect of this legislation, that it will tend toward greater stability in our distribution of industrial supplies without interfering with the free play of competition. This basic function which we perform is a service that must be rendered—at least no one has come up with a more efficient method. It is reasonable to expect, therefore, that those who perform the service are entitled to a reasonable return for the effort.

Now, there is certainly no need here for Federal regulation of prices. On the other hand we do believe there is a Federal duty to equalize the regulatory policy with respect to distribution of house brands and distribution of national brands. We believe that competitive products should be allowed to seek their own price level on the basis of product competition without the handicap of intrabrand price cutting imposed on one segment of distribution.

After thorough study of the quality stabilization bill, we believe that this phase of the problem will be greatly helped, if not largely eliminated, by this legislation. At the same time our competitive system will not suffer because the machinery of the bill cannot become operative unless product competition does exist. I do not see how we could devise a better way to protect the functioning of our competitive system, and at the same time promote a degree of order and stability in our markets.

I believe the lesson we are beginning to learn is that unrestrained competition, even though there may be no unfair competition, nor any violation of existing national policy, does not necessarily lead to the best interests of the national

economy. As we have definitely seen in my industry, employment has suffered simply because we do not have the profit necessary to employ the people we could use. I know of many cases where industrial distributors and wholesalers have decided to close their doors because they can no longer pay their basic overhead. You can see, therefore, that although this phase of distribution is confronted with an entirely different problem, we have a good sound reason to strongly support this bill. It stands to reason if a substantial segment of distribution in this country is able to avoid intrabrand competition demanded by the Federal enforcement agencies, our segment of distribution should not be the victim of an unsound and discriminatory theory of regulatory enforcement.

I would just like to touch on one point mentioned by Chairman Dixon of the Federal Trade Commission—he repeatedly referred to the fact that where a distributor purchases goods from a manufacturer, the title passes, and from that point the distributor should be able to set his own price at any level. In the first place, although the distributor may acquire title to the goods he certainly does not acquire title to the trademark he buys. Trademarks have been protected all the way to the ultimate consumer for many years in recognition of the right of the trademark owner to protect the trademark and the goodwill which it represents at any stage in the flow of commerce. Furthermore, we now see throughout the whole area of distribution which has to struggle with intrabrand competition that senseless price cutting, that is unrestrained competition on an intrabrand basis, can have pronounced adverse effects on the economy as a whole.

At this point I would like to quote from a very pertinent editorial from the Wall Street Journal of April 23, 1963:

"The small, independent businessman may be wondering whose side the Federal Trade Commission is on anyway—his, or his chainstore competitors.

"One of the ways small businessmen compete with the chains is by use of cooperative advertising programs. A group of independent merchants, for instance, may pool their advertising funds and jointly buy ads in newspapers or other media. A typical co-op ad will list the names and addresses of participating retailers and give specific prices for specific products.

"But the FTC has ruled that any cooperative advertising offering the same product for sale at the same price at several independent stores could be considered as evidence of price fixing. So the participating advertisers run the risk of criminal prosecution under the antitrust laws * * *.

"Nor is it (cooperative advertising of identical prices of the same brands) quite the sort of practice the antitrust laws were designed to prohibit.

"Rather, the ruling amounts to a pesky interference with a widespread and accepted business practice, and it looks specially strange coming from an agency that's supposed to be the small businessman's protector."

I appreciate this opportunity to extend these remarks, and hope our problem will receive your favorable consideration.

Mr. DINGELL. Is there anyone here who desires to file a statement? [No response.]

I will call on Mr. T. H. Murphy of the Home Shop.

STATEMENT OF THOMAS H. MURPHY, PRESIDENT, THE HOME SHOP, RICHMOND, VA.

Mr. MURPHY. Mr. Chairman, I do not have a prepared statement. I will try not to be too lengthy, and try to cover some points that may be of interest to everyone.

I have felt very proud, the last few days, being here. I have never been talked about so much in my life. I am one of the small businessmen. I am one of the statistics that have been talked about quite a bit.

My name is Thomas H. Murphy. I am president of the Home Shops of Richmond, Va.

About 6 or 7 years ago I left a retailing job with a major department store in the area, one that I was controlling approximately $1

to $2 million worth of volume annually. I got the funny idea that a fellow today could make a few dollars on his own hook in the retail business. So by begging, borrowing, and stealing, I was able to accumulate about $25,000 worth of capital, which is a mammoth sum, I am sure you all agree.

We started with a small business of approximately 4,000 feet. And we have developed to the point where we now have three small stores. We are still small business, because they are small stores in comparison to the giants that we have for competition today.

There have been many things discussed, and many things have confused me, and I had certain things I wanted to talk about. And, possibly, some of my remarks will be a little disjointed.

We have discussed what the small businessman wants from the legal angle, from the Congress angle, from the Government angle, from the FTC angle. I will tell you very frankly, gentlemen, what the small businessman wants.

We want to stay in business and we cannot today. I have seen a business that I have worked for for 7 years in the last 6 to 8 months, because of outside pressures from giant merchandisers, slowly go down the drain. I do not think it is because I do not know merchandising; I have been in it for 20 years. I sold at the retail level; I sold at the specialty shop level; I was buyer and department manager for department stores.

I believe I know the business, and deep down in my heart I believe I can merchandise with anybody. I cannot compete with their money. When they have millions of dollars behind them they can do anything they so desire; we cannot. As a small businessman we need some protection.

Now, whether it is the quality stabilization bill or whether it is YX's bill I do not care. I am interested in one thing, something that will give the small businessman the right to be a merchant again. We are becoming a country of hucksters. We are not merchants any more. We take the merchandise and do anything with it. You have heard the discussion about loss-leaders and nail-downs, switch-ups, switch-downs, sellouts. You name it, it is being done.

As just an example, this happened just 3 days before I came to Washington. We carry a famous make high chair. The best possible price we can buy that for is $7.50. This famous make high chair was advertised by a local giant for $6.88. I sent my girl up to buy some, because I could buy them from him cheaper. The doors opened at 10 o'clock, she was in at 10:05, and there were no high chairs.

This, in my opinion, is not competition, this is stupidity, that we permit in a country such as this things to go on like that.

I can name hundreds of things that have happened, many, many others, that affect the small businessman. And it is not whether the legal phrase is right, or this is right, or that is right, it is the thing that is actually happening that is squeezing the lifeblood out of small business. Small business was built on one thing—the salesman—and that is what I am. I have never known anything else.

The industry, the market today that these giants are massacring was built by the salesman, and by the small businessmen. We still have a long way to go in our market. There are many new developments

to be brought about—the waterless washer, the electronic oven, and thousands of other things.

Who is going to sell them? Who is going to create this market that is necessary to continue the economy that we have in this country? Not the mass merchandiser. He likes to ride on the things that have already been established. He will not take an item and develop it. He will not spend the time, or the money, or the advertising to develop a product. It is up to the salesman, the creative merchants of this country.

It is because of the creative merchants of this country that you have at home a washing machine, a vacuum cleaner, and many other things.

Do you remember when the automobile came out? One of the big sayings at that time was "Get a horse." No one bought the automobile just because someone made it.

Mr. DINGELL. Mr. Murphy, I am very interested in your comments, and I think you are making a very useful statement to the committee, but I am sure you understand that the committee is going to be faced with an adjournment; we are only permitted to sit during the debate, and I would appreciate it if you would devote yourself to a discussion of the legislation.

Mr. MURPHY. This is a discussion of legislation, and this is my life-blood. And if this is not a discussion of it, what is it?

Mr. DINGELL. I am asking you to devote yourself to a discussion of the legislation which we have here, of H.R. 3669. We have had a great deal of testimony on the economic conditions. And I can assure you that every member of this committee is keenly aware of this. But we are anxious, if possible, to get your comment on H.R. 3669, the legislation which is presently before this committee.

Mr. MURPHY. That is what I am here for.

Mr. DINGELL. I hope you will address yourself as closely as you can to the bill.

Mr. MURPHY. As I was saying, these markets have to be created, they have to be developed by someone. The only way these markets can be developed is by a retailer, a manufacturer, or who it might be, with some type of control. It has to be a control that will permit them to make a profit, because there is much that has to be invested in order to develop them properly.

To develop markets it takes advertising, it takes salesmanship, it takes everything that goes with it. And this bill that we have been talking about, which is supposed to help the small businessman, is what we need in order to give us the ability to develop markets.

Price control from the standpoint of the Hawley stabilization bill or any other bill is essential so that a man can feel that he can take the time and effort to develop a market, create a market, and do some creative selling, and not just depend on price alone. We can no longer depend on price alone to build the market we need in this country. We must have something to permit a manufacturer to be able to spend this money, develop things and allow a retailer to make a normal profit.

Profit is a very important part of our economy. I am sure you realize that without profit there are no taxes, without taxes there is no government, and without government we have nothing but chaos.

Thank you, Mr. Dingell.

Mr. DINGELL. The committee is very appreciative of your statement today, sir. And we are going to bear your comments very carefully in mind.

Mr. Van Deerlin.

Mr. VAN DEERLIN. I was quite impressed by the witness. I think that a man freewheeling like this rather than reading into the record a prepared script——

Mr. MURPHY. I am sorry that I was stopped; I had some other points that I would have liked to have brought up.

This is serious, I have lived this for 20 years. And I cannot tell you a story in 5 minutes. My life is more important than this.

Mr. VAN DEERLIN. I think you did mighty well with the time you had.

You mentioned especially the loss leaders and switch ups and switch downs and sellouts, and so forth; those were the particular points of grievance for you. And I wondered if you had, in looking over the legislation offered as the quality stabilization bill, felt that the proposed legislation adequately meets these grienvances; whether it does this and much more—and what you think of the much more that it does.

Mr. MURPHY. I definitely do think it—I do not say that this bill is going to be all things to all men, I do not think any bill can, as I am sure you realize. I think this is a big step in the right direction, though, to create a bill that will give this protection that we need.

The manufacturers that we deal with and that most small businesses deal with are very realistic manufacturers, and they have built their lines on being very honest. We talk about many things that a manufacturer might do. I have dealt with manufacturers for years, and I do not feel that they would want to commit suicide in merchandising any more than you folks would want to commit political suicide. And it could very easily be done by assuming or stating that a manufacturer would so some of the things we have stated here that he might do. They are in business to make a profit just the same as I am and many other people are. And there are things that are good business and there are things that are bad business. And the manufacturer wants volume, he wants to sell merchandise. He will do nothing to jeopardize that.

Mr. VAN DEERLIN. The purpose of legislation is to meet specific needs and not to——

Mr. MURPHY. Yes, sir.

We have a need so that we can continue to sell. We have lagged in the last few years, selling. There is no more selling. It is strictly, "Mrs. Van Deerlin, come in, we have a hair dryer that is $45.80," but Mrs. Van Deerlin does not have any idea of what the hair dryer will do, and there is not enough profit in it for anyone to tell her what it is.

I just use that as an example, but there are thousands of things that manufacturers will bring into a deal, and there is no one to take the time to show the customer what to do.

Mr. VAN DEERLIN. It has been my experience that Mrs. Van Deerlin takes entirely too much on faith.

Mr. MURPHY. Absolutely. You can spend your dollar with a good salesman and get much more for your dollar than you will ever get just by price. There are many products on the market today that it

takes some knowledge of the product, some information about the product, for you to really get your dollar's worth.

Mr. VAN DEERLIN. And yet you will concede that the purpose of legislation must be to meet specific needs and not to shorten them?

Mr. MURPHY. Yes, sir.

Mr. VAN DEERLIN. Some of these grievances are subject to State and local controls, and I was wondering whether——

Mr. MURPHY. In reference to this loss leader, and so forth, most of this has been discussed many times with the Better Bussines Bureau in that area, which also in turn has discussed it with the FTC. But because of problems—because of the enormity of the situation and the fact that people do not have time to do anything about it, and can take only certain things at a time, it is not done. But naturally it will be done when I am gone.

Mr. VAN DEERLIN. Thank you, Mr. Chairman.

Mr. DINGELL. Mr. Curtin.

Mr. CURTIN. Mr. Murphy, I want to congratulate you on your statement. You presented your problems very well.

A am uncertain as to the type of stores you operate. Do you have specialty stores or do you sell general merchandise in those stores?

Mr. MURPHY. We have a small store in shopping centers.

Mr. CURTIN. What kind of merchandise do you sell?

Mr. MURPHY. We sell mostly hard lines—in fact, everything in the hard lines, housewares, hard lines, applicanes.

Mr. CURTIN. Just a general store, you do not specialize in any particular type of product?

Mr. MURPHY. No. I only specialize in running up against discounters. I think that is my basic business.

Mr. CURTIN. You have told us what is wrong in this field. I certainly can sympathize with your problem.

Would you tell us just how you feel that this bill is going to help you, just specifically how do you think it is going to be any advantage to you?

Mr. MURPHY. As I mentioned before, we deal with what I call the best and the top manufacturers in the business. I believe they are honest, they want to do an honest job for the purchaser. And a lot of them today are still, through much expense to themselves, controlling their prices.

I do not know if I am permitted to mention lines here or not. But many of them are——

Mr. CURTIN. If I could just interrupt you for the sake of brevity, do you find that it is in the famous name or wel-known brand name that you suffer a lot of the so-called "loss leader" problems?

Mr. MURPHY. Yes, sir; the lines we do the best with are the famous name lines that are still controlled.

As I say, they do control them, at much expense to themselves, and we do our best job with those. And the customer gets their best value with those.

Mr. CURTIN. My question is whether or not there is a lot of this discounting on these famous, or brand names.

Mr. MURPHY. I misunderstood your question, I am sorry, sir.

That is where they are cutting the heart out of us, because there are so few famous name lines left today that permit us to do a selling job.

Mr. CURTIN. Thank you.

That is all, Mr. Chairman.

Mr. DINGELL. Mr. Murphy, the committee is very grateful to you. If you feel that you have been stopped short of your purpose, if you do have anything else to say, we will be very happy to hear it. But I want you to understand that we will probably be receiving a call from the floor in a few minutes.

Mr. MURPHY. I realize the problem, sir.

Mr. DINGELL. As you know, I am opposed to this legislation.

Mr. MURPHY. From your comments I would never assume that.

It is so seldom that a person like myself ever gets an opportunity like this. And I just wanted to say a few words.

Mr. DINGELL. I am delighted that you did. I am keenly aware of the problem. I have a district full of small businessmen who face not a dissimilar problem.

I am wondering, how would this stop the problem that you had with the high chair, this bill?

Mr. MURPHY. The high chair, for example, this manufacturer is in favor of supporting legitimate retail prices.

Mr. DINGELL. In other words, he would want a price support?

Mr. MURPHY. He would have established a legitimate retail price at which it would be advertised or promoted or sold.

Now, this has happened for years, and has been and still is with many lines a very satisfactory operation. And it is not giving the customer a hooking, because even though they advertised it for $6.88, you could not buy it.

Mr. DINGELL. You have mentioned loss leaders. Will this bill stop loss leadering?

Mr. MURPHY. Not necessarily, sir. Loss leadering in some cases is good merchandising. But the use of famous names for continuous loss leaders is killing merchandise.

Mr. DINGELL. Do you loss leader?

Mr. MURPHY. Sometimes, for Richmond Day, Washington's Birthday, sometimes like that. It depends upon your actual classification of loss leader.

You can sell an item a penny under cost or at a profit of a penny. It is something that is used by any good merchant. But it is an item that does not destroy an image. It may be an ice cube, as a case in point, with no manufacturer's name connected with it, selling for 18 cents, if you want it.

Mr. DINGELL. Did you hear my discussion with Mr. Gosnell?

Mr. MURPHY. Yes, sir.

Mr. DINGELL. Do you want to see your price fixed at one level, that of competitor, and in the adjacent marketing level fixed either higher or lower?

Mr. MURPHY. I believe I answered that partially before. Market areas established by any well accepted national manufacturer—and when I say well accepted, I do not mean only by the industry, I mean by the people—they have had to operate in such a way to create a good

business, they have built a business. They cannot create market areas that will be disturbing. They will have to create market areas, though, due to cost of transportation and so forth, but they usually establish it in such a way——

Mr. DINGELL. This is one of the things that concerns me about this bill.

Assuming that we were to give the differential for transportation and the legitimate marketing costs that the manufacturer had, is it your feeling, then, that the costs of the merchandise fixed across the country should be fixed as a uniform level allowing credit for the legitimate charges like transportation and things of that sort?

Mr. MURPHY. I believe that is what the bill is trying to imply, sir, the fact that it would take into account in certain areas due to freight and things of that sort.

Mr. DINGELL. Mr. Murphy, the committee is grateful to you for your presence.

Mr. MURPHY. Thank you, sir. It was a pleasure.

Mr. DINGELL. The Chair will recognize for a brief period at least Charles F. Fort, president of Food Town Ethical Pharmacies, Inc., Baton Rouge, La.

Do you have anyone with you, Mr. Fort?

Mr. FORT. Mr. John Schwegman, Jr., will testify with me.

Mr. DINGELL. Gentlemen, you may proceed.

STATEMENT OF CHARLES F. FORT, FOOD TOWN ETHICAL PHARMACIES, INC.; ACCOMPANIED BY JOHN SCHWEGMAN, JR.

Mr. FORT. Mr. Chairman, I would like to explain, with the permission of the chairman, that Mr. Schwegman and I are submitting a joint statement in which Mr. Schwegman and I concur on the objections to the bill, H.R. 3669.

The other remarks which I will make relative to my company with respect to this bill and its objections to it will affect only my company, and the same applies to him.

If that is agreeable to the chairman, we would like to proceed it that way.

Mr. DINGELL. Very well.

Mr. FORT. For the sake of brevity, I would like to have the statement received in full in the record, and I would like to touch on some of the points which we think are important in our objections to the passage of H.R. 3669.

Mr. DINGELL. Without objection it is so ordered.

(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 11 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.

EXPERIENCE REVEALS THAT 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 permitted 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 conspiracies and agreements on a horizontal plane between competitors, especially when the power to fix prices is delegated to manufacturers.

Retail competitors exerted pressure on 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 has been 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 our competitors on fixed prices dictated by manufacturers.

Our policy compels the highest professional standards 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. We do not feature private brands.

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.

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 enforceable 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 their 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, nor did they fair trade their products.

What price-fixed brand is held in higher esteem than these? What price-fixed trademarks sell in greater volume?

Libby's, Carnation, Kellogg, Chrysler, Borden's Ford, Del Monte, Hormel, Lipton, Kraft, Campbell's, General Motors, Firestone, Quaker, Heinz, Armour, Swift, Goodrich, and many, many others.

The aforementioned trademarks, never price fixed, are honored, bought, and sold in great quantity by thousands of small resellers.

The contention in the Quality Stabilization Act 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 above.

The aforementioned famous brands refute other allegations in the Quality Stabilization Act 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 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. 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 or representatives of the people.

As a businessman who buys and sells goods, I am vigorously opposed to the Quality Stabilization Act, and recommend that democratic and capitalistic measures be employed to aid the small businesses of America.

Passage and extended use of the Quality Stabilization Act eventually might mean that brokers, distributors, wholesalers and retailers could not obtain title to their labeled inventory.

What would happen to the balance sheet?

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 and paragraphs 8 (A), (B), and 8(C) define 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 methods of distribution.

(*a*) Bait merchandising practices.

(*b*) It will be illegal for anyone (broker, distributor, wholesaler, or retailer) to sell "owners" goods at prices other than those prices including and between the minimum and maximum resale prices or the currently established resale price.

(*c*) It will be illegal to publish misrepresentation concerning "owners" goods, with intent to deceive purchasers.

MANUFACTURERS WILL BECOME CENSORS

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 now serve the alleged purposes of this bill, so it seems apparent that its real purpose is legalize price fixing by manufacturers.

What is bait advertising? The quality stabilization bill empowers the manufacturers of the U.S. 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 U.S. 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, or 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 Federal law to empower private individuals to dictate and limit freedom of speech while serving as censors of advertising.

MANUFACTURERS CANNOT FIX A FAIR PRICE, EVEN WITH A MINIMUM AND A MAXIMUM—MANUFACTURERS' DICTATED PRICES FOR BROKERS, DISTRIBUTORS, WHOLESALERS, AND RETAILERS CANNOT ACCOMMODATE GREAT VARIATION IN COST OF DOING BUSINESS

The Quality Stabilization Act empowers the manufacturer to fix currently established resale prices for brokers, distributors, wholesalers, and retailers.

In this country's 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 businesse 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 price 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 made $2.50 on the same $10 sale. The manufatcturer's fixed price was too low and too high.

The strength and surplus of the discount operator continue to grow as he applies his 500 percent greater net profit to advertising and merchandising tech-

niques 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. This bill can damage the small businesses in this country.

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 legitimate discount house.

The following aproximate cost of operational information further illustrates the impracticability of fixing an equitable price for every type of business:

	Percent [1]
Department stores	36
Drugstores	28
Food Town Ethical Pharmacies, Inc	17
Big discount houses	12

[1] Cost of operation.

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.

CURRENTLY ESTABLISHED RESALE PRICE RANGE—HIGHEST, LOWEST, AND IN BETWEEN

As described in paragraph (14) (D), the phrase above would permit the manufacturer to fix a price range from which a broker, distributor, wholesaler, or retailer may select a price for his level of distribution.

This feature seems designed to infer that manufacturers will use the "resale price range." Some may desire to do so, however, the practical benefits are doubtful because, for example, the retailers with the highest cost of doing business will put pressure on the manufacturer to fix one price to accommodate the highest cost of operation.

In my opinion the result will be one fixed high price, as the distributive pressure will prevent manufacturers use of a fixed lower price.

COST OF ENFORCING THE QUALITY STABILIZATION ACT 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."

These objections would apply to the Quality Stabilization Act.

THE QUALITY STABILIZATION ACT WILL COST CONSUMERS MILLIONS

If this bill is passed, many prices in 26 States and in the District of Columbia (all now free of price fixing) will be increased from 20 to 30 percent or more. The estimated cost of the Quality Stabilization Act per family ranges from $100 to $250 a year, or more. Statisticians report that $2.5 to $6 million is a conservative estimate of the increase in consumer costs in the 26 States which are now free of price-fixing laws.

BIG DISCOUNT AND MAIL-ORDER HOUSES WERE AIDED BY PRICE FIXING—QUALITY STABILIZATION WILL ASSIST THEM ALSO

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 home town. 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. Quality stabilization will perform the same function.

PRICE FIXING BY MANUFACTURERS DEFINITELY HARMFUL TO SMALL BUSINESS, AS PROPOSED BY QUALITY STABILIZATION

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.

For example, vitamin mineral preparations sales are important to the small drugstore. Vitamins are one of the biggest volume items. House-to-house salesmen sell millions of dollars worth a year. Mail-order and discount houses also take their toll by selling their low price private brands. As a result, drugstores and small business sales are reduced.

PRICE-FIXING QUALITY STABILIZATION 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.

PRIVATE BRANDS OF BIG BUSINESS

The big operators penalize the small retailer with big newspaper advertisements which entice the consumer to buy 100 private brand 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 large mail-order house, offering a 30-day supply of vitamins free.

The small businessman is faced with tough competition on prices from—

1. House-to-house man (not price-fixed) (private brands).
2. Big national chains (not price-fixed) (private brands).
3. Mail-order houses (not price-fixed) (private brands).
4. The big discount houses (not price-fixed) (private brands).

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 labels? 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 Drugstore vitamins were as good as those made or packaged 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 Act would rob the small man of his best competitive weapon:

Low prices on nationally advertised brands.

Vitamins were used as illustrative of conditions involving thousands of items in small stores.

LOW COSTS AND RAPID TURNOVER—GOOD PROFIT WITHOUT CHEATING OR FIXING PRICES BY FEDERAL LAW—BUSINESSMAN'S BEST WEAPON

Unit turnover comparison:

Fair trade in cost-of-sales comparison—Quality stabilization

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) (some retailers—32 percent)	37.50

Mass distribution in same cost-of-sale period

Investment-inventory	$100.00
10 turnover sale price (5 percent over cost)	105.00
Total sales volume (10 unit gross $50.00)	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 dollars-and-cents cost of operation, demanding that fixed costs and 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 volume retailer closer and closer to this dollar-making utopia.

Obviously large-volume sales and large inventory will not perform this feat; turnover and productive operating costs are the effective factors.

Price-fixing quality stabilization prevents the small businessman from using this technique, which is his most effective competitive weapon.

PRICE-FIXING (QUALITY STABILIZATION) ESTABLISHES HIGHER PRICES, AS MANUFACTURERS COMPETE TO GIVE HIGHER PROFITS TO EACH LEVEL OF DISTRIBUTION

When the power to fix 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 quality stabilization items must be in competition with items in the same general class.

For this valuable favor the retailers, distributors, and wholesalers give manufacturers their goodwill and their business. Then different manufacturers individually and collectively (by following the leader) begin to compete for the goodwill and business from those in their system of distribution by offering higher fixed fair trade (quality stabilization) prices and more profits for all. There develops a type of competition to determine which manufacturer can offer the highest profits under fair trade (quality stabilization) prices as high as the traffic will bear. The winning manufacturers get the most business and goodwill.

This process results in the practical fixing of prices on a horizontal basis between competitors; actual price competition is eliminated. It also forces prices upward.

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 because of high distribution costs 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 goodwill at higher cost to the consumer.

Any price-fixing legislation will result immediately in substantial increases in the cost of distribution and therefore in consumer prices.

If enforced at Food Town Ethical Pharmacies, the Quality Stabilization Act would mean retail price increases of from 19 to 50 percent immediately.

NIRA PREFERABLE TO DELEGATION OF PRICE-FIXING POWER TO MANUFACTURERS

Small businessmen and consumers probably would benefit more by Federal bureaucratic price fixing similar to NIRA.

(*a*) Consumer pressure could be exerted through representative government eventually to the appropriate price-fixing 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 quality stabilization.

ANTITRUST ACTS SUSPENDED TO PERMIT HORIZONTAL PRICE FIXING AND CENSORSHIP BY MANUFACTURERS

The Quality Stabilization Act 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.

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 as a result of the follow-the-leader process.

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 manufacturer.

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 in Louisiana before it was invalidated by the State supreme court.

Manufacturer	Wholesale fair trade fixed	Retail fair trade fixed	List
Lilly	$30.60	$45.90	----------
Lederle	30.60	45.90	----------
Parke, Davis (and others)	30.60	45.90	$51.00

Steam and dry irons

Manufacturer	Wholesale	Quantity wholesale	Retail
General Electric	$12.57	$12.12	$17.95
Sunbeam	12.57	12.12	17.95
Westinghouse (and others)	12.21	11.67	17.95

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 Act 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 8 of the Quality Stabilization Act—goods usable for the same general purpose.

"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 mater, and by court decisions, this alleged public protection has proven useless in many retail areas. The phrase "same general purpose" is too broad and compelling; consumer demand eliminates the "same general purpose."

EXEMPTION (16) (D) FOR DOCTORS' PRESCRIPTIONS MAY BE ELIMINATED IN CONFERENCE TO CONFORM TO S. 774

My opposition to quality stabilization price fixing by manufacturers includes all merchandise, but is especially objectionable as it relates to manufacturers' fixing of prices for doctors' prescriptions.

Even though H.R. 3669 (16) (D) excludes prescription price fixing, the Senate version (S. 774) is reported to include prescriptions. In view of the possibility that prescription price fixing may be included in the conference version of both the House and Senate quality stabilization bills, our views opposing it are contained in this statement as pertinent information.

A recent trade publication reflected the determination of some proponents to include prescription price fixing, quote:

"If pharmacy remains united and will tell Members of Congress that it wants prescription drugs covered by the pending quality stabilization bill the differences between House and Senate versions of the measure probably can be reconciled * * *."

It was also reported, quote:

"It is the hope of the NARD leadership that this difference between Senate and House bills can be reconciled in joint conference committee in favor of the Senate version."

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 eight simulated prescriptions attached to this statement illustrate the absence of protection 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 Ethical Pharmacy price. The generics are not price fixed, fair traded. Note that prices vary in some instances more than 1,000 percent. These comparisons do not infer a recommendation or condemnation of generics, as we do not dispense them except on physicians' specific instructions because most of the physicians in our area prescribe nationally advertised, patented pharmaceuticals—brands which can be trusted.

By nature, a doctor's prescription (some shown in attachments) 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 Act 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 Act 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. 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 prescription—ed.)

This question 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.

158,000 U.S. PHYSICIANS AND MILLIONS OF CONSUMERS COULD BE VICTIMS OF THE PRESCRIPTION PHARMACEUTICAL MONOPOLY

Because the Federal Government inspects approximately 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 and there is no product "usable for the same general purpose."

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 high 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 and costs, 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 or more or less of sales for advertising and promotion, and 8 percent or more or less of sales for research as 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, especially as related to monopolies, i.e. patented products requiring a doctor's prescription.

It is most undersirable to empower any manufacturers to fix wholesale and retail prices as reportedly specified in the Senate version of Quality Stabilization Act this year.

American consumers spent $1,800 million for prescriptions in 1958; $2,058 million in 1959; and $2,043 million in 1960; $2,255 million in 1962.

The number of prescriptions has increased more than 300 percent since 1940, with the average retail price now $3.21. It is one of America's best buys, even if they may be priced too high under legalized price fixing in many States.

The Quality Stablization Act would permit prescription price fixing by manufacturers in 50 States for wholesalers and retailers whose cost of operation varies from 12 percent to 36 percent * * * at a time when costs vary even more because of the fact that approximately 92 percent of these prescriptions are dispensed as manufactured, and only about 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 professional capacity of tremendous responsibility and trust, which demands the most exacting professional ability.

The Senate version of this act reportedly would, but should not, empower manufacturers to fix the pharmacist's price and his professional fee, which in some instances might be too low.

CONVICTION OF NORTHERN CAILFORNIA PHARMACEUTICAL ASSOCIATION EXEMPLIFIES MANNER IN WHICH PRICE FIXING RESULTS IN ILLEGAL HORIZONTAL PRICE AGREEMENTS

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 the Senate version (S. 774) of this price-fixing Quality Stablization Act, the prescription pricing process described above probably would be legal, provided manufacturers fixed the retail prices of their prescription pharmaceuticals.

THE QUALITY STABLIZATION 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 (1961 data) socialized and price fixed

Number of prescriptions	230,000,000
Dollar value	$191,000,000
Average price-fixed selling price	$0.83
Cost to patient	.14
Paid by Government	.69

In the United States (1962 data)

Number of prescriptions	702,000,000
Dollar value	$2,256,000,000
Average selling price	[1] $3.21

[1] Approximate.

The quality Stabilization Act would increase prescription prices in my company's stores 50 percent to several hundred percent. Prescription prices will increase nationally under quality stabilization, especially in the 26 States now without price-fixing laws.

Consider the overtaxed consumer, now struggling with a 43-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 $3.21. He may remember reading about the $23.63 price of 1,000 tablets to the U.S. Government, compared to the $170 price for the same 1,000 tablets to U.S. drugstores.

QUALITY STABILIZATION IS NOT THE SOLUTION—BUSINESSMAN'S RECOMMENDATION FOR SMALL BUSINESS ASSISTANCE

The authors of quality stabilization bill H.R. 3669 and S. 774 are to be complimented for their sincere desire to help small businesses succeed in the highly competitive marketplace.

Our experience as a small business, which is typical, has convinced us that Federal laws empowering manufacturers to fix price on all branded merchandise are not the solution for the many reasons discussed in this statement.

SMALL RESELLER BUSINESS TAX BENEFITS

1. Under $100,000 sales annually, which is more than national average for drugstores in United States.

(*a*) Whether these very small businesses are proprietorships, partnerships or corporations (90-percent owned by the active operator-manager), their profits should be excluded from Federal corporation taxes and $100,000 bracket small business should exempt its active owner, active partners or 90-percent stockholder (active manager-operator) from all income taxes on income derived from the one small business (25-percent salaries and net) (now averaging 5-percent net).

(*b*) Eligible businesses should be defined as resellers of products, 60-percent of which must be manufactured in the United States.

2. Small Resellers with annual sales of $250,000 or less.

(*a*) Graduate above formula.

3 Small resellers with annual sales of $500,000 sales annually, special tax formula; $1 million sales annually, special tax formula; and $2 million sales annually, special tax formula.

LABOR WOULD BENEFIT, AS WOULD FARMERS AND PROFESSIONAL PEOPLE

1. Quality Stabilization will take extra millions from the aggregate income of these groups.

2. Federal tax reduction plan would reduce the labor market by encouraging entire families to work in a very small business, so they could benefit from the average 20-percent payroll which would be tax free to the active proprietor, partners, and 90-percent active stockholder.

CHANGE SMALL BUSINESS LOAN REQUIREMENTS

Present small business loan requirements do not serve the purpose of aiding new small businesses.

A new business obviously cannot meet the requirement of showing a period of profitable operation; it usually cannot offer sufficient collateral.

Changes in this law should offer a solution for a pharmacist, for example, when he graduates. A small business loan to him personally would be secured by his character, education, ability, and the probability of the success of the venture he plans. Cash required of him should be nominal and interest rates low. The repayment plan should be extended.

Operating under the proposed Federal tax plan for small business, this pharmacist, properly capitalized, could compete successfully with his big competitors. To the extent of his productivity, his payroll would be tax-free profit.

THERE IS A BETTER WAY TO STRENGTHEN THE SMALL BUSINESS COMMUNITY THAN QUALITY STABILIZATION

Application of the ingenuity of Senators, Congressmen, NARD and other reseller groups is needed urgently to produce a solution without empowering one economic group to fix all distributive prices of branded merchandise at higher levels to accommodate the highest cost of reselling merchandise.

QUALITY STABILIZATION MORE DAMAGING TO STATES RIGHTS THAN FAIR TRADE NONSIGNER CLAUSES (IN EFFECT—QUALITY STABILIZATION)

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 Act makes nonsigners of all affected brokers, distributors, wholesalers, and retailers.

1. Four States never passed fair trade price-fixing laws—Texas, Missouri, Alaska, and Vermont.

2. One State repealed, Nebraska.

3. Twenty-one State courts declared unconstitutional: Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, New Mexico, Oklahoma, Oregon, South Carolina, Utah, Washington, West Virginia, and Wyoming.

Twenty-six States thus have repudiated price fixing tantamount to quality stabilization. Two States, Idaho, and Ohio, are now not fully determined (Trade Regulation Reporter, February 18, 1963).

The Quality Stabilization Act empowers manufacturers to fix wholesale and retail prices against the decisions of State supreme courts, and the wishes of the people in 26 and possibly 28 States.

STATES RIGHTS AMENDMENT IS REQUESTED

The subcommittee is requested to recommend the adoption of the States rights amendment which was adopted last year by the House Interstate and Foreign Commerce Committee, as offered by Representative Joe Kilgore, of Texas, so that quality stabilization will not be forced on States in which resale price maintenance is prohibited by State law, State constitution, or State court decisions (such as Louisiana where State supreme court declared fair trade nonsigner clause unconstitutional in the Schwegmann case).

REQUEST UNFAVORABLE REPORT ON H.R. 3669, THE QUALITY STABILIZATION ACT

However, if this subcommittee votes the bill out favorably, we urgently request that the subcommittee specify that doctors' prescriptions be excluded.

It is requested further that the subcommittee specifically record its vote against including prescriptions in conference.

THE PLEDGE OF OUR COMPANY

The citizens of Louisiana have our sincere pledge that we will resist, in every legal manner, any law which delegates to manufacturers authority to fix prices for brokers, distributors, wholesalers, or retailers.

The officers, management, stockholders, and customers of Food Town Ethical Pharmacies, Inc., sincerely and respectfully urge your vote against the Quality Stabilization Act, and any bill which delegates price-fixing power to any economic group.

ATTACHMENTS

THE PUBLIC DOES NOT KNOW
THEREFORE
THERE IS NO PROTECTION IN THE PHRASE
"When Goods Usable for the Same General Purpose Are Available to the Public from Other Sources."

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (1)

℞
TABS.
SERPASIL 0.25 MG.
DISP # 100 (CIBA)
SIG: AS DIRECTED

F.T. 17.50 $5.14

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (1)

℞
TABS
RESERPINE 0.25 MG
DISP # 100
SIG: AS DIRECTED

$1.06

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (2)

℞
TABS.
PERITRATE 10 MG.
(WARNER CHILCOTT
DISP # 100
SIG: AS DIRECTED

F.T. 4.17 $2.34

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (2)

℞
TABS
PENTAERYTHRITOL
TETRANITRATE
10 MG
DISP # 100
SIG: AS DIRECTED

$1.32

Reg. No. S/ JOHN DOE M.D.

THE PUBLIC DOES NOT KNOW
THEREFORE
THERE IS NO PROTECTION IN THE PHRASE
"When Goods Usable for the Same General Purpose Are Available to the Public from Other Sources."

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (3)

℞
TABS
BUTISOL - SODIUM
(McNEIL) 30 MG.
DISP # 100
SIG: AS DIRECTED

F.T
2.85 178

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (3)

℞
TABS
BUTABARBITAL
SODIUM 30MG.
DISP # 100
SIG: AS DIRECTED

.64

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (4)

℞
TABS.
DEXEDRINE
SULFATE 5MG.
DISP # 100 (S.K.F.)
SIG: AS DIRECTED

F.T.
4.26 3.32

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (4)

℞
TABS
DEXTRO-AMPHETAMINE
SULFATE 5MG.
DISP # 100
SIG: AS DIRECTED

39¢

Reg. No. S/ JOHN DOE M.D.

THE PUBLIC DOES NOT KNOW
THEREFORE
THERE IS NO PROTECTION IN THE PHRASE
"When Goods Usable for the Same General Purpose Are Available to the Public from Other Sources."

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 32rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (1st)

℞
TABS
METICORTEN (SCHERING) 5MG.
DISP # 100
SIG: AS DIRECTED

F.T. 29.83 $16.79

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 32rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (5)

℞
TABS.
PREDNISONE 5MG.
DISP # 100
SIG: AS DIRECTED

$3.54

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 32rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (9)

℞
DEXAMYL SPANSULES (S.K.F.) #2
DISP # 100
SIG: AS DIRECTED

F.T. 13.68 11.32

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 32rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (9)

℞
CAPS-
DEXTRO-AMPHETAMINE & AMOBARBITAL #2
DISP: # 100
SIG: AS DIRECTED

3.46

Reg. No. S/ JOHN DOE M.D.

THE PUBLIC DOES NOT KNOW
THEREFORE
THERE IS NO PROTECTION IN THE PHRASE
"When Goods Usable for the Same General Purpose Are Available to the Public from Other Sources."

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (7)

℞
CAPS-
NEMBUTAL SODIUM
(ABBOTT) 0.1 GM
DISP # 100
SIG: AS DIRECTED

F.T.
3.24 2.76

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (7)

℞
CAPS-
PENTOBARBITAL
SODIUM 0.1 GM
DISP # 100
SIG: AS DIRECTED

.98

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (8)

℞
DEXAMYL SPANSULES
(S.K.F) #1
DISP # 100
SIG: AS DIRECTED

F.T.
10.83 9.79

Reg. No. S/ JOHN DOE M.D.

FOOD TOWN PHARMACIES, INC.
"Precisely As Your Doctor Prescribed"
Phone DI 4-2666
Florida at Margaretta - 33rd Street BATON ROUGE, LA.

For MRS JOHN CONSUMER
Address _____ Date (8)

℞
CAPS-
DEXTRO-AMPHETAMINE
& AMOBARBITAL #1
DISP: # 100
SIG: AS DIRECTED

3.18

Reg. No. S/ JOHN DOE M.D.

Mr. FORT. Just to review our qualifications to testify, our company was organized in 1955. It was a very small company with one store. At that time Food Town Ethical Pharmacies, Inc., operated under price-fixing fair trade in the State of Louisiana, which was subsequently declared unconstitutional in the *Schwegmann* case. So our company has operated both under fair trade price fixing similar to the price-fixing powers in the Quality Stabilization Act, and we have also operated under the free trade atmosphere which exists in Louisiana now.

We have grown from 1 store doing a few dollars a day in volume until we have 11 stores now doing over $6 million a year.

I would like to submit this information as a background to my testimony, not that it has any personal implications, but to show the committee that the small businessman can succeed even better under a free enterprise system than under a system by which the manufacturers are empowered to fix the price.

Where manufacturers are empowered to do it, price fixing breeds conspiracies and it creates an atmosphere in the market in which almost everyone seems to feel that in spite of the Sherman Antitrust Act that it is legal for businessmen to understand each other on a retail or wholesale price.

We are not a pine-board operation. We pay the highest salaries in our area. And we sell only nationally advertised products. We refrain from using private labels, because in many cases we can't stand on the efficacy or the quality of that merchandise.

We feel that any allegation that has been made that this bill is necessary to protect trademarks has absolutely been disproven by the famous names which have never used price fixing in any way, such as Libby's, Carnation, Kellog, Borden, the Ford Motor Co., Del Monte, Hormel, Lipton, and thousands of other trademarks which are accepted by the people as being the highest quality, even though these manufacturers have never resorted to price fixing on the distributor, wholesale, or retail level.

There is a danger to a small business or any business involved in this bill because it affects the balance sheet, that is, when you submit a balance sheet and your inventory is your principal asset, and that inventory can be taken by a manufacturer under the provisions of this bill without even one penny in controversy, using the Federal courts to do it, then there is some question in our minds that when that balance sheet and inventory is the biggest item the bank might say, well, that inventory is based on your adherence to the prices fixed by these manufacturers, and since you may not do that, then the assets represented by your inventory are questionable.

We also object to the fact that this bill empowers manufacturers not only to fix retail but wholesale and broker prices.

It also empowers a manufacturer to become a censor, in paragraph (8)(a) and (8)(c), because he is permitted to control the advertising and merchandising techniques of both distributors and retailers as well as wholesalers.

There are plenty of laws in effect now to enforce and clean up what is called an unsatisfactory condition in the retail market in which small businessmen are in danger of becoming bankrupt. We feel

that this bill doesn't solve any of these problems. It even creates problems for a small man who can cut the price of a nationally advertised brand, as we did it, to sell it for cost without investing any capital, and have a terrific advantage in effective advertisements, whereas in contrast he wouldn't be able to use or pay for a full page ad. So we feel it limits him. It would hurt the small man.

The fact that the manufacturer cannot fix a fair price is evident because of the variation in the cost of operation of doing business. It varies generally from 36 percent to 12 percent. So that the manufacturer who fixes a price to suit his distributive customers must fix it at 36 percent of cost of operation as far as the retail price is concerned. So the public would never be in the position of benefiting from the 12 percent cost of operation at retail because the manufacturer would be compelled to fix the price at 36 percent to satisfy those with a high cost of operation.

It is apparent that if the manufacturer fixes the high sale price at $6, and the retailer's gross is $4 on a $10 sale. The 30 percent cost of operation retailer makes 50 cents on that transaction, one transaction, while the net for the 15 percent cost retailer, who turns it over faster, would be $2.50.

For this reason we feel that this bill is very detrimental and would hurt small business.

Now, the price range mentioned in this bill, in our opinion, that is, paragraph 14(b), is one that would be impossible for most manufacturers to use who supply us, because they wouldn't have that privilege. So the retail price range, as a practical matter, would never exist.

The cost of enforcing the Quality Stabilization Act is a cost to the consumer. And it is one that experience has proven is very costly. In fact, General Electric in the last years of adherence to fair trade, in enforcing the Fair Trade Act, spent over a million dollars in over 3,000 alleged violations. It would actually cost consumers millions of dollars, because in our case the markup would increase as much as 50 percent on a nationally advertised brand.

Now, just a brief review of the growth of big retail operations such as chainstores and discount houses. They grow faster and have grown faster under fair trade, or price fixing such as quality stabilization, then they ever grew before, because it empowered them, made it possible for them to produce a private brand of the same quality, the same trademark as far as the contents of the package are concerned, so that the consumer would pay as much as 50 cents less for the same product in a retail chainstore as compared to the price in an independent that had no authority to cut a fixed price.

The same problem will exist under quality stabilization. Nothing would make the chainstores happier and the big discount stores happier than to have the national brands on their shelves at the same price that they are everywhere, and then be permitted to put a private brand next to it with the same content label and sell it for about 50 percent less.

The examples in the statement are self-evident, and I won't spend any time on them.

But the committee should consider this fact, which is something which has happened recently: The private brand of a big operator? A nationally advertised brand is no longer a private brand. So the

discussion is now that nationally advertised brands which manufacturers would be empowered to fix a price on are not distinct any more.

For example, we compete with a big drug operation which has its private brand, and the label contents are identical with those on nationally advertised brands. And they will sell that product, 100 for one price and another 100 for a penny, which is below our cost on the nationally advertised brand that has the same content or label. We feel that would help big business and hurt the small business. Consider the millions of dollars it would actually cost consumers. And we would object to it in our State, because it would mean an increase in prices to consumers in Louisiana, where the Supreme Court has held this principle unconstitutional, that is, this bill itself is nothing but a big "nonsigner" clause. The nonsigner clauses have been declared unconstitutional in Louisiana in the *Schwegman* case. This was based on the fact that a contract didn't exist between all the merchants, but only one. In this case there would be no contract. So, in effect, it is just a nonsigner clause, the Quality Stabilization Act.

It should be recognized here that experience has shown that the consumer is no fool. And these people who say that discount houses can run a price and not have the merchandise and fool the consumer are certainly not conversant with consumers, because the consumers cannot be fooled repeatedly. And every businessman who does business in volume knows that you cannot fool the consumer.

So to say that this bill is necessary for the protection of the consumer is absolutely unfounded. And in addition to that, laws exist, both Federal and State laws, which protect the consumer against these practices.

We would rather have the Government, or a bureau set up by the Congress, fix these prices than have the manufacturers have that authority, because the manufacturers must respond to their customers, the distributive system, and the prices are going to be as high as necessary to cover the highest cost of operation.

I want to pass over some of these other paragraphs.

I would like to point out that we do have a recommendation to substitute for this act.

But first I would like to say that there has been a lot of discussion here about what would happen under this bill if a manufacturer has a majority of the market, for example Kodak, which has a terrific percentage of the film business.

There has only been one case that our attorneys have been able to find in which the courts have held that any price fixer has violated the provision that there must be similar product available in the same general class. And as a matter of practical protection, it is worthless, because only one time in all the years of price fixing, fair trade, have the courts held that. And that was in the case of Kodak color film.

So we feel that there is no protection there for the consumer.

We would like to recommend to those who are interested in helping small business to think of the 80,000 drugstores in the United States, whose average sales are only $200 a day. They do less than $100,000 worth of business, and we feel like there could be a tax formula worked out under which those men could be tax free on sales under $100,000,

so that they would be able to compete and even to take advantage of the big competitors who have a fixed overhead.

Thank you very much for your time, Mr. Chairman. I will turn the discussion over to Mr. Schwegman.

Mr. SCHWEGMAN. Thank you very much, Mr. Fort.

I am happy that the chairman has given me this opportunity to speak to you for a few minutes.

I am John Schwegman, Jr. I represent the Schwegman Bros., and I am sure if it wasn't for Schwegman Bros. in the year 1951, when the U.S. Supreme Court handed down a decision that the nonsigners clause was unconstitutional, that we wouldn't be arguing this case here today.

Schwegman Bros. started in the year 1946 with practically no money whatsoever, nothing except a willingness to work, and inside of 16 or 17 years we ran up our sales to $75 million. We have a payroll of approximately $5 million a year.

In the *Schwegman* case, the nonsigners clause, it lasted approximately 14 months. And with the McGuire law, which was another amendment to the Sherman Act, of course we had a little with fair trade once again. And of course the State of Louisiana made the decision all over again killing fair trade once again by ruling the nonsigners clause unconstitutional.

I, too, am a legislator. I am a representative in Louisiana. And, of course, I, like you, am trying to do my very best for the people I represent. And I know at times it is trying to find out which of various bills are good and which are bad.

Now, I have been fighting fair trade for years, because I realize that the consumer cannot get the lowest price under competition with the price fixing being allowed, and leaving the manufacturers to set the price. I would say that since the Government would have to enforce it, it would take millions of dollars' worth of the time of the judges throughout the United States. In our particular case we had 70 Federal injunctions. I know that our case cost us over a hundred thousand dollars. I do not know exactly what it cost the Federal Government, or how many millions it cost the various manufacturers.

Now, if the taxpayers would have to pay this bill to supervise this new law, I think the responsibility ought to be with Congress if we are to have it, if we are to have the fair trade law. And I will continue to call it a fair trade law, because that is exactly what it is; it is a price-fixing law. If we are to have it, then I think Congress ought to set these prices, because then I am sure the Congressmen would sit down with the various manufacturers, and they would have some breakdown as to how much the manufacturers could actually charge these consumers.

Now, everybody has their problems today. The merchants, you hear a lot about them, you hear that they are not making enough money. Well, sometimes if you were to review their income taxes you would find out that they are not as broke as they might sound.

You have to look at it from the side of the consumer today. And the consumer is fighting the high cost of living. They are not making a whole lot of money today, especially if they work outdoors, it rains a lot. And these people have families to support. And I think it is just a question of whose side or what side you are on. And I feel in

studying this fair trade law that you will find out that everyone would be better off if they let the prices be set by independent business under the free enterprise system, under the law of supply and demand.

Now, I didn't hear it raised here today, but probably it has been, that this is a valuable trademark, and they spend a lot of money on it, and of course, it should be protected. That really is not true. This valuable trademark that they have spent a lot of money on is all deducted from their income taxes. Mr. and Mrs. Consumer when they bought any product were charged for that type of advertisement. So in effect they didn't have that valuable trademark. The people paid for it when they bought the various merchandise at retail.

Now, of course, in our stores we, too, have prescription drugs. We have six stores. And I would say that under this price-fixing arrangement—because I have lived under both of them, like Mr. Frank Fort—that the markups would be anywhere from 50 percent to several thousand percent, depending on the unit value and what they want to charge. And actually the consumer doesn't have the protection that he should have today.

Now, of course, another thing is to some extent you actually are taking State's rights away from the various States if the Federal Government law is to supersede the State law. I am not sure in this particular case what would happen. We have already had a decision handed down by the State supreme court which ruled price fixing illegal in the State of Louisiana.

Now, of course, you always have merchants who are not good merchants, not through any fault of their own, because not everyone can be a merchant, just like not everyone can be a lawyer or any particular trade. There are some failures that will exist in all trades, and there are going to be some that will exist in the retail trade. I can't see that this Congress should give too much weight to some independents who are complaining, because it could be for many reasons.

In my particular case—and I could name you five or six people just from the area in which I am so successful, they all started with nothing under the free enterprise system, it was just a question of giving the consumer more for his dollar. And there is nothing wrong with that. Under the price-fixing arrangements it really wouldn't hamper him. There are many methods by which a retailer today can use this as a good weapon. We will take a small merchant for an illustration. He might put a little blackboard on the sidewalk and put 5 pounds of sugar for 50 cents, 45 cents, whatever it may be. And he wants to use that method of advertising, because he has cut the price of sugar. A big merchant like myself or a chainstore may decide that he wants to spend a thousand dollars in a newspaper to advertise his prices. Some merchants might decide that the best way to do business in their particular location is to give credit and deliver.

Now, none of those things are taken into consideration in this price setup. I think that a woman or a man who wants to come into a store and get a low price, because they need a low price, and are willing to cart the merchandise home—and maybe they don't have a tremendous credit, want to pay cash—I think that would work a tremendous disadvantage to such an individual who wasn't taking advantage of these services which are in this price.

I would say in my serious opinion—and I have fought this case for years and years, I would say I am an old soldier at fighting price fixing—I honestly believe that all merchants today have a privilege in even selling to the American people. I believe it is a great privilege to sell to the American people, without figuring out a way of ganging up on them by passing a law that would keep the consumer from getting the benefits of competition. I think that that is one of the things—I have been in Russia, I have been throughout Europe, and you can see that the economy we have in this country is so wonderful because we have competition.

When you use the prices of any commodity you eliminate thousands and thousands of low wage earners in their particular market. You can't judge that necessarily by a man like myself or anybody who is in a fairly good wage bracket. But to a family that has four or five children it has to buy a tube of toothpaste, and that tube of toothpaste could be anywhere from 35 cents to 45 cents, a dime on a tube of toothpaste might mean the difference whether those children were brushing their teeth twice a day or once a day.

I think it is a great responsibility that we are taking upon ourselves to set prices. True enough, today we don't have it in the food line. But this bill would permit it to be in the food line. The people today want to earn money with the least amount of effort. That is true of most all people. And this would be a wonderful way of making money, you understand, at the cost of the consumer without competition.

I am not going to take but a few more moments. And I want to leave with this committee that I wouldn't want this responsibility to decide to pass a price fixing law, because I think that there is no man wise enough in all of Washington to decide what is the right price for anything. The right price is the price that is established under competition. You have many, many factors that enter into the market. You could have an oversupply of merchandise so that the price would never be changed because it takes too long a period of time to change it. The manufacturer would have to write notices and have meetings, and it would have to go all the way down to the lowest form of distribution, which would be the retail level. And I would remind you once again that all competition starts at the retail level.

If you could fix the price or stifle competion at the retail level, you could stifle it all the way to the manufacturer. And I would say from my experience in talking to many, many manufacturers that they do not want it. This urge to have the price fixing is actually originating at the retail level. I would say that druggists and small business people, for some reason or another—and maybe they don't know how to run their businesses, or they want to take it too easy, or they want to have it made at the expense of fixed prices.

I would say that this is a grave responsibility, to set prices, because you are going to affect every child, every family in the United States. And if you could see Russia, or you could see Europe and you could see a can of peaches in West Germany or in England, it is 75 cents for a can of peaches. And it can be bought in this country for less than 25 cents.

The power of competition is one of the greatest forces in raising the standard of living. And if we were to fix prices, we would not

only eliminate the people in the market, but we would eliminate millions of people who are working in these factories making these commodities to be sold. Labor will be affected. I don't know if labor has taken any stand on this, but labor will be affected, because the lower the price, the more people can buy it, and the more people that buy, the more people have to manufacture it. It is a vicious circle that benefits everyone. The money itself is nothing else but a bookkeeping entry. But you will be putting people to work, and the standard of living will be higher, and the children can brush their teeth more often, and the people can drink more milk, and then get their prescriptions filled on time. Many, many people have carried prescriptions around from the doctor for days and did not get them filled because they couldn't afford the price. And under competition I am sure that nobody will take this grave responsibility on themselves and say, I think I set the price too high, or, I think I set it too low. Under the law of supply and demand in the free enterprise that we are bragging about in this country the right price will be set.

Thank you very much, Mr. Chairman.

Mr. DINGELL. Thank you, Mr. Schwegman.

Mr. Van Deerlin?

Mr. VAN DEERLIN. A very comprehensive statement, sir. It makes me think of the marble in a pinball machine, the way you move around.

I have a lot of questions, such as whether the 75-cent peaches in West Germany are under a price-fixing arrangement, and some other factors that may enter into it. But I am more concerned over a couple of things that you skipped over rather quickly.

Mr. SCHWEGMAN. I would be glad to answer them.

Mr. VAN DEERLIN. In the matter of the trademarks, I am not sure just what you told us about your philosophy on trademarks.

Mr. SCHWEGMAN. It has been argued many, many times. Up to now I haven't heard it in this committee. But it has been argued that this vital trademark, that it took years and years to develop and cost millions of dollars is what they're trying to protect. And I thought I would bring out very forcefully that this vital trademark no longer belongs to them in the sense that they have this money invested as a capital account. In other words, it has been depreciated and deducted in a form of income tax. In other words, you could take a bottle of aspirin, as an illustration. No doubt over the course of years Bayer has spent millions of dollars on this bottle of aspirin advertising it. But they don't have it set up with these millions and millions of dollars of advertising, because they have taken it off of their taxes. And the consumer has paid for it when he has bought his bottle of aspirin. And the U.S. Government didn't get it in the form of taxes. It was taken off and it was charged to an advertising account.

So I am trying to bring out repeatedly, and I know it exists, as it has been brought out many, many times, that they have a tremendous fortune of money invested in this thing, and if somebody could come on out there and buy this bottle of aspirin at less than the price they would set they would injure this valuable trademark, because they have all this money invested in it. I am bringing out forcefully that they don't have all this money invested in it. Mr. and Mrs. Consumer have paid for that when they bought the aspirin.

Mr. VAN DEERLIN. But the value of the trademark is considered to be the goodwill generated by the seller to satisfy the customer over a period of years, isn't it?

Mr. SCHWEGMAN. In this country here, because of the antitrust laws, we don't let anyone set prices. In other words, nobody who buys this bottle of aspirin for less than the price that they would like to have it set at does injure this aspirin any, in fact they sell more aspirin, and if anything they are reducing the price year in and year out, because the more people that can buy these aspirins, the more people will go to work, and the overall cost of manufacturing these aspirins is constantly being reduced. And under our system of government if we were to set this price by the Government or by the manufacturer, the price would be much higher than it is today, and there would be fewer aspirins sold.

In so many words I would like to say that I don't believe the manufacturer has that right in this country to say what his commodity will be sold at after he has sold it and has gotten paid for it, then he no longer owns it. That would be true in Russia, where someone would buy something—in fact, it all belongs to the Russian Government, they set prices over there. But in this country here, our system, in fact, the truth of the matter is that the antitrust laws forbid the very thing that this law is attempting to do. If it weren't for the enabling act—this is nothing else but an enabling act, if it wasn't, we would all be in jail for doing it if we did it tomorrow.

Mr. VAN DEERLIN. I yield.

Mr. DINGELL. Mr. Schwegman, we are grateful to you for your presence today——

Mr. FORT. Mr. Chairman, may I interrupt you. I would like to add one thing to my statement. I would like to request that the subcommittee, whether voting favorably or unfavorably on this bill, specify, if that is possible, if it is procedurely possible, that prescription drugs will not be included in this act in the conference committee. The Senate version now includes prescription prices. And of course we consider, as my statement points out in detail, that prescription prices are considered a monopoly, and they actually are from a practical standpoint. And we feel that the inclusion of prescription prices, even if we are unfortunate enough to have the bill passed, would be a great handicap, and also in violation of the act which prohibits the fixing of prices on monopolies. And of course it would increase our prescription prices as much as 50 percent.

I would like to make this request to the subcommittee if it is in order

Mr. DINGELL. Of course, I am very well aware of the importance of that subject. Of course, it is impossible for the full committee to bind the Congress. You know very frequently very strange things happen in Congress. But I am keenly aware of that point.

Mr. FORT. Thank you.

Mr. DINGELL. Gentlemen, it has been a privilege to have had you today. We appreciate the courtesy of your coming.

The next witness is Dr. Stewart M. Lee.

Dr. Lee, we are privileged to welcome you to the committee. We have had a long and happy friendship with you.

Mr. LEE. Thank you.

STATEMENT OF STEWART M. LEE, CHAIRMAN, DEPARTMENT OF ECONOMICS AND BUSINESS ADMINISTRATION, GENEVA COLLEGE, BEAVER FALLS, PA.

Mr. DINGELL. Without objection, your remarks will be included in the record in full at this point.

(The prepared statement of Mr. Lee is as follows:)

STATEMENT OF DR. STEWART M. LEE, CHAIRMAN, DEPARTMENT OF ECONOMICS AND BUSINESS ADMINISTRATION, GENEVA COLLEGE, BEAVER FALLS, PA.

My name is Stewart M. Lee. I wish to thank the committee for the opportunity of presenting this statement in opposition to all bills which would establish Federal sanction for resale price maintenance. I live at 3227 Fourth Avenue, Beaver Falls, Pa. Since June 1950, I have taught economics and business administration courses at Geneva College. For 2 years I taught economics courses at the University of Pittsburgh. At present I am chairman of the department of economics and business administration at Geneva College.

I received my A.B. degree from Geneva College, and M.A. and Ph. D. degrees from the University of Pittsburgh. My doctoral dissertation, which was accepted at the University of Pittsburgh, summer, 1956, was entitled, "Some Economic Implications of Resale Price Maintenance With Particular Attention to the Discount House." Two chapters of this dissertation appeared in the hearings before the Committee on Interstate and Foreign Commerce, House of Representatives (86th Cong., 1st sess., March 16, 17, 18, 19, 20, 23, 24, and 25, 1959) on H.R. 768 and related bills, entitled "Fair Trade."

I have been a contributor to publications of the Council on Consumer Information, the American Marketing Association's publication, the Journal of Marketing, and Pennsylvania Conference of Economists. I am president of the Council on Consumer Information.

I am not representing any group. I am speaking before your committee as an economist, as an educator, and as a consumer. In years of study and research on the subject of resale price maintenance, I have come to the conclusion that little good if any has come or will come to our economy by the passage of such laws, and that some harm and possibly a good deal of inequity have been present under resale price maintenance laws, and that this type of legislation would create an even worse situation by forcing resale price maintenance upon States which have rejected it.

I believe it is important to keep in mind that in reality this proposed bill is actually nothing more than a variation on past fair trade bills, which are more accurately defined as resale price maintenance bills. The National Association of Retail Druggists Journal stated in its January 7, 1963, issue that this measure was "stabilized quality of trade merchandise coupled to resale price maintenance" and "a proposal which would legalize in the Federal sphere stabilized quality of trademarked merchandise coupled to resale price maintenance."

First, we had the "fair trade" name which at least 25 State supreme courts have ruled unfair, so we then had the name "fair competitive practices" for a proposal which was to place specific limitations on competitive practices. Now we have the term "quality stabilization" with no provision whatsoever in the bill establishing quality standards or standards for quality stabilization and yet the bill states as its purpose, "to promote quality and price standardization."

It is important, I believe, to understand that under this proposed bill the manufacturer may reduce price as well as quality if he so wishes, or if he wishes, he may increase price and reduce quality. A manufacturer, under this bill, can do anything he wishes with regard to quality, and it seems a real misnomer to affix the name "quality stabilization" to this bill.

If fixed prices are needed for quality stabilization and confidence in brand names, is one to assume that since most goods have never been fair traded; that these goods do not have public confidence and there is quality deterioration? If this is to really be a quality stabilization bill, I wonder if some consideration should be given to an amendment to prohibit manufacturers from deteriorating quality of their products once they sell them under resale price maintenance

agreements. Company after company has specials on its products such as combination sales and cutting the price, or having a special lower price once a year. Apparently the manufacturers in establishing this type of pricing do not feel that it hurts quality or the brand image. But if the retailer cuts price, then it is argued the brand image is damaged and the quality deteriorates. Does the buyer really know who is responsible for price reduction?

There are other types of price fixing which have been mentioned by the proponents as a defense for resale price fixing, but notice who establishes the prices:

A. Public utilities—price established by Government.
B. State milk commissions—price established by Government.
C. Minimum wage—price established by Government.
D. Farm price support—price established by Government.

In addition, we find retail prices fixed by the manufacturer when he sells direct to the consumer and when a retailer has a private brand. Who else could fix the price? We also find price fixing by the manufacturer selling on consignment and sometimes exclusive agreements, but in these cases the manufacturer has assumed additional responsibilities. What this bill does is to give the manufacturers a blank check to write a price.

The bill states that only those products which are in free and open competition may be "fair traded," and this term is not and has not been defined. The Supreme Court of the Commonwealth of Pennsylvania ruled recently that the burden of proof rests on the company as to whether it is in "fair and open competition." (The term used in the Pennsylvania statute.)

In a recent court case in Pittsburgh, the Gillette Co. stated that it had 95 percent of the double-edge blade market in the United States and over 70 percent of the wet shave market business. Is this free and open competition? Should Gillette be permitted to fair trade its products?

Chain Store Age presented some information for the trade which appeared in Advertising Age, October 3, 1960, entitled "How Top Brands Control Their Markets." It showed how many different companies' products had to be handled to satisfy 75 percent of the customers' demand for a product area and how many to satisfy 55 percent. In 13 cases only 1 brand had to be handled to capture 75 percent of the sales. These included mouthwash, preshaves, hair clips and bobby pins, spray deodorant, cotton items, cotton swabs, guaze and cotton sponges, adhesive tape, adhesive bandages, baby oil, face powder, lipstick and nail-care applications. The retailer had to handle only 2 different brands in 14 other categories in order to satisfy at least 75 percent of the store customers. This raises a serious question as to what really is free and open competition.

The chances of price fixing under conditions somewhat similar to monopoly pricing become much easier when there are fewer firms producing than when there are many. Where there are many producers, competition almost blocks fair trading, because competition is primarily price competition; but where there are few producers, the tendency is to act more like a monopolist and price accordingly, thus removing price from the competitive arena.

One of the arguments for this bill is to maintain many small retailers. One might ask, What is the point of having many retailers if they cannot compete on price? They can compete on things that add to price, such as advertising and promotional schemes, but this bill would prohibit them from competing in an area which would reduce prices?

This bill also gives the manufacturer a wide latitude when it states: "Owner of brand determines marketing area." In Pittsburgh a judge ruled that a product fair traded in Pennsylvania, had to be fair traded at the same price statewide. This bill has no qualification.

The proponents are frequently stating that legislation is needed to prohibit loss-leader selling. We already have protection from this type of pricing on the national level in the following: The Federal Trade Commission Act, section 5, states: "That unfair methods of competition in commerce are hereby declared unlawful." In addition most of the States have passed so-called loss-leader or unfair practice acts to prohibit the very pricing practices which the proponents of fair trade say they need protection against. In addition one will find in studying the testimony presented at previous fair trade hearings, and the Federal Trade Commission's 1945 Report on Fair Trade, that when loss-leader bills have been introduced to meet this problem of predatory pricing, proponents of fair

trade shied away, wanting to have no part of such loss-leader bills. Studies by the Restrictive Trade Practices Commission, Department of Justice, in Canada, and studies by the Federal Trade Commission do not substantiate the fears of loss-leader selling. These studies have indicated that there is very little real loss-leader selling being done.

I, along with others, believe that this bill, if enacted, would increase prices on many products. For example, portable electric mixers have been selling around $15, but when fair trade was effective in many more States than today, they were selling for around $20. Today many of us are able to buy over-the-counter drug items and health and beauty products at prices considerably below their former fair trade prices. Should these prices be forced up by the passage of this bill?

A study I made which was presented before the subcommittee of the Committee on Commerce, U. S. Senate (87th Cong., 2d sess., on S.J. Res. 159) "Hearings on Quality Stabilization," May 1962, presented detailed information and the potential cost to consumers of a Federal resale price maintenance law. The minimum projection was $1.5 billion and the maximum was $14 billion. The middle projection was $5 billion. Let me be the first to admit that these figures are nothing but educated estimates, and until more accurate figures are developed only estimates can be used, but in the testimony of the proponents of a Federal fair trade bill the impression is certainly given that many, many products need the protection of fair trade pricing, and that many retailers need this protection. If those proponents feel that these estimates are very far out of line then they would seem to be defeating their own arguments that fair trade is vital to the survival of small business and to the maintenance of quality products.

In reality these figures may well be too conservative on a projected basis, because this bill would make fair trade pricing applicable to all 50 States and the District of Columbia. This could encourage many manufacturers who have never fair traded their products to fair trade. In a period of possible inflation it is extremely questionable if a bill should be passed which has all the indications of inflating prices even more.

For the past two summers and this summer, I have and will be working on a research project in which I am attempting to see what, if any, correlation exists between the number of retail stores, retail sales, retail failures in States with fair trade laws, States which have never had fair trade laws, and States in which the fair trade laws have been declared unconstitutional in whole or in part. The following empirical data have been developed to date. Unfortunately this is just the first of the many areas where I hope to see what type of correlation, if any, exists. (See exhibit A.)

As was stated earlier, price competition reduces prices for the consumer, but this bill would block this type of competition. The promotional type of competition which increases prices would continue. In a recent Pittsburgh court case, evidence was admitted showing that trading stamps, equal to as much as a 17-percent discount, were being given on fair trade products without legal action, but the manufacturer moved in to block the giving of cash discounts of any amount.

Evidence seems to indicate that resale price maintenance legislation and an effectively competitive system are incompatible. A choice must be made between an economy in which Government regulation becomes more important or an economy which is to be based upon the free enterprise system. The choice does not rest upon the acceptance nor rejection of resale price maintenance legislation, but the passage of such legislation is indicative of a trend away from a freely competitive economic system.

EXHIBIT A

Resale price maintenance study

	1958	1954	1948	1939	1935	1933
Fair-trade areas:						
Percentage of population in States with fair-trade laws [1]	62.10	82.70	91.30	91.50	40.20	5.53
Percentage of retail stores in States with fair-trade laws [2]	62.22	83.12	91.33	91.48	45.36	6.77
Percentage of retail sales in States with fair-trade laws [2]	62.65	82.24	91.16	91.84	47.68	7.66
Percentage of merchant bankruptcies in States with fair-trade laws [3]	62.20	83.90	92.40	(4)	(4)	(4)
Non-fair-trade areas:						
Percentage of population in States with no fair-trade laws [1]	37.90	17.30	8.70	8.50	59.80	94.47
Percentage of retail stores in States with no fair-trade laws [2]	37.78	16.88	8.67	8.52	54.64	93.23
Percentage of retail sales in States with no fair-trade laws [2]	37.35	17.76	8.84	8.16	52.32	92.34
Percentage of merchant bankruptcies in States with no fair-trade laws [3]	37.80	16.10	7.60	(4)	(4)	(4)

[1] The population statistics are the estimates of the Bureau of the Census, U.S. Department of Commerce.
[2] The number of retail stores and the sales of retail stores are taken from the censuses of business, Bureau of the Census, U.S. Department of Commerce.
[3] The merchant bankruptcies are taken from the Federal Administrative Office, U.S. Courts. The merchant bankruptcies include both voluntary and involuntary bankruptcies. For the years 1933, 1935, and 1939 bankruptcies were not recorded on a State-by-State basis.
[4] Not available.

NOTE.—A. The years used for this study are those years in which a census of business was taken by the Bureau of the Census, U.S. Department of Commerce.
B. All figures have been developed on the basis of the States with fair-trade laws and States without fair-trade laws for each year in which a census of business was taken. If a State passed a fair-trade law in the year a census of business was taken, it has been included in the fair-trade area. If a State had its fair trade declared unconstitutional in the year a census of business was taken, it has been included in the non-fair-trade area.

Mr. LEE. Thank you.

I think probably I should state that I am a teacher of economics at Geneva College, and my dotcoral dissertation was done on the subject of retail price maintenance.

Then I would like to skip over to page 2 and run through some items with regard to this subject as I look at it.

First, we had the "fair trade" name which at least 25 State supreme courts have ruled unfair, so we then had the name "fair competitive practices" for a proposal which was to place specific limitations on competitive practices. Now we have the term "quality stabilization" with no provision whatsoever in the bill establishing quality standards or standards for quality stabilization and yet the bill states as its purpose, "to promote quality and price standardization."

It is important, I believe, to understand that under this proposed bill the manufacturer may reduce price as well as quality if he so wishes, or if he wishes, he may increase price and reduce quality. A manufacturer under this bill can do anything he wishes with regard to quality, and it seems a real misnomer to affix the name "quality stabilization" to this bill.

If fixed prices are needed for quality stabilization and confidence in brand names, is one to assume that since most goods have never been fair traded that these goods do not have public confidence and there is quality deterioration? If this is to really be a quality stabilization bill, I wonder if some consideration should be given to an amendment to prohibit manufacturers from deteriorating quality of their

products once they sell them under resale price maintenance agreements. Company after company has specials on its products such as combination sales and cutting the price, or having a special lower price once a year.

Apparently the manufacturers in establishing this type of pricing do not feel that it hurts quality or the brand image. But if the retailer cuts price, then it is argued the brand image is damaged and the quality deteriorates. Does the buyer really know who is responsible for price reduction?

We have heard some discussion on price fixing here today.

There are other types of price fixing which have ben mentioned by the proponents as a defense for resale price fixing, but notice who establishes the prices:

A. Public Utilities—price established by government.
B. State milk commissions—price established by government.
C. Minimum wage—price established by government.
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In addition, we find retail prices fixed by the manufacturer when he sells direct to the consumer and when a retailer has a private brand. Who else could fix the price, when you sell directly to the consumer?

We also find price fixing by the manufacturer selling on consignment and sometimes exclusive agreements, but in these cases the manufacturer has assumed additional responsibilities. What this bill does is to give the manufacturers a blank check to write a price.

The bill states that only those products which are in "free and open competition" may be "fair traded," and this term is not and has not been defined.

The Supreme Court of the Commonwealth of Pennsylvania ruled recently that the burden of proof rests on the company as to whether it is in "fair and open competition."

One of the arguments for this bill is to maintain many small retailers. One might ask what is the point of having many retailers if they cannot compete on price? They can compete on things that add to price, such as advertising and promotional schemes, but this bill would prohibit them from competing in an area which would reduce price.

This bill also gives the manufacturer a wide latitude when it states: "owner of brand determines marketing area." In Pittsburgh a judge ruled that a product fair traded in Pennsylvania had to be fair traded at the same price statewide. This bill has no qualification.

The proponents are frequently stating that legislation is needed to prohibit loss-leader selling. We already have protection from this type of pricing on the national level in the following: The Federal Trade Commission Act, section 5, states: "That unfair methods of competition in commerce are hereby declare unlawful." In addition, most of the States have passed so-called loss leader or unfair practice acts to prohibit the very pricing practices which the proponents of fair trade say they need protection against. In addition, one will find in studying the testimony presented at previous fair trade hearings and the Federal Trade Commission's 1945 Report on Fair Trade, that when loss-leader bills have been introduced to meet this problem of predatory pricing, proponents of fair trade shied away, want-

ing to have no part of such loss-leader bills. Studies by the Restrictive Trade Practices Commission, Department of Justice, in Canada, and studies by the Federal Trade Commission do not substantiate the fears of loss-leader selling. These studies have indicated that there is very little real loss-leader selling being done.

I, along with others, believe that this bill, if enacted, would increase prices on many products. For example, portable electric mixers have been selling around $15, but when fair trade was effective in many more States than today, they were selling for around $20. Today many of us are able to buy over-the-counter drug items and health and beauty products at prices considerably below their former fair trade prices, anywhere from 15 to 20 percent below.

Should these prices be forced up by the passage of this bill?

A study I made which was presented before the Subcommittee of the Committee on Commerce, U.S. Senate, 87th Congress, 2d session, on Senate Joint Resolution 159, "Hearings on Quality Stabilization," May 1962, presented detailed information on the potential cost to consumers of a Federal resale price maintenance law. The minimum projection was $1.5 billion and the maximum was $14 billion. The middle projection was $5 billion. Let me be the first to admit that these figures are nothing but educated estimates, and until more accurate figures are developed only estimates can be used, but in the testimony of the proponents of a Federal fair trade bill the impression is certainly given that many, many products need the protection of fair trade pricing, and that many retailers need this protection. If those proponents feel that these estimates are very far out of line then they would seem to be defeating their own arguments that fair trade is vital to the survival of small business and to the maintenance of quality products.

In reality these figures may well be too conservative on a projected basis, because this bill would make fair-trade pricing applicable to all 50 States and the District of Columbia. This would encourage many manufacturers who have never fair traded their products to fair trade. In a period of possible inflation it is extremely questionable if a bill should be passed which has all the indications of inflating prices even more.

For the past two summers and this summer, I have and will be working on a research project in which I am attempting to see what, if any, correlation exists between the number of retail stores, retail sales, retail failures in States with fair trade laws, States which have never had fair trade laws, and States in which the fair trade laws have been declared unconstitutional in whole or in part. The following empirical data have been developed to date.

Unfortunately, this is just the first of the many areas where I hope to see what type of correlation, if any, exists.

I would like to show now, if I may, a chart which has been developed on this subject. This is found at the end of my statement in appendix A.

Looking at this chart, I think we see some rather interesting things. What I was trying to find out was, what is the difference, if any, between the number of retail stores in States with fair trade laws, the number of retail sales in States with fair trade laws, the percentage of

merchant bankruptcies in States with fair trade laws, in comparison to those which do not have fair trade laws.

And because of the periods of time at which the census of business is taken, I have used those years in which the census of business was taken. So that means 1933, 1935, 1939, 1948, 1954, and 1958.

The correlation in this chart, as I ran it through a calculator, amazed me. If we look at 1958, we find that the percentage of population in States with fair trade laws was 82 percent. The percentage of retail stores in States with fair trade laws was 82 percent. The percentage of retail sales in States with fair trade laws was 82 percent. The percentage of merchant bankruptcies in States with fair trade laws was 82 percent.

We look at the non-fair-trade areas, and we find an identical correlation, 38 percent of the population in the non-fair-trade States, 38 percent of the retail stores in these States, 38 percent of the retail sales in these States, 38 percent of the merchant bankruptcies in these non-fair-trade States.

In the 1954 census of business this same thing follows through. In 1948, the same thing. In 1939, the same thing.

Now, this certainly is not an all-conclusive proof of the fact that it really doesn't make too much difference with regard to whether a fair trade law is in effect or not. This is a study of the total United States, what is the situation as you view it?

I think I should point out, as my testimony does at the end, that the merchant bankruptcies were developed from the Federal Administrative Office, United States Courts. And this is not the only method of developing bankruptcies; this is one method. And this was one where we had good Government figures on voluntary and involuntary merchant bankruptcies.

So as we look at this chart and look at these figures, we find that apparently it doesn't make any difference whether there is a fair trade law in a State or whether there isn't, because the population of the State seems to be the important factor in how many retail stores there are going to be.

And to me, as I ran this through a calculator, it seems to be a very significant development, because I didn't know what was going to come out. And actually I was interested in what was coming out, but I had no idea what might come out.

But these are the figures, the facts, and anyone can do the identical thing by looking at the Census of Business, and looking at the population estimates by the Census in the Department of Commerce, and looking at the administrative courts for their number of merchant bankruptcies, and then they would come up with the identical figures, which to me is a very strong case that apparently the total impact on total retail stores, total retail sales, merchant bankruptcies, was identical in your fair trade areas as your non-fair-trade areas.

Certainly we realize that these figures are total figures, that does not break it down. This summer I am hoping to break it down more specifically by particular types of retail stores to see if a correlation continues to follow through here or not.

As was stated earlier, price competition reduces prices for the consumer, but this bill would block this type of competition. The

promotional type of competition which increases prices would continue. In a recent Pittsburgh court case evidence was admitted showing that trading stamps, equal to as much as 17 percent discount, were being given on fair trade products without legal action, but the manufacturer moved in to block the giving of cash discounts of any amount. In fact, the judge in this case said that it seems rather peculiar that a manufacturer with fair trade products would block a retailer from discounting it even 1 percent, but he wouldn't take action to block the giving away of trading stamps which at times would have a value of up to 17 percent. And exhibits were presented to show that this was the value of the trading stamps given on this company's products a number of times. The judge moved in this case, and gave a temporary injunction restraining the company from giving trading stamps on its products when it said that it wanted to enforce fair trade. In addition to that, as we pointed out before, the judge also made this company quit choosing its marketing area as it wanted to. The judge said this was a State court, and if it was going to fair trade, it had to fair trade at the same price in every area in the Commonwealth of Pennsylvania. And I think that the main point in that case was that the judge in his preliminary hearing said that Gillette was not selling in free and open competition, therefore, the product could not be fair traded in Pennsylvania. And that is still under litigation. That was a temporary injunction, and the final decision has not been rendered there, since the supreme court of the State now has under advisement a petition to rule the act in Pennsylvania unconstitutional.

Evidence seems to indicate that resale price maintenance legislation and an effectively competitive system are incompatible. A choice must be made between an economy in which Government regulation becomes more important or an economy which is to be based upon the free enterprise system. The choice does not rest upon the acceptance nor rejection of resale price maintenance legislation, but the passage of such legislation is indicative of a trend away from a freely competitive economic system.

I wish to thank the chairman for the opportunity to present this testimony today. I will be back to class tomorrow morning, and one of the subjects in the current economic problems class, as you might expect, is H.R. 3669.

Thank you.

Mr. DINGELL. It has been a privilege to have had you with us today, and as a personal friend, I am glad that you could be with us. The committee is indebted to you for your kindness and courtesy today.

The next witness is Mr. William C. Mashaw.

Mr. Mashaw, we are privileged to have you here today.

STATEMENT OF WILLIAM G. MASHAW, NATIONAL RETAIL HARDWARE ASSOCIATION

Mr. MASHAW. Mr. Chairman, in view of the fact that I have a prepared statement, and in deference to the time situation, and since many of the arguments in support of the proposed legislation that I now have to advance have already been advanced by prior witnesses, and covered to some extent in my prepared statement, I will not read

the statement, but will merely comment on one or two points within it. And I request that my prepared statement be submitted for the record.

Mr. DINGELL. Without objection it is so ordered.

(The statement referred to follows:)

STATEMENT OF THE NATIONAL RETAIL HARDWARE ASSOCIATION

Gentlemen, this statement of the National Retail Hardware Association is presented by Russell R. Mueller, managing director, and William G. Mashaw, executive vice president and publisher of Hardware Retailer magazine.

Our organization, representing the grassroots market of 22,000 independent retail hardware merchants in more than 10,000 U.S. communities, has for many years supported the principles and objectives contained in the legislation under consideration by this committee. We were the first of more than 70 national trade and professional organizations to recognize the merits and to endorse the quality stabilization bills.

This position is concurred in by an overwhelming majority of our member stores. The stand taken by hardware merchants should, we submit, have a material bearing on the committee's consideration of this legislation.

Among service-type retailers, the hardware retailer occupies a wholesome image in the minds of most all consumers. Their stocks of tools, housewares, garden and farm supplies, paint, sporting goods, and other service items are well known to all.

These stores provide a maximum of service and convenience to the purchasing public wherever they might be located. Well over half are in trading areas of under 10,000 population. Hardware stores have always been dominantly stocked with quality lines of manufacturer branded goods. Manufacturers' brand name merchandise is, in fact, the backbone of hardware stores' inventories.

Far and away the majority of goods sold through hardware stores is obtained through wholesale sources of supply (estimated at approximately 85 percent). Hundreds of independent hardware wholesalers across the country provide efficient and mass distribution through our stores. It is significant that the National Wholesale Hardware Association, representing most of the general line wholesale hardware firms, has also endorsed this legislation.

Reasons for our support can be simply stated:

(*a*) We feel that enactment could have decidedly beneficial results in all areas of the economy.

(*b*) Manufacturers should be granted the brand-control privileges afforded by the legislation. Legal obstacles which deprive manufacturers of brand name goods from maintaining some measure of control over distribution, are working serious hardships on retail hardware and similar service-type establishments.

(*c*) Enactment would make for more healthy and effective competition at retail, by making it no longer imperative that a brand name "compete against itself" in price and otherwise.

The above-stated conclusions are supported as follows:

1. *The quality stabilization bill, as law, would strengthen competition among brands and greatly expand markets.*—It would accomplish prevention rather than encouragement of monopolistic practices. By providing a practical means by which manufacturers could competitively achieve brand control through distribution, retailing giants would be forestalled from engaging in practices inevitably leading to market monopolization.

In the hardware field, unrestrained cut-throat price competition on some branded lines of electric housewares and other items has demonstrated how all but the very large volume retail operators can be practically eliminated, and ultimately restrain distribution by depriving manufacturers of the brands involved of access to the thousands of smaller merchants with whom they would prefer to do business.

Hardware retailers in such markets often have no alternative but to deemphasize or discontinue price depressed brands which can no longer be sold profitably * * * or in which consumer confidence has been killed by footballing and baiting practices.

2. *Manufacturers who choose to distribute their brand-name goods through independent wholesalers and retailers are discriminated against under existing law.*—Some of the privileges of brand control which are granted in the quality stabilization bill (and which are not now permissible) to independent distribution of brand names, are widely permitted in other competing methods of marketing. Some manufacturers' brands are required to compete with themselves. Others are not. Why should this inequity be tolerated?

Under the following systems of marketing brand name products can be completely and legally controlled as to "fixed" retail prices. As these examples are reviewed, please consider why each of these marketing techniques is any more desirable than what the quality stabilization bill proposes:

(*a*) 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.

(*b*) Factory owned and controlled wholesale and retail outlets: This is prevalent in numerous chainstore operations. For example: factory-owned shoestores, clothingstores, paintstores. No one shops for a lower price on Robert Hall clothes.

(*c*) Factory direct salesmen: The wide range of branded products sold door to door by factory salesmen graphically illustrates this technique. For example, "Avon," 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?

(*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*) 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.

3. *All existing legal safeguards would be preserved. Privileges would not be granted to manufacturers in monopoly situations.*—Price competition is assured when a brand must have competition from other brands, whereas, monopolistic trends are invited when brands must compete with themselves.

Any retail price established for a branded product is at the competitive peril of the owner of the brand. If the price is out of line, competition is invited to take the business with another brand competitively priced.

4. *No one is required to do anything under this law. Use of the legal rights established under the proposed bill is entirely voluntary.*—Owners of branded products are in no way required to make use of the privileges as granted. A facility for marketing is merely provided for those who desire to use it under the conditions as specified. No Government action is necessary.

Manufacturers who elect to use the rights as granted are required to give distributors adequate notice, and to be vigilant in enforcement.

5. *Profitless distribution of brand-name goods brings a chain reaction of economic depression.*—When independent retailers and wholesalers find it impossible to sell goods profitably, and factories lose markets for their brands, reduced sales are followed by reduced employment, reduced advertising, reduced dollars in circulation, reduced tax dollars, and a stifled economy.

Would-be purchasers are deprived of convenience and confidence of trading in customary outlets. The ability of the economy to absorb productive capacity is reduced. As outlets capable of marketing quality lines disappear, jungle prices lead to poorer quality and customer deception.

Unstable prices invariably lead to unstable quality.

IN CONCLUSION

We respectfully urge this committee to give favorable consideration to this vitally needed legislation. Enactment would broaden distribution of quality, branded goods, assure healthier independent business through removal of inequities under existing law, and be in the general public welfare.

Mr. MASHAW. I represent the Retail Hardware Association, which is an association representing approximately 22,000 independent retail hardware merchants in more than 10,000 U.S. communities.

I feel that the fact that the position in support of this legislation is concurred in by an overwhelming majority of member stores is worthy of consideration by this committee. These hardware stores are predominantly marketers of brand-name merchandise. I would say that there is probably no better example of the type of merchant who has built his distribution philosophy on brand-name merchandise than the retail hardware merchant.

I would like to refer to the last paragraph on page 2 of my statement, which contains the point that I would like to enlarge upon. And that is, we submit that manufacturers of branded goods who choose to distribute their brand-name goods to independent wholesalers and retailers are discriminated against under existing law.

And the point in support of that statement is that some of the privileges of brand control which are granted in the quality stabilization bill (which are not now permissible) to independent distribution of brand names, are widely permitted in other competing methods of marketing.

We would like for the committee to consider the question of why some manufacturers' are required to compete with themselves and others are not. It has gotten to where it is impossible, practically speaking, for a manufacturer of a brand name to nationally advertise a product and use a price in his advertising. One knows the importance of using priced advertising. And there are all kinds of reasons why the manufacturer places himself in jeopardy when he uses a price in his national branded advertising.

The distribution setup in which the chain or some other group of retailers owns a private brand or a controlled brand presents that type of distribution with the full privileges of advertising price at any time they care to, without any fear whatsoever of anyone ever underselling on that brand. That is essence of brand control and price control. It seems to me that it is a rather inconsistent thing when the people who are supposed to be so much opposed to the quality stabilization bill seem to see no inherent evils in complete brand control by methods of distribution in which independent whole-

salers and retailers do not become involved. So my big questions is, "Why is it evil for some and not evil for others?"

I don't think that it would be conducive to anything in the way of progress to comment further on the prepared statement, in view of the fact that I am completely aware that the chairman's position on this bill from past experience. And I know that we have debated this before, and I believe the points have been well made, Mr. Chairman, from both points of view.

I have nothing further to say.

Mr. DINGELL. Mr. Mashaw, you have been most kind. It is always a pleasure to see you back again.

The chair will recognize Mr. Ray Burch.

STATEMENT OF RAY BURCH, SALES PROMOTION MANAGER, ARNOLD, SCHWINN & CO.

Mr. BURCH. My name is Ray Burch. I am sales promotion manager of Arnold, Schwinn & Co., makers of Schwinn brand bicycles. I make this statement on behalf of my company, our 31 distributors and approximately 6,000 independently owned Schwinn retail dealers across the country. We support H.R. 3669, the quality stabilization bill.

The bicycle business presents an excellent example of the need for protection to small businessmen in property rights in brand names that would be provided by this legislation.

About 4 million new bicycles are sold in this country each year having a retail value of approximately $160 million. For some years now nearly one-third of these bicycles have been imported. The remaining two-thirds are produced and sold by 10 domestic manufacturers, Schwinn accounting for from 12 to 14 percent of total U.S. bike sales.

About half of all bicycles are sold by the giant mail order and automotive retail chains that distribute and retail their bicycles under their own private labels in every town and city across the country. The remainder are distributed by jobbers or sold direct to dealers. These bicycles are sold through department stores, hardware stores, variety stores, discount and catalog stores, and by the small, independent, servicing bicycle dealers.

The bicycles of most manufacturers are sold under a great variety of brand names and labels, each producing not only under his own label but also under a great many private labels owned by his customers.

In the 1930's Schwinn became the leader in improving bicycle design and quality. As a result, our bicycles began to be identified with the name "Schwinn," no matter what private labels they carried, even before the Schwinn name was nationally advertised. Slowly the trade name "Schwinn" became accepted. Postwar we discontinued all private labels and all of our bicycles are now sold under the Schwinn name. Our trademark is known everywhere as identifying the high-quality bicycles my company produces.

Our success in business has been achieved only because we ourselves have assumed the responsibility for consumer satisfaction in the use of our products. This consumer satisfaction depends upon our prod-

uct being sold through retail outlets that will share with us a mutual responsibility to the consumer, and who are equipped to stock, display, sell, and properly service Schwinn bicycles. We share this responsibility with our dealers in many mays. For example, we extend to every purchaser of a Schwinn bicycle a no-time-limit guarantee; we operate dealer service schools so Schwinn dealers can give their customers factory-trained service; we help Schwinn dealers support bicycle safety programs in their schools and communities; and we provide Schwinn product identification for their stores, in the yellow pages, on network television, and in many other ways.

We have found that when we can provide the servicing dealer with adequate help and incentives to stock a variety of sizes and models and to promote and advertise our product, he is increasingly successful in selling Schwinn brand bicycles in competition with his much larger, better financed, price conscious competitors selling private label bicycles.

These small independent servicing dealers, unlike the giant retail chain and mail-order stores with whom they compete in the sale of bicycles, service what they sell. Not only does the dealer assemble and adjust the bicycles he sells, but he also provides repair service for the bicycles of practically all other bicycle retailers. He is a vital element in the customer satisfaction of all kinds of bicycles in making possible their continued safe operation.

This is of real significance since nearly all bicycles are bought by or for children. Less than 5 percent are used by adults. These bicycle consumers and their parents across the country know the Schwinn trademark and brand name. They recognize it as assuring the quality and safety of Schwinn products resulting from careful manufacture and field servicing through responsible dealers.

My company and the small businessmen who sell its products throughout the country decidedly favor the proposed quality stabilization bill for several reasons:

First, we believe that Schwinn's reputation for quality, safety, and satisfaction embodied in our trademark is the most important factor in the sale of our products.

Secondly, that quality, safety and satisfaction cannot be maintained in the face of predatory, destructive, and dishonest selling practices.

Finally, we are convinced that the grim alternatives to a quality stabilization law are the gradual extinction of small businessmen who sell and service brand name products like ours and their replacement by giant merchandisers with integrated distribution, contrary to the aims of the antitrust laws.

Like any other vehicle, a bicycle needs to be properly assembled. It requires adjustment and repair in use. This is particularly true since bicycles are used primarily by children who often abuse them. Moreover, bicycles have become more complicated. We now sell not only 3-speed bicycles, but thousands of 10-speed and 15-speed derailleur-equipped models with caliper brakes and other refinements. The compelling need for proper adjustment and service has sharply increased.

Large integrated retail chains use bicycles for "Traffic builders." They are primarily concerned with price competition and price considerations, sell bicycles "in the carton" and afford the consumer little

or no service in setting up or assembling them. They assume that anyone can assemble bicycles, not realizing the complexities of multi-speed gears, the various kinds of brakes and other equipment.

The small independent bicycle dealer, usually operating a neighborhood shop, is trained to properly assemble bicycles. He maintains an adequate supply of parts and trained personnel to keep bicycles in condition for our children to use safely.

But such dealers, as a key element in keeping all makes of bicycles in safe operation, cannot survive as businessmen on their service charges alone for adjusting gear shifts, tightening brakes, repairing tires, and fixing this and that so that our children can ride and play in safety. Rather, the independent servicing bike shop can stay in business and continue to keep the bicycles in this country maintained and operating in a safe manner only if he can compete on equal terms with the mass sellers in the sale of new bicycles.

It is widely recognized that he must sell merchandise identified by a trademark, brand, or trade name of high quality, that is widely advertised and known, if he is to compete with the large retail chains. His sales depend largely on the manufacturer's goodwill and the reputation of his brand name, and upon his having an adequate inventory, and his promotion of that brand locally. This requires the manufacturer to retain a continuing interest in the merchandise until it reaches the consumer.

We are now witnessing the erosion and perhaps eventual demise of the small servicing dealer on whom we have traditionally depended to deliver customer satisfaction. From time to time our products are diverted into discount channels and are put on display at the stores of mass merchandisers. We know from painful experience that our products cannot be used successfully by consumers in most cases without the assumption of responsibility for consumer satisfaction by the retailer at the point of purchase. Discount houses, large volume, low markup, minimum service merchants are simply not equipped to give this kind of consumer service on bicycles any more than they can do it for Chevrolet automobiles. When they can exploit our product to their own ends, the servicing dealer is forced to give it up.

Such small retailers can only compete in the sale of new bicycles if the brand they sell can be and is safeguarded against those mass marketers who wish to exploit it as a loss leader, for "bait and switch" advertising, or practices that would otherwise quickly destroy its good name. This is the only practical way small retailers can compete successfully with the large chain and discount stores.

By their tremendous volume of private label bicycle sales the large integrated chain retailers dominate and have long dominated the bicycle consumer market. They are protected from intrabrand competition by reason of their integration. They locate stores where they wish and prevent discount houses from using their brand. They fix the retail prices in every store. They completely control competition within their brand of bicycles. They permit only interbrand competition of their line of bicycles with other brands of bicycles.

Sears, Roebuck & Co., for example, sells the J. C. Higgins brand of bicycle. Without a doubt, Sears is the largest single bicycle retailer in the country, selling as many or more bicycles than all Schwinn retailers combined. The retail prices of the J. C. Higgins bicycle are

fixed by Sears, and by Sears alone. As a result, there is no competition pricewise of any kind between the 1,690-plus Sears retail stores and catalog units across the country as to the J. C. Higgins bicycle. Sears is never troubled by any discount house or other so-called wholesale or loss-leader competition on its particular brand of bicycle, whether located in a fair-trade or non-fair-trade State.

The same is true of the 1,150+ Montgomery Ward stores and catalog units selling the Hawthorne brand bicycle. These giant retailers, and others like them are entirely free of intrabrand price competition in their brand of bicycles. They are able to devote themselves entirely to competing, effectively and profitably, with other brands of bicycles. They have their own, built-in, quality stabilization protection.

On the other hand, the small home-owned dealer, handling the Schwinn brand bicycle, without adequate legislation such as H.R. 3669, must compete first with every other dealer selling the Schwinn brand before he can begin to compete with Sears, Ward and the other large chains handling other brands.

The absence of such security in the quality brands he handles not only places the small dealer at a serious competitive disadvantage, but threatens his very existence as a retailer.

The quality stabilization bill offers a carefully considered new approach. This bill would establish a more complete property right in the brand name so that the manufacturer can (*a*) specify certain conditions under which the brand name cannot be used in the resale of his product and (*b*) obtain an injunction to prevent the continued misuse of his brand name under such conditions.

Basically H.R. 3669 would provide three reasons for which a manufacturer who chooses to utilize the bill could revoke the right of the reseller to use his brand or trademark in selling his product, i.e. (1) "bait merchandising" practices, (2) selling or advertising at other than the manufacturer's currently established resale prices, or (3) intentional misrepresentations as to make, quality, model, size, age, etc.

This bill would not apply at all unless competitive products were available to the consumer. It is designed to strengthen the antitrust laws by suppressing certain unfair methods of competition that are generally acknowledged as promotive of monopoly in distribution.

It would thereby preserve and intensify competition between different brands of bicycles, the interbrand competition, by precluding the destructive competition on the servicing retailer's own brand that can remove all his incentive and profitability in conducting his business.

Present market conditions in many lines, including bicycles, are undergoing drastic changes. Overcapacity of manufacturers, the impact of imports, the growth of discount houses, other changes in the distribution system, and the increasing prevalence of predatory selling practices have created a compelling need for this type of legislation.

To those who argue that this is simply another fair trade or resale price maintenance bill, let me give a few examples of what can and has happened to our Schwinn brand—and these have nothing to do

with resale prices. These examples are taken from our files of market research reports, showing to what lengths some retailers will go to use the Schwinn name for "bait and switch" deception. Here is what they told customers:

1. In Florida, a retailer who advertised Schwinn bicycles told a customer who asked for a Schwinn:

> Yeah, but it will cost you $80 or $90 * * *. Why, they are so high-priced—we had lots of them and you know we took a lickin' to get rid of them during Christmas—I did not want to stock them. The only thing is with Schwinn that they use English parts and put it on their bikes, that's all. If you want the Schwinn I am sure you will be satisfied with Raleigh—that's the best bicycle made.

The fact was, the Schwinn model the customer was interested in had a suggested price of $58.95—not $80 or $90—but this retailer made a little more profit on another brand. So he advertised the Schwinn name for "bait" and then misrepresented the facts to work the "switch."

2. In Detroit, a retailer who makes it his regular practice to keep a few Schwinn bicycles on display for "bait" told his customers:

> I'm glad you asked for a Schwinn—come here and I will show you one. Look at this front fork, it's just welded on. Look at the cheesey chain guard. This sells for $47.95. What you are paying for is only the name. Let me show you a good bike for that price.

He then showed me two other brands and pointed out their good features.

The facts: The Schwinn bicycle was the only make on the market at that time equipped with a solid forged steel fork and a chain guard strong enough to support the weight of an adult standing on it (for demonstration purposes). He misrepresented the facts to "switch" the customer to another make on which he could make more profit.

3. In Chicago, Ill., a retailer who used the Schwinn name as "bait" to attract customers for his imported bicycles on which he made a higher profit worked the "switch" this way. The report says he—

> Tried his very best to convince me that the Hercules was the best bike, and when I insisted on the Schwinn he even went so far as to tell me that if it was his decision to make he would pass up the sale entirely because he was absolutely sure the boy he was buying the Schwinn for would have nothing but grief with the Schwinn.

This dealer advertised Schwinn, but only to sell his imported bicycles—not the Schwinn he claimed to represent.

4. In Stamford, Conn., from another "bait and switch" retailer:

> He said it was impossible to service the Schwinn bicycles because the gear shift was made in Austria and you could not get replacement parts for them. He said Schwinn bicycles were outrageously expensive. He said he would order one if my husband insisted but said I was foolish.

The fact is that Schwinn is the one bicycle on which replacement parts are always available, but this retailer, after using Schwinn for "bait" was trying to "switch" the customer to another brand.

5. In Philadelphia, Pa., this retailer made it a practice to keep at least one Schwinn on display, but as we say in the trade, it was

"nailed to the floor." He wouldn't sell it—it was what we call a "kicker." Here's how he used it:

When I entered this place I asked for a Schwinn bicycle and the sales person showed me the one and only one he had on display. He at once told me that he was sure I did not want the Schwinn for $59.95 as the Huffy bike which sells for $39.95 was a better buy and also said that some of the foreign imports were even a better buy than the Schwinn.

Now these are only a few samples of the everyday abuse a respected brand name product like Schwinn gets in the hands of unscrupulous retailers. It is bad enough for competitors to make false statements about our product, but when these "bait and switch" outlets pose as Schwinn dealers to deceive our customers and destroy our good name, it a special kind of treachery which demands relief.

By what right should such people be allowed to use our own good name against us—or against our dealers and our customers? How can this kind of deception possibly serve the public interest?

The quality stabilization bill will help to correct these and other abuses of reputable brand names like Schwinn and preserve for responsible producers and retailers alike the opportunity to serve consumers with honesty—the only way that will insure their satisfaction and continued patronage.

We urge the prompt enactment of H.R. 3669.

Mr. DINGELL. The next witness will be Mr. L. Griffin Eckle.

STATEMENT OF L. GRIFFIN ECKLE, TULSA, OKLA.

Mr. ECKLE. Mr. Chairman, I am L. Griffin Eckle. I own and operate a retail business in Tulsa, Okla., known as Lee's Bicycle Shop. Being an independent servicing bicycle dealer and typical of many hundreds of such dealers across the United States, I support the quality stabilization bill, H.R. 3669.

My store has been operating for 51 years in Tulsa, a city of 350,000 persons, in which the competition in the sale of bicycles is as keen and intense as anywhere in the country. My little store competes in the sale of bicycles with the mass merchandisers such as Sears and Montgomery Ward and with large automotive chain organizations, such as Western Auto, Oklahoma Tire & Supply, Goodyear, Firestone, Goodrich, et cetera, and with department stores, large discount houses, hardware stores, variety stores, and many other retailers of general merchandise. It is not uncommon for these competitors to advertise bicycles for resale at less than my wholesale cost. Actually, the Skaggs Drug Discount House in Tulsa is selling full-size bicycles, made in a Communist country, for $19.95.

During my experience as a bicycle dealer I have seen many enter and many leave the business because they have found it to be unprofitable. This condition has been brought about by a series of things, such as increased taxes, increased rents, wages, and many other costs. I have also seen the increased growth of the giant chainstores that have long been the dominant bicycle retailers, to the point where a single retail outlet of one such chain in Tulsa sells more bicycles of its own private brand than all of the bicycle shops in Tulsa. Yet the chain uses the bicycle as bait for additional sales of other merchandise, while the bicycle shops depend upon their sales in order to exist.

I am grateful for our type of Government which grants a business, as small as mine, the opportunity to express its thoughts before a committee such as yours. I am grateful for such a privilege extended me today.

As a small, independent retail dealer with but three employees, I am glad to say that I favor the proposed quality stabilization bill. It is my opinion that the need for this legislation lies in the answers to these basic questions:

1. Is the continued operation of independent retail merchants important and essential to our American economy?

2. Can the independent retail merchant continue to operate without protection from predatory competitive selling practices by others of the same known brands that he sells?

3. Is quality stabilization fair to the manufacturer, the retailer, and most important of all, to the consumer?

I firmly believe that the answer to question No. 1 is "Yes"; namely, that the continued operation of the independent retail outlet is not only important and essential, it is vital in our American economy.

The independent or neighborhood merchant has long been the cornerstone around which our American communities have been built. He functions as the medium through whom mass distribution of many products has been accomplished without monopolization or undue concentration in distribution and retailing. His livelihood depends upon his having available an adequate inventory of quality products, of intensively promoting their sale, and of servicing the products he sells in order to convert the casual customer into a regular customer.

He and his business affect many segments of our economic, civic, and social life.

He creates a demand for many service industries that are directly affected by his successful operation, including, by way of example, the transportation, advertising, and insurance industries.

In civic life he is in the forefront of organizations such as Rotary, Kiwanis, Lions, exchange, chambers of commerce, and other civic groups seeking to develop answers to otherwise unsolvable local problems. He is actively engaged in supporting local charitable and other drives and programs concerned with the problems of his fellowman. He is invariably the sponsor of many recreational and civic endeavors and activities.

These things come so naturally to his operation that whenever any local group contemplates a civic or social program, the independent retailer is invariably one of the first to be contacted.

His method of doing business differs from chainstore operations in which the managers of the stores are not independent operators. His method of operation has the advantage from the standpoint of our American system of competitive economy, of enabling individuals with small capital to enter and remain in business for themselves. If our economy does not permit such a method to operate, these individuals would be forced to become merely employees. The sale of nationally known products by such individuals creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors rather than from employees of a vast chain.

I submit that that method of operation is therefore good for the economy and that the continued function of the independent retail merchant is not only important, but also necessary and vital to maintaining an expanded American economy that is not dominated by large, absentee-owned, chain or mail-order organizations.

But can he continue to operate without relief from certain predatory competitive practices affecting the merchandise that he sells? In my experience, it is wholly improbable that small dealers such as I am, can continue to operate. The independent merchant is now definitely threatened as such by inroads being made by discount houses, by cutthroat pricing of name brand merchandise used as bait, by the growing intensity of competition from large integrated retailers and by the trend toward monopoly in the retail field.

The opportunity for an orderly distribution of quality merchandise by small businessmen like myself is essential to our economy. I believe that the American people are willing to patronize a business operated by a small merchant who must of necessity make a reasonable profit if he is to pay wages, rent, and taxes and survive.

To achieve this result he and his supplier should be assured against misleading, unfair, and cutthroat practices, often on a hit-and-run basis, by outlets advertising the same trademarked articles at so-called discount prices, as bait to lure customers to buy long-profit merchandise that is not advertised. While such opportunists can do what they want with their own brands, they should not be able to destroy the nationally known brands of others.

Such predatory practices are unfair to the consumer, to the independent retailer, and to the manufacturer. The proposed quality stabilization bill will give some measure of protection, in a fair and equitable way, in affording the manufacturer the opportunity of protecting his property rights and his trademark from unfair exploitation by others at the retail level.

In the case of "big ticket" items like bicycles, small retail merchants can only sell a well-known brand or quality product if they are to compete with other mass merchandisers exploiting their private labels. If their manufacturer-supplier is unable to prevent predatory practices with respect to this brand, the small servicing dealer's incentive to adequately stock and promote that line is destroyed, his new bicycle business is gone, and he cannot survive on the modest charges for his repair and adjustment services.

Such independent retail merchants, in my opinion, urgently need this legislation to stay in business and continue to serve the public by offering quality merchandise, at fair prices, by being guarded against the deceptive and unfair competition of some who grossly overcharge consumers on certain items after having lured them into buying as the result of "bait" offers on well-known quality merchandise.

This bill is vital to the protection of the brand name of a top quality product such as Schwinn bicycles that requires substantial service at the point of sale, and very frequently after the sale, to provide customer satisfaction.

Does this legislation harm or benefit the consumer? It is, I believe, distinctly to the consumer's advantage, both pricewise and otherwise:

In the first place, the product he buys is only covered by this bill if "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 are in free and open competition therewith." Therefore, the consumer is insured a free choice of competing merchandise. Secondly, the consumer is not compelled to do anything—he is completely free to choose a Schwinn bicycle or any other brand. Thirdly, if he does choose a Schwinn bicycle, he is assured of the customary high quality and full value for the dollar he spends. Fourth, the consumer has the continued service of the expert neighborhood dealer to assure his child's riding safety.

What effect does this have on the dealer? He, too, is benefited in numerous ways: First, he has access to well-known and reputable brand names to attract customers to his store, with incentive to stock and promote it. Secondly, the dependable quality of such products enables the dealer to recommend them to his customers, knowing they will be satisfied and return to buy again. Thirdly, the continuing demand for these products and the service he renders enables him to compete effectively with larger, integrated mass merchandisers. Fourth, because he can compete effectively, he can earn a living for his family.

Is this in the public interest? Decidedly so, I believe. The small private merchant is the backbone of the community. The health and vigor of the competitive process is enhanced by his presence in competition with mass retailers. Moreover, he performs a real service in the safety of children who ride bicycles.

I believe that H.R. 3669 would help to assure my survival. I urge its prompt enactment.

STATEMENTS OF FRANZ LEICHTER AND GEORGE J. NEVOLE ON BEHALF OF NATIONAL BELLAS HESS, INC.

Mr. LEICHTER. My name is Franz Leichtner, and I appreciate the courtesy of this esteemed committee in having us appear before it, and its distinguished chairman.

And we are very happy that our fine Congressman from New York, William F. Ryan, is considered as highly here as he is in New York.

We are appearing on behalf of National Bellas Hess, Inc., and G-E-X, a large national retail organization.

In view of the time available, I would prefer to give my time to Mr. Nevole. He has a statement here which he is going to summarize.

Mr. Nevole is a retailer, and I think it would be helpful to have the bill under consideration looked at from the viewpoint of a retailer.

Mr. NEVOLE. My name is George J. Nevole.

Mr. Chairman, in view of the fact that the time is short, I will depart from the prepared statement here.

Mr. DINGELL. I assume you both desire to submit a prepared statement to the committee.

Mr. NEVOLE. Yes. And we desire it to be part of the record.

(The prepared statement of Mr. Nevole is as follows:)

STATEMENT BY NATIONAL BELLAS HESS, INC.

My name is George J. Nevole. I thank the committee for this opportunity to appear before it and to express the opposition of National Bellas Hess, a nationwide retail organization, to the so-called Quality Stabilization Act.

National Bellas Hess specializes in mail-order retailing and also owns and operates in the Midwest, in the East, and in the South large retail centers known as G-E-X stores. I am the manager of one of these stores in Hampton, Va.

Permit me to point out initially that we do not engage in the use of loss leaders, bait merchandising, false advertising, or any other improper practices this bill reportedly aims at in its avowed purpose of restraining "unfair methods of distribution." And as retailers satisfying hundreds of thousands of customers annually, we do not and will not take second place to anyone in our concern for "quality," a stated goal of this measure and featured in its name.

Frankly, we find the title of this bill and its statement of purposes confusing and misleading. Except for the title, there is no reference to quality. Its provisions grant equal protection to shoddy and premium goods. If quality stabilization were to be achieved by such legislative fiat, some standard and control thereover would have to be written into this bill. But none is in fact provided.

If its purpose is to prevent unfair methods of distribution, then it should not leave enforcement to the manufacturer but would have to provide for governmental regulation and enforcement through strengthened machinery of the Federal Trade Commission. But this in fact it does not do.

What it does do, and what is manifestly its main thrust, is to legalize price fixing. It is purely and simply a national "fair trade" measure and must be considered as such. What it seeks to do is nothing else but to nullify the advantages to the consumer of lower prices resulting from free competition and which are the product of the current revolution in merchandising, of which, I am proud to say, we are a part and a result.

The basis upon which our stores operate is a high volume of sales and a low markup. Our markup ranges between 20 and 30 percent, and, on certain lines, even lower. This contrasts with the traditional retail markup of approximately 40 percent and sometimes higher. And, it must be emphasized, that our low markup applies across the board—to all merchandise sold in these stores. It applies consistently to national brands, our own brands, and unadvertised brands. We do not entice customers into our stores by cutting the prices on well-known brands and having a higher markup for lesser known brands.

The basis for the merchandising revolution we have witnessed since the end of World War II is not grounded in deceptive practices. If it were, we would not have seen such a widespread public acceptance—more properly characterized as a demand—as evidenced by the billions of dollars of sales yearly by high-volume, low-profit-margin stores.

Contrary to the picture being presented by the proponents of this measure, the American consumer is not spending billions of consumer dollars on inferior products at inflated prices after being lured into the premises of unethical retailers by the offering of nationally known brands at giveaway prices. The growing sales volume of the high-volume, low-profit-margin establishment and the obvious satisfaction of the consumer belie the attack that modern retailing is a fraud and that the consumer needs protection therefrom.

No, I respectfully submit, one cannot justify price fixing through "fair trade" by claiming that it is necessary to defend the consumer from sharp practices. If it were, why are all consumer, labor, and farm groups against it?

Lower prices through modern retailing is a fact and there is no mystery as to how this is made possible. These reduced prices are the result of—

1. Move of stores near population centers, especially in burgeoning suburbia;
2. Move to low-cost land;
3. Reduction of overhead by limiting services to those that are necessary, as contrasted with the extensive and often unwanted services which the traditional store gives and for which it charges all its customers;
4. Inexpensive but convenient interiors and furnishings;
5. Lower advertising costs in many instances;
6. Convenience and savings to the customer in having all goods available under one roof; and

7. Mass merchandising through low markup on all goods and high volume of sales. The latter is the single most important feature of the merchandising revolution.

The development of modern retailing, which can truly be likened to a revolution because of its phenomenal growth, is only a part of the greater American economic revolution. It follows—chronologically and logically—the revolution in the means of production and bears great similarity thereto. Much as the assembly line and mass production created greater efficiency and lower prices, so modern retailing has sought to place the distribution to the consumer on a more efficient, less costly mass basis.

This so-called Quality Stabilization Act seeks to roll back these modern advances in merchandising and to promote and foster inefficient and costly methods of distribution. One might as well have sought, in the early years of this century, with equal logic and justice, to outlaw the assembly line and the mass production of the automobile when introduced by Henry Ford.

It has certainly never been the intent of Congress to penalize an industry for efficiency and for giving lower prices to the consumer. Yet this is exactly what the measure under consideration seeks to do. While purportedly helping the consumer, it strikes in fact at the lower prices the consumer has been enjoying and demanding. It talks of unfair methods of distribution but these have not been shown to exist and no enforcement machinery to prevent deception is provided. What the bill would unquestionably accomplish is to impose on the economy national price fixing through fair trade.

The examples and studies are legion which have demonstrated that what is euphemistically called fair trade raises the price the consumer must pay. Attorny General Brownell in 1955, in an address before the National Retail Dry Goods Association, stated that:

"It seems evident that the absence of competitive pricing under fair trade results in higher prices for the consumer." [1]

And last year, at a hearing before the Senate committee on a measure similar to the instant one, Assistant Attorney General Lee Loevinger stated:

"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." [2]

A survey by the Department of Justice some years ago of the prices of 119 consumer items in 8 non-fair-trade cities illuminated the cost of fair trade. In Washington, D.C., for instance, the saving from the fair trade price was 41 percent in the case of housewares and small appliances, 35 percent in the case of jewelry, 17 percent in the case of prescriptions, 27 percent in the case of cameras and photographic equipment, and 31 percent in the case of typewriters. The average saving on all the items surveyed in all the 8 cities was almost 20 percent.

Our experience confirms the higher cost to the consumer of fair trade. When the manufacturer can fair trade his product, the minimum resale price he fixes is inevitably based on a markup of 40 percent or more. We do not need or want such a markup on any of our goods and we do not believe the consumer should be forced to pay it.

I would like to compare and contrast for you our resale prices for known name items and the manufacturer's fair trade resale prices therefor:

(*a*) The manufacturer's wholesale price of a 4¾-ounce bottle of Old Spice after shave lotion is 75 cents. Our resale price is 99 cents, a markup of 24.3 percent. The fair trade or suggested retail price is $1.25, a markup of 40 percent.

(*b*) The manufacturer's wholesale price of a giant bottle of Halo shampoo is 60 cents. Our resale price is 81 cents, a markup of 25.9 percent. The fair trade or suggested retail price is $1, a markup of 40 percent.

(*c*) The manufacturer's wholesale price for Abdec pediatrics drops in quantities of 60 ccs. is $2.11. Our resale price is $2.79, a markup of 24.4

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[1] Quoted in Maurice Mermey, "Fair Trade, the Fundamental Issues," vol. 1, the Antitrust Bulletin (1955), p. 140.

[2] Testimony of Hon. Lee Loevinger, Assistant Attorney General, Department of Justice, Hearings on S.J. Res. 159, subcommittee of the Committee on Commerce, Senate, 87th Cong., 2d sess., 1962, p. 133.

percent. The fair trade or suggested retail price is $3.51, a markup of 39.9 percent.

(*d*) The manufacturer's wholesale price of a 12-ounce bottle of Phillips milk of magnesia is 39 cents. Our resale price is 51 cents, a markup of 23.5 percent. The fair trade or suggested retail price is 63 cents, a markup of 38.1 percent.

(*e*) The manufacturer's wholesale price of 100 Upjohn Unicaps is $1.67; our resale price is $2.19, a markup of 23.8 percent. The fair trade or suggested retail price is $3.11, a markup of 36.8 percent.

(*f*) The manufacturer's wholesale price of 1 pound of Whitman's Sampler chocolates is $1.20. Our resale price is $1.59, a markup of 18.8 percent; the fair trade or suggested retail price is $2, a markup of 40 percent.

Fair trade was likened by former Assistant Attorney General Robert Bicks to a national sales tax paid by the consumers of fair traded items.[3] And who is the beneficiary of the subsidy granted from this tax? We submit it is not the small retailer, though his needs are often cited as the reason for a fair trade measure, such as the Quality Stabilization Act.

We do not know if the case has been established to make assistance to retailers a matter of national purpose. If it has, this bill certainly will not help him. As a retailer, I submit this bill will hurt him. A survey made by the Department of Justice of the rate of business failures in fair and non-fair-trade States confirms this. The rate in States which did not hinder the retailer's business freedom by price fixing laws was approximately one-half the rate for the States which did have fair trade laws.

The reason is that fair trade takes away the small dealer's prime competitive weapon, freedom in pricing. He can no longer determine how he will price his goods. This is the essential decision every retailer must make for himself. When it is made for him by the manufacturer, his welfare and, even his existence, are threatened and the Department of Justice survey proves just that.

The small retailer will also be damaged by the impetus that a national fair trade law will have for developing and increasing the marketing of so-called private brands, which should more aptly be termed distributors' controlled brands. In recent years there has been an enormous increase in the marketing of these brands; to such an extent, in fact, that manufacturers of national brands are increasingly selling their products not only under their own name but also for marketing under distributors' brand names—at lower prices. If the retailers are denied pricing freedom on national brands and a business stagnation is forced on them through high markups, they will increasingly turn to the use of their own brands. But only the larger retailer, who can develop and handle such brands, is in a position to do this; the small retailer who cannot will only be placed at a greater disadvantage.

If the aim of this bill is to help the small retailer, why is it administered and its provisions triggered by the manufacturer setting the resale price? Under its provisions the manufacturer is free to impose a resale price and he can determine this price as he wishes. Certainly his determination will not be guided by what is best for the small retailer.

The idea that the manufacturer should control the resale price for his product is foreign to our economic system and has been judicially repudiated in the past few years in over twenty States. The instant bill overrides the decision of those States which do not want and have rejected fair trade. It also introduces a unique property concept, that the manufacturer of a trade name item can retain control over it after he has sold it and after title has passed to the purchaser. The argument is made, and apparently seriously, that the purchaser, if he wants to sell the goods free from the restraints the manufacturer has imposed, need only remove the trade name or mark. But how can the dealer remove the product from the can—does he squeeze the toothpaste out of the tube to sell it free of the manufacturer's name and restrictions?

The property right which the owner of a trademark has is, of course, well recognized and defined. No additional protection is required. The argument that the good will the owner of the trademark has built up is damaged when the goods which it identifies are sold at less than the customary high markup has never been substantiated. A Canadian commission, which conducted extensive hearings on fair trade, reported:

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[3] Testimony of Hon. Robert A. Bicks, Assistant Attorney General, Department of Justice, hearings on fair trade, H.R. 1253, etc. Committee on Interstate and Foreign Commerce, House of Representatives, 86th Cong., 1st sess., 1959, p. 520.

"No positive evidence was submitted which would indicate that a consumer's attitude toward a branded article became less favorable if he found that he could purchase it at a lower price, and in fact the evidence which was given as to the quantities of certain branded articles, which were bought in brief periods when a substantial price reduction was advertised, points in the opposite direction." [4]

As a retailer, I tell you that it is not the price but the quality which determines the consumer's evaluation. You can sell good merchandise which has a reputation for value at a relatively low price without damaging its favorable image; and if the merchandise is shoddy, you will not hide this from the consumer by pricing it high. But if any manufacturer feels that the worth of his product demands that it be highly priced—he can, of course, set a high price at which he sells to the retailer. There is no reason to also let him determine the markup for the retailer.

We do not think any meaningful protection against monopolistic high prices is provided by the provision of the bill that only those goods in free and open competition with similar goods can be fair traded. For one, this is at best an imprecise standard, but secondly and more important, once vertical price fixing is permitted it is an invitation to horizontal price fixing. What has happened in the drug industry, which has made the greatest use of fair trade where available and which is the main proponent of this bill, is instructive here. The Senate Antitrust and Monopoly Subcommittee showed the unconscionably high profits made by drug manufacturers. It is not improbable and in fact highly likely that what has happened in this industry will be repeated in others under the protective shield this bill would provide.

Our economy has been based upon free competition. Fair trade destroys competition. This Quality Stabilization Act legalizes price fixing and trespasses on, and is in restraint of, a freely competitive market. The report of the Attorney General's National Committee To Study the Antitrust Laws, a distinguished official panel of experts on our economy and the laws guiding it, unequivocally expresses its disapproval of fair trade, stating:

"It is the Committee's view that fair trade * * * is at odds with the most elementary principle of a dynamic free enterprise system." [5]

We had occasion in our various stores to verify a definite consumer opposition to fair trade. The people want lower prices and they want to pay only for those services they use and for no others. Our impression and view are apparently not isolated ones. We are impressed by the disfavor with fair trade traditionally expressed by governmental bodies, labor organizations, consumer and farm groups and many spokesmen of the business community.

We respectfully submit that the Quality Stabilization Act is not in the public interest.

Mr. NEVOLE. As I said, sir, I would like to depart from the prepared statement, but there are some essential points here I would like to refer to to give you the full flavor of our attitude and feeling in this record.

We basically express the opposition of the National Bellas Hess, a nationwide retail organization, to the so-called Quality Stabilization Act. National Bellas Hess specializes in mail-order retailing, and also owns and operates in the Midwest and in the East and in the South large retail centers known as G–E–X stores. And I am the manager of one of those stores in Hampton, Va.

Permit me to point out initially that we do not engage in the use of loss leaders, bait merchandising, false advertising, or any other improper practices that this bill reportedly aims at in its avowed purpose of restraining unfair methods of distribution. And, as retailers satisfying hundreds of thousands of customers annually, we do not

[4] Quoted in "Unfair Trade," a monograph. Published by National Association of Consumer Organizations, Inc., March 1959, p. 19.

[5] Report of the Attorney General's National Committee To Study the Antitrust Laws, 1955, p. 154.

and will not take second place to anyone in our concern for quality, the stated goal of this measure, and featured in its name.

We have become part of a merchandising revolution which we have witnessed since the end of the Second World War. And we are a product of it. And certainly this revolution was not grounded in deceptive practices. If it were, we would not have seen the widespread public acceptance more properly characterized as a demand, as evidenced by the billions of dollars of sales yearly in high volume, low profit margin stores.

Contrary to the picture being presented by the proponents of this measure, the American consumer is not spending billions of dollars on inferior products at inflated prices after being lured into the premises of unethical retailers by the offering of nationally known brands at giveaway prices. The growing sales volume of these high volume low profit margin establishments and the obvious satisfaction of the consumer belie the attack that modern retailing is a fraud, and that the consumer needs protection from it.

I respectfully submit that low prices to the consumer are the product of this revolution, in modern retailing, which has been characterized by:

First of all, we have had in recent years the move of stores to the new population centers. They have moved to the suburban areas.

Secondly, we can cite the move to low cost land as another factor which contributes to the fact that they can offer lower prices. And certainly the reduction of overhead by limiting services to those that are necessary as contrasted with those that are extensive and often unwanted, which are given by the traditional store is another factor.

Inexpensive but convenient interiors and furnishings can be cited as another reason.

And, as a fifth reason, we would add that in many instances there are lower costs of advertising.

The convenience and saving to the customer in having all the goods available under one roof is certainly another factor.

And finally we have mass merchandising through low markup on all goods and high volume of sales. The latter is the most singular important feature in this merchandising revolution.

The development of modern retailing, which can truly be likened to a revolution because of its phenomenal growth, is only a part of the greater American economic revolution. It follows—chronologically and logically—the revolution in the means of production and bears great similarity thereto. Much as the assembly line and mass production created greater efficiency and lower prices, so modern retailing has sought to place the distribution to the consumer on a more efficient, less costly, mass basis.

This so-called Quality Stabilization Act seeks to roll back these modern advances in merchandising and to promote and foster inefficient and costly methods of distribution. One might as well have sought, in the early years of this century, with equal logic and justice, to outlaw the assembly line and the mass production of the automobile when introduced by Henry Ford.

It has certainly never been the intent of Congress to penalize an industry for efficiency and for giving lower prices to the consumer. Yet this is exactly what the measure under consideration seeks to do.

While purportedly helping the consumer, it strikes in fact at the lower prices the consumer has been enjoying and demanding. It talks of unfair methods of distribution but these have not been shown to exist and no enforcement machinery to prevent deception is provided. What the bill would unquestionably accomplish is to impose on the economy national price fixing through fair trade measures.

Sir, very frankly, we find the title of the bill and its statement of purposes confusing and misleading. Except for the title, there is no reference to quality. Its provisions grant equal protection to shoddy as well as premium goods. If quality stabilization were to be achieved by such legislation, some standard and control thereof would have to be written into this bill.

But none is, in fact, provided.

We look at the purpose of the bill, and we find that it is to prevent unfair methods of distribution. If this is so, then it should not leave enforcement to the manufacturer, but would have to provide for governmental regulation and enforcement through strengthened machinery of the Federal Trade Commission—and, again, the bill does not provide this.

There are basically three arguments that are advanced by the proponents of this bill. And I think we can deal with them very briefly and dismiss them one at a time.

First, the proponents of the bill say that this legislation will help the consumer. Well, let us examine that very briefly. We know that we have before this committee the testimony of the Justice Department which, in effect, indicated that the consumer pays higher prices in those areas or States that have fair traded or price fixed mechandise than they do in those that do not. There have been many witnesses before the committee today that have indicated their positive feeling that price fixing or fair trading of merchandise would inevitably cost the consumer more. And certainly there are very many more examples that go on to point this out to us.

But as a retailer, I will tell you that my experience and that of our company confirms the higher cost to consumers of fair trade. When the manufacturer can fair trade its product, the minimum retail price he sets is usually approximately 40 percent. We do not need in our business this 40 percent. We don't need as high a markup as this. And we believe that the consumer should not be forced to pay for it.

And I would like to compare and contrast for you our resale prices for known brand items and the manufacturer's fair trade resale price therefor.

The manufacturers wholesale price of a 4¾ ounce bottle of Old Spice After Shave Lotion is 75 cents. Our resale price is 99 cents. This is a markup of 24.3 percent. The fair trade or suggested retail price is $1.25, a markup of 40 percent.

As another example, I would cite the giant-sized bottle of Halo Shampoo, which costs 50 cents through the manufacturer. Our resale price is 91 cents, which is a markup of 25.9 percent. The fair trade, or suggested retail price is $1, which is a markup of 40 percent.

And so the examples will go, indicating that the manufacturer is looking for a 40-percent markup, where we are satisfied and know

that we can run and operate our business with less than this and pass the saving along to the consumer.

Another example that I would make reference to would be Pediatric Drops, Abdec, where, again, we are looking for a markup of approximately 25 percent, and manufacturers are suggesting that the retailer obtain 40.

Phillips Milk of Magnesia, and the 100-bottle of Upjohns Unicaps and for those with a sweet tooth, Whitman's Sampler Chocolate, would fall into this very same category.

So you see, sir, we submit to you that the consumer would not benefit by any fair trade or price fixing legislation which may come out as a result of this bill.

Another argument that is advanced is that this legislation will help the smaller retailer. We submit to you, sir, that it will not, because, among other things, it will take away his most potent weapon, the thing that he needs most, his ability to set his own prices.

As a retailer and with experience that goes back some 20-odd years, I can tell you that if the retailer doesn't have this prime and most important factor at his command, the ability to regulate his price, and set the price that he wants rather than have someone else set it for him, he has given up one of the most important things that he has.

And certainly there has been reference today to own brand merchandise. And this will seriously jeopardize and affect the small retailer. If this bill is allowed to become a law, we will find that the public acceptance to fair traded and price fixed items will be such that larger stores and larger chains will seek to develop more and more their private brands. And, as a result, there will be even a greater acceptance for the private brands than there is today.

And the small retailer with one outlet or one store could not possiby hope to compete on a private brand basis because he may neither have the money nor the know-how or the ability to get these things to the degree that the larger retailer would.

So when we take these two arguments which are presented by the proponents of the bill, where they say that it will help the small retailer, it is obvious to us that it will hinder the small retailer rather than help him.

And the final argument that is presented, as we understand it, is that the bill is designed to protect the goodwill of the manufacturer. And here, again, to you we submit that this is false, because in our opinion the goodwill is not represented by a trademark, but in effect the quality of the product.

And I refer now to study made by a Canadian commission last year. And I feel it is important to quote this, because it puts the finger right on the pulse. This Canadian commission that was investigating fair trade reported:

> No positive evidence was submitted which would indicate that a consumer's attitude toward a branded article became less favorable if he found that he could purchase it at a lower price, and in fact the evidence which was given as to the quantities of certain branded articles which were bought in brief periods when substantial price reductions were advertised points in the opposite direction.

Sir, as a retailer, I tell you that it is not the price—and I have observed both personally. And I speak now of my observations of the

consumer—it is the quality of the merchandise that determines the value of it. And a manufacturer can put any price he wants on it, and this in the consumer's eye will not make it a good or a bad product.

But we also submit that if the manufacturer feels that the worth of his product demands that it can be highly priced, then he, of course, can set a higher price at which he sells to the retailer. There is no reason to also let him determine the markup for the retailer. And we feel very strongly about this.

I realize that time is short, but I would like to conclude with this statement, that we have had occasion in our various stores to verify a definite consumer opposition to fair trade. The people want lower prices, and they want to pay only for those services they use and no others. Our impression and view are apparently not isolated ones. We are impressed by the disfavor with fair trade traditionally expressed by governmental bodies, labor organizations, consumer and farm groups, and many other spokesmen in the business community. And we respectfully submit to this committee that quality stabilization is not in the public interest.

Mr. DINGELL. Your statement has been most helpful to the committe. I am grateful to you for being present. I am sure the committee is very appreciative of your kindness and of your assistance to us in our consideration of this legislation.

Gentlemen, we are grateful to you both for being present. I am sure you gentlemen are aware of my views on this legislation.

The Chair regrets to announce that the House is now considering the feed grains bill under the 5-minute rule. And under the rules of the House this subcommittee no longer has authority to meet. For that reason, the Chair will announce that the committee will convene tomorrow morning at 10 o'clock sharp.

I express my personal apologies to those who are present for the delay in appearing.

With that, the committee will stand ajourned until 10 o'clock tomorrow.

(Whereupon, at 5:15 p.m., the committee recessed, to reconvene at 10 a.m., Friday, April 26, 1963.)

QUALITY STABILIZATION—1963

FRIDAY, APRIL 26, 1963

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

The subcommittee met, pursuant to recess, at 10 a.m., in room 1334, Longworth House Office Building, Hon. John D. Dingell presiding.

Mr. DINGELL. The Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce will come to order.

The committee is hearing this morning witnesses on H.R. 3669 on the bill by the distinguished chairman called the quality stabilization bill.

The Chair is very happy to welcome our beloved colleague and distinguished friend, the Honorable Chet Holifield from California, to be our first witness.

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

Mr. HOLIFIELD. Mr. Chairman, members of the committee, my support for the quality stabilization bill is well known to you, but I do appreciate your permitting me to come before you to express my views regarding this vital legislaiton.

I have introduced H.R. 3863, which is identical to H.R. 3669, sponsored by your chairman, the Honorable Oren Harris.

The fact that this bill is impressively bipartisan is significant.

But even more significant is the fact that it is backed by men who are experienced in the area with which the legislation is concerned.

It is no accident that Senator Monroney, a former retailer, is fully behind the principles of this bill. It is not a coincident that Senator Humphrey, Representative Nygaard, Representative Stubblefield, and myself are sponsoring the bill.

It is because we as small businessmen have personally experienced the unfair types of competition that threaten the small businessman's existence.

That is why we are working so hard for the enactment this year of the quality stabilization bill.

The small businessman should have a fair profit on his investment and for his long hours of work.

I might interject here a remark not in my prepared testimony, that I am very pleased to note that some of my friends who are representatives in the unions are here this morning. I think it is time for them to receive a few grains of truth on this subject and dispel some of the

theoretical positions which they have maintained for so long and which I believe are inimical to the average wage earner.

Mr. DINGELL. I would just as soon the gentleman direct his attention to the committee.

Mr. HOLIFIELD. I am directing my attention to the chairman of the committee and I am expressing my pleasure that some of the representatives of labor are here today.

Fair union wages are set by eliminating "scab" labor, thereby modifying the factor of competition in the labor cost area, not creating a monopoly, but modifying pure competition; union labor calls "scab" labor unfair and Congress has legislated procedures to protect decent levels for wage earners. In so doing, Congress has recognized that unrestrained competition in the wage area is unwholesome for our society.

Retailing is the final step in the chain of production and distribution. It is just as necessary as any other step. It is entitled to some protection just the same as are the people engaged in all the other links in the chain. I am not asking complete protection, I am asking for a fair amount of protection.

I do not ask for complete protection, nor do I think it will completely protect the small businessman. He has many factors against him in this struggle to stay alive.

Let me describe to you the chain of production and distribution of a national branded item of merchandise. I use an Arrow shirt, for example, as I am now, and have been a retailer of Arrow shirts and other national brand items of union-made men's wear for more than 25 years.

Link No. 1. Production of cotton: Competition modified by legislation (crop control and price support).

The Congress just yesterday passed a bill for price support in feed grains. They have been passing similar bills for 30 years. Every time they pass this bill or a similar bill in this or any other area of agriculture, they modify competition, and they do it for the purpose of the beneficial, allover impact on society as a whole.

Link No. 2. Transportation costs from raw cotton to the retailer's store. Here competition again is modified by legislation of Congress, and I need not call this to the attention of the members of this great committee, because this is their important duty in the field of all regulatory agencies dealing with transportation.

And they set the interstate commerce rates or give the legislative authority to setting interstate commerce rates based on the cost incurred by the transportation companies, including the component union-wage level of all employees.

Link No. 3. The production of textile cloth and manufacture of the same into final garment; this is indeed two links. Every link of production is based on fixed costs, including union wages.

Link No. 4. Distribution of the final garment to the consumer. Now, it is in this field that no legislative protection exists for the independent businessman, who serves in this final link in the chain of production and distribution. Here we have pure competition; we have complete competition; unmodified by any type of legislative protection. As a result, "scab" practices run wild.

The decent merchant who wishes to retail good merchandise made in union-wage factories finds himself at the mercy of the "price gimmick," "deceptive advertiser," the mass handler of nonunion-made merchandise from various parts of our country or from Japan. These operators use national brand merchandise as "come-on" for the purpose of unloading on the consumer a large amount of nonstandard, nonunion-made merchandise.

Such practices as I have outlined are threatening this last link in the distributive chain.

The independent operator cannot last if he is forced to operate in a cost of operation area where his costs are rigid until it reaches the point of delivery to the consumer. There it is suddenly faced with ruthless competition. I would assume that everybody within reach of the sound of my voice would agree with me that the small businessman is a desirable factor in our society, that he does perform a service and that he is worthy of his hire—and his hire is reasonable profits.

Now, let me further explain the independent businessman's present dilemma as a result of fixed costs of operation and unmodified competitive conditions in selling.

1. The article he sells in a national brand item is a nonmonopoly item. Similar articles are made by dozens of competitors. Again let me refer to Arrow shirts. I cite "Manhattan," "Van Heusen," "Jayson," "Hathaway," plus hundreds of less well known shirt manufacturers.

So there is no doubt that in selling this nationl brand item, he is selling a nonmonopoly item.

An important point to remember is that the quality stabilization bill cannot be applied to a monopoly item. There must in every instance be similar items available to the consumer.

2. The independent retailer's cost area contains many noncompetitive areas. I cite a few:

(*a*) Wages, in most areas unionized. They are fixed.

(*b*) Rents. Percentage of sales based on a retail scale related to different kinds of businesses plus traffic count of people who would pass in front of his door.

(*c*) Insurance. All old line insurance companies charge almost identical rates.

(*d*) Interest rates on commercial loans.

Usually the smaller merchant pays in an identical rate from all banks in a trade area.

(*e*) Transportation costs on goods; as noted before, these costs are noncompetitive, fixed by interstate commerce rates.

(*f*) Utilities. All fixed noncompetitive rates set up by public utilities commissions which, incidentally, include a floor of guaranteed profits to the utilities above their investment and costs. And in most instances, a guaranteed wage to their employees. A fixed wage to their employees, fixed by negotiation.

(*g*) Last, but not least, the manufacturer must supply the retailer any specific item at a nondiscriminatory price (Robinson-Patman Act). I refer, of course, to the provisions of the Robinson-Patman Act.

The nondiscriminatory price for an identical item gives the retailer some protection as between himself and a competitor retailer, but it

also establishes a fixed noncompetitive price for the wholesale cost of the item.

As a result of all these areas of fixed or semifixed costs, the retailer does not have the benefit of competition in the components of his cost of doing business. His investment in inventory is a cost which deserves a fair profit return. His time and skill deserve a fair recompense.

If we demand that he face unmodified competition at the point of distribution, we deny him the right to a fair profit and say that the law of the jungle must control and apply to this area only in our distributive system.

I say that a principle of equity is involved which is identical to the basic principle involved in securing a fair wage for the wage earner. If we do not permit by legislative approval the extension of reasonable and fair protection to the independent retailer, as we have to the wage earner, we are neither just nor consistent.

Now I've heard the theorists get up and expound that the quality stabilization bill is no good because it will raise prices to the consumer. This is hogwash. The Nation's small independent retailers who so desperately plead for the enactment of this quality stabilization bill do not want it as a means to gouge their neighbors and lifelong friends who helped them build their business.

In the first place, the quality stabilization bill is specific on this point. The law cannot be used unless (paragraph 8 of the bill):

> 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 are in free and open competition therewith * * *.

Of course, the Department of Justice will probably come in here and say they got on their bicycle and made a survey in various stores in various areas and their conclusion is if this bill is enacted it will cost the consumer dearly. But that's only one side of the story. Let's look at the other side.

The Federal Trade Commission is a historic opponent of resale price maintenance of any kind. Therefore, its conclusions favorable to resale price maintenance are entitled to a great deal of weight, as a sort of "admission against interest." In a 1945 report on reseale price maintenance, the Federal Trade Commission published the following significant material:

> One reason for this general absence of important effect of minimum retail price maintenance upon actual retail prices was that the minimum prices stipulated by the manufacturers were put at or near the prices that were previously being charged by their large customers—the chainstores or the supermarkets.
>
> The manufacturers' policy was to limit price cutting in leader advertising rather than to raise prices above those at which their large customers were selling normally. Moreover, only a comparatively few brand owners placed their products under resale price maintenance; consequently, they were careful not to name prices that would be out of line with non-price-maintained competitive brands (from p. 636).

This factor always obtains in the marketplace if you are talking about a nonmonopoly item. And this is a most important factor.

The idea that because you have a right to sell something in a nonmonopoly industry gives the manufacturer or the retailer a chance to gouge the market is completely erroneous. It may be justified by theories, but in the practical application of it, this is just simply a factor that doesn't obtain.

Again at page 710 of the 1945 F.T.C. report:

The manufacturers of the price-maintained brands of drugstore items covered in this study generally named minimum prices that were within the range of prices actually charged by their large volume customers just prior to the time they placed their trademarked products under minimum reseale price contracts. Adoption of this policy had two distinct advantages from the viewpoint of the manufacturers of nationally advertised brands. It avoided material increases by large distributors in the prices of brands when they were put under price maintenance, and thereby avoided unduly stimulating the sale, by any type of retailer of private brands of non-price-maintained merchandise, or of competing manufacturers.

Now, I have appended to this part of my prepared testimony a statement of some 56 principles. These principles are set up directly to illustrate to labor, which has opposed this bill, exactly what the principles that are involved in this bill are, and how they relate to the same principles which labor has supported over the years and which I, as a Member of Congress, have supported for 21 years.

I am going, with the permission of the chairman, to include this in the record. I do not intend to read it all.

Mr. DINGELL. Without objection, so ordered.

(The document referred to is as follows:)

QUALITY STABILIZATION LEGISLATION IS IN ACCORD WITH THESE PROPOSITIONS

1. That Matthew Woll, as vice president of the American Federation of Labor, correctly foresaw today's chaotic marketplace when he said: "The makers who sold at a price lower than anyone else could meet were once considered great benefactors; but now they are disliked, and the day will come when they will be considered criminals. Then a law will be passed permitting no manufacturer to sell at a price which does not show him a fair profit on top of a fair wage rate."

2. That quality stabilization will stabilize employment and will avoid skimping on labor costs and consequent layoffs of factory labor as price competition on the product forces the manufacturer to expect 15 men to do the work of 20.

3. That labor is the greatest consumer of goods it produces and should lead, therefore, in the demand for orderly marketing of quality branded goods—as essential to a stable economy.

4. That the closing of only one store or shop puts, as a minimum, one more family out of work, adding to the critical employment problem in this country.

5. Millions of union wage workers are engaged in producing and selling brand name merchandise. Unless the distributive pattern for such merchandise is protected at every step, those workers' jobs will be imperiled.

6. That the predatory merchant, whose volume of sales comes predominantly from the wage earner, is an enemy of labor, because he uses advertising lures of brand name merchandise to unload inferior merchandise.

7. That much of the predatory merchant's tremendous and unholy profits come from foreign goods or inferior merchandise from low-wage areas, neither category of goods being made by union labor.

8. That quality stabilization is not fair trade, is not price fixing, and does not conflict with Federal or antitrust laws.

9. That quality stabilization stimulates incentive of the citizen to create, produce, and distribute new and better products to raise our level of living and national security.

10. That quality stabilization will incur no cost on the part of the Government for enforcement nor will it be to the detriment of the consumer.

11. That quality stabilization will provide encouragement to tomorrow's citizens to go into business for themselves; that without quality stabilization, only giants will be left and only those with huge capital will be able to go into business.

12. That quality stabilization will restore the confidence of the consumer by providing a standard of value to help make her selection in the marketplace—a standard against which to measure the quality of a product and to measure the fairness of applicable prices.

13. That labor, unless it supports quality stabilization, shall, by forfeiture, contribute to the destruction of its own basic principle of a fair wage, in this instance to the employer of labor.

14. That labor must lead the fight to keep domestic production standards high, and American quality supreme, in order to maintain security of jobs.

15. That quality stabilization is the only measure before Congress that can and will bolster the ability of the American manufacturer, distributor, and worker to compete on a value basis (quality of product as related to its price) in the intensely competitive world market.

16. That the welfare of labor and the welfare of the employer are interdependent, and are based on fair wages and fair profits.

17. That if labor's wages are to be stabilized and to grow, then the product creating those wages must be stabilized as to quality and price.

18. That quality stabilization will in the long run increase market demand and factory output by promoting fair competition—thus creating more stable jobs and more security for labor.

19. That quality stabilization is essential to the implementing of the established principles of the AFL–CIO—to ever strive to improve product and quality of workmanship.

20. That quality stabilization asks only that the U.S. manufacturer of a trademark product be given the same protection and remedy as was given long ago by Congress to the foreign manufacturer of a trademarked product under the tariff law.

21. That the mushrooming growth of retail monopoly is a threat today to the AFL–CIO.

22. That labor's interest will be promoted by endorsing quality stabilization as necessary to the preservation of labor's own dignity, economic welfare, and security.

23. That quality stabilization enables the honest manufacturer of a quality brand name product—and the ethical distributors of that product—to compete on a fair basis in the market place.

24. That quality stabilization promotes and encourages vigorous competition between the quality brand name product and all other goods, branded or unbranded, and stabilized under the Quality Stabilization Act or unstabilized.

25. That quality stabilization gives the consumer an unlimited range of choice of price and quality of product to best suit the consumer's needs.

26. That the present rampant "jungle warfare" in the marketplace is affecting the manufacturer's ability and incentive to create quality goods—thereby injuring labor and the consumer. It is causing a flight of industry to cheaper and cheaper labor areas here and abroad.

27. That President McKinley in an earlier era correctly admonished: "I do not prize the word cheap. It is not a badge of honor * * * it is a symbol of despair. Cheap prices make for cheap goods; cheap goods make for cheap men; and cheap men make for a cheap country."

28. That predatory price cutters, in the long run, hurt labor more than they can help labor.

29. That quality stabilization protects the quality-conscious manufacturer by stopping the predatory retailer who in his war of destruction against smaller competitors forces price (and quality) concessions and specifications upon the manufacturer.

30. That a manufacturer of a popular quality brand product may be driven out of one marketing area after another because smaller retailers will refuse to handle it as a loss.

31. That such manufacturer is confronted with increasing costs as his volume shrinks, and must cut quality to cut his costs.

32. That the manufacturer, to stay in business, may be forced to reduce costs, with quality materials being sacrificed for inferior materials and quality employees being scarificed for those less skilled.

33. That the consumer (and wage earner) thus is often the innocent victim of deceptive pricing, forcing in a vicious cycle lower and lower quality into the product—thus giving the consumer (and wage earner) less and less in value.

34. That substitutions of inferior labor and materials forced upon the manufacturer endanger public health and safety and depresses the market of labor.

35. That the New York Times of August 19, 1962 reported there were 153,000 shopkeepers in 1950 in the metropolitan area of New York, yet 10 years later

the number had decreased from 150,000 to only 66,474—despite the enormous increase in population and sales.

36. That though the small businessman is the backbone of American economic strength, he is, at the same time, the stepchild of American Government, fighting against unfair competition, complicated tax laws, and conflicting regulations.

37. That the wholesaler and retailer find in their business today the stabilization of rent, employee salaries, freight rates, travel rates, light, gas, and power rates, advertising rates, etc.

38. That the wholesaler and retailer is thus confronted with stabilization of almost every aspect of his business except the right to earn a profit. He cannot earn a profit if practically every part of the distribution cost pattern is rigidly controlled and he is forced to earn his profit in a "cutthroat competitive" area of profit margin.

39. That leaders of communism boast they can take over this country if the small businessman is put out of business—which is happening today at an alarming rate.

40. That United Press International has issued stories quoting discount house enthusiasts as saying "their movement is going to take over, lock-stock-and-barrel, before 1970, 80 percent of the retail business of the country."

41. That unfair and predatory price cutting retailers frankly confess that they use well-known quality brand name products as "leaders" to lure the unsuspecting consumer into their store.

42. That the discounter openly confesses he tests the value of his advertising of popular trademarked products, not by how many units he sells of that product, but by how many people does the advertising bring into the store.

43. That there is overwhelming endorsement of quality stabilization provisions to retard injury to the consumer by helping check the evil practices of "bait and switch" tactics and misrepresentation of well-known quality brand name products.

44. That the predatory merchant promotes automation and less manpower, with one of his major goals the attainment of unattended or robot retailing.

45. That necessary to robot retailing is still greater reliance by predatory merchants on the well-known quality brand name product presold because of its quality and price by its manufacturer to the consumer—thus posing even greater danger for the manufacturer and employees making that product.

46. That courts and regulatory agencies in opposing orderly marketing on the pretext that such programs are antimonopoly are in fact fostering and encouraging the most vicious form of monopoly—retail monopoly.

47. That if the United States is the land of free, individual enterprise, then the manufacturer must be able to exercise the same rights and privileges with respect to the merchandising of his products as retailers have in their private brands.

48. That quality stabilization will put the smaller manufacturer on an equitable footing with giant competitors using factory-owned retail outlets, with retailer-owned brand names, with consignment selling, with direct door-to-door selling, etc.—all of which practices are now lawful.

49. That research will come to a halt if the new product—the fruit of that research—is to be torpedoed in the marketplace as soon as the product is made available to the public.

50. That quality stabilization is unique—an example of free, competitive enterprise at its best—in providing an essential private remedy on an optional basis. It cannot be enforced in the sale of a monopoly item. There must always be similar competitive items available to the consumer, thereby protecting the consumer against prices based on a monopoly.

51. That quality stabilization will give the small ethical businessman a new lease on life to provide for the consumer the service and the assortment of necessary but slow-moving items that the "fast-buck" operator cannot and will not provide.

52. That loss of taxation revenue of government—at all levels—resulting from the "swallowing up" of the smaller ethical merchant and manufacturer can be reversed by enactment of quality stabilization.

53. That the honest citizen and the honest manufacturer should each have the right to protect his good name against defamation.

54. That implicit in quality stabilization is the right of a reseller to engage in any practices that may injure the reseller's name—so long as that reseller does not involve the brand name or good will of the trademark owner.

55. That under quality stabilization no manufacturer will be restrained from building the best product he can, or the cheapest product he thinks he can sell—with or without any pricing restrictions at the retail level.

56. That quality stabilization will survive and serve only if it is good; that it will quickly die if it does not fulfill its purpose.

Mr. HOLIFIELD. But I would like to pick out a few points in this 56-principles statement and stress them.

Labor is the greatest consumer of goods it produces and should lead, therefore, in the demand for orderly marketing of quality branded goods as essential to a stable economy.

Millions of union wage workers are engaged in producing and selling brand-name merchandise. Unless the distributive pattern for such merchandise is protected at every step, those workers' jobs will be imperiled.

The predatory merchant, whose volume of sales comes predominantly from the wage earner, is an enemy of labor, because he uses advertising lures of brand-name merchandise to unload inferior merchandise on his customers, many of whom are the families of union workers and who think they are getting a bargain.

Much of the predatory merchants' tremendous and unholy profits come from foreign goods or inferior merchandise from low-wage areas, neither category of goods being made by union labor.

Quality stabilization will provide encouragement to tomorrow's citizens to go into business for themselves. Without quality stabilization, only the giant retailers will be left and only those with huge capital will be able to go into business.

And I don't like this situation, because I, as a young man, at the age of 17, went into business for myself and I built a business, a successful business, against competition. And that business I still own and operate today.

Labor, unless it supports the principle of quality stabilization and this legislation, by forfeiture contributes to the destruction of its own basic principle of a fair wage, in this instance to the employer of labor.

The welfare of labor and the welfare of the employer are interdependent and are based on fair wages and fair profits. If you do not give the small independent retailer, who is an employer, the right to fair profits, he can not employ employees and pay them a fair wage. His first move will be to operate with scab labor and his second move will probably be to go broke.

If labor's wages are to be stabilized and to grow, then the product creating those wages must be stabilized both as to quality and to price. You can't stabilize one without the other.

Quality stabilization is essential to the implementing of the established principles of the AFL–CIO to ever strive and improve product and quality of workmanship.

I say that the mushrooming growth of retail monopoly is a threat today to the AFL–CIO. Quality stabilization enables the honest manufacturer of a quality brand product and the ethical distributor of that product to compete on a fair basis in the marketplace. The present rampant jungle warfare in the marketplace is affecting the manufacturers' ability and incentive to create quality goods, thereby injuring labor and the consumer. It is causing a flight of industry to

cheaper and cheaper labor areas here and abroad—and make no mistake of that.

The words of President McKinley, in an earlier area, correctly admonished:

> I do not prize the word "cheap." It is not a badge of honor * * * . It is a symbol of despair. Cheap prices make for cheap goods; cheap goods make for cheap men; and cheap men make for a cheap country.

The manufacturer, to stay in business, may be forced to reduce his costs with quality materials being sacrificed for inferior materials and quality employees being sacrificed for those less skilled.

Under quality stabilization, no manufacturer will be restrained from building the best product he can, or the cheapest product he thinks he can sell with or without any pricing restrictions at the retail level.

Quality stabilization would survive and serve only if it is good and it will quickly die if it does not fulfill its purpose.

Now, in conclusion, I looked up in Webster's Unabridged Dictionary the meaning of the word "competition." The first, primary meaning—

> active competing, especially of seeking or endeavoring to gain, what another is endeavoring to gain at the same time.
> A contest between rivals.
> The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms; also the relations between different buyers or different sellers which result from this effort.

Then there is a quote in the dictionary:

> Where competition does not act at all, there is complete monopoly.

Now, I am not advocating the elimination of competition. I am only saying that competition has to be modified in areas where you are dealing with nonmonopoly items in order to make equitable the chain of production and distribution from its beginning to its final end of delivering into the consumer's hand a product. And, I reiterate that if you give modification of competition in all of the links of that chain, until you get to the final link and there you impose upon that final link in the pattern of production and distribution, jungle warfare of unmodified competition, you are neither just nor consistent.

Now, monopoly. I looked up that word. The first meaning:

> (*a*) Exclusive possession of the trade in some article or exercise of some business.

I submit that this bill would not give exclusive possession of the trade in some article or the exercise of some business.

> (*b*) The exclusive right, privilege, or power of selling or purchasing a commodity or service in a given market.

Again, I say that this bill would not come under that meaning of the word "monopoly." And I point out in the common law that the term "monopoly" was specifically applied to an exclusive privilege of trade created by a State grant or charter.

A patent, for instance, in effect establishes a modified monopoly in a certain area for a specified length of time. Why did we do this? We did this for the social benefit of our Nation. We did it to give

incentive to people to be ingenious and to create and to give them a special reward for that ingenuity and that creativeness.

It is a modification of pure competition. And so when we talk about competition being the life of trade and competition being necessary in the marketplace, we do not necessarily mean the ruthless type of competition which cannibalizes itself and destroys itself by its excesses and abuses. We are talking about competition under orderly rules of society to protect all of the component factors of society to an equitable extent. This is what the quality stabilization bill will do:

It will bring about equity in one area where equity does not now obtain. It will not force any manufacturer to use it; it will not give any manufacturer a chance to use it in a monopoly item area. It will not create an obligation on the part of any consumer to buy that item. He can obtain various similar items and buy them if he does not want the stabilized item. It is an orderly adjustment of what I consider to be an inequitable situation, condition, in our pattern of production and distribution which threatens to eliminate that final link of independent retailing.

Now, if independent retailing is worthy of a place in the market, if it is something that we want to preverve to give opportunity to the little man to start into business and grow big, it has a justifiable position in the marketplace. I say that it has such a position and millions of small retailers throughout the country which would certainly also say that it is justified. They are putting in 10, 15, 16 hours a day. They are putting in their life savings into little drugstores, into little retail hardware and clothing and grocery stores. They are struggling against many odds in the competitive area.

Can't we give them a little bit of the protection that we give to every other facet in the chain of production and distribution?

I don't buy this idea of running scared under the bed, at the alarm banner of price fixing. If we are going to be honest and realistic, price fixing, modified price fixing, is a part of our economy. We do not have a complete, pure, competitive, free enterprise system, and anybody that says we have just simply does not understand what is going on in this country. We have competition in this country in business. But it is a modified, regulated type of competition. It is not the ruthless type of competition that we had in the early days when supply was less than demand. Today we have a situation in every area, whether it be in food fiber in the farm areas, or in the manufactured product, where we have a capacity to overproduce the consumptive power of the market. The rules of free competition might well have been justified by some, during the era when supply exceeded demand. Today we have supply much greater than effective demand, and, therefore, we must introduce into our economy rules and regulations to modify pure, ruthless, cannibalistic competition.

Thank you very much.

Mr. DINGELL. The Chair is particularly grateful to our old friend and colleague coming down here and giving us the benefit of his views and experience. As the gentleman knows, I am a great admirer of his. I cherish his friendship highly, and I hope the fact that I disagree with him on this bill will not be held against me.

Mr. HOLIFIELD. It certainly will not.

Mr. DINGELL. The Chair is very grateful. Thank you for coming.

Mr. HOLIFIELD. Thank you.

Mr. DINGELL. The next witness will be Mr. Rooke, accompanied by Mr. Jehle, and we have Mr. Foulkrod.

You are Mr. Rooke?

STATEMENT OF RALPH E. ROOKE, CHAIRMAN OF COMMITTEE ON NATIONAL LEGISLATION, THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS; ACCOMPANIED BY PHILIP F. JEHLE, WASHINGTON REPRESENTATIVE AND ASSOCIATE GENERAL COUNSEL

Mr. ROOKE. Mr. Chairman, I recognize that our statement will contain repetition of some other statements that have been made but they will express the thoughts of a lot of people and I appreciate the opportunity of presenting them to you.

Mr. DINGELL. Proceed.

Mr. ROOKE. My name is Ralph R. Rooke, and, for 42 years I have practiced pharmacy in Richmond, Va., where I now own and operate two community drugstores. I am a past president of the National Association of Retail Druggists and also of the Virginia Pharmaceutical Association.

I appear here as a chairman of the NARD Legislative Committee. The NARD, as you know, is a small business organization having a nationwide membership of more than 36,000 independent drugstore owners. The NARD speaks for its membership of family druggists on all legislative matters affecting their professional and competitive interests.

Accompanying me is Philip F. Jehle, Washington representative and associate general counsel of the NARD.

Mr. Chairman and gentlemen, the National Association of Retail Druggists supports the quality stabilization bill which has been introduced by your great committee's chairman, the Honorable Oren Harris, and more than a score of colleagues in the House. We hope for and strongly urge its early enactment.

NARD takes this position not only in the interest of the men and women in retail pharmacy today but of those who will enter the profession in coming years as well.

The actions taken in Congress today will shape the business world of the future.

Largely in the business trends already well underway in this decade lies the answer to the role which independent business is to hold in national economic affairs during the 1970's and beyond.

In all candor, though, the Nation's small entrepreneurs have but slight reason for hope and encouragement—to the extent today's business trends are in fact forming the business world of tomorrow.

However reviewed, not much opportunity for business independents can be foreseen in the business world being shaped by such anti-competitive forces as predatory pricing, monopolistic mergers, price discriminations, fraudulent advertising, credit and capital deficiencies, and unjust tax treatment.

We in the small business community need your help to stop the destruction, by mass merchandisers who call themselves discount

operators, of small, independent business firms. The predatory pricing practices of these operators menace not only the retail druggists but all small retailers.

They have created an illusion that by the development of new merchandising techniques they are able to bring goods and services to the consumer in many fields at far lower prices than independent retailers customarily charge. But, it's merely an illusion.

They are using age-old gimmicks—the loss leader, price juggling, bait advertising. Admittedly, they've changed the loss-leader techniques from a product to a department basis, but it's essentially the same tired old trick.

The predatory price cutter, with his superior capital resources, has sometimes been willing to sink hundreds of thousands of dollars to capture a foothold in the marketplace, and his price juggling technique is the oldest and one of the most vicious methods of removing smaller competitors.

By these predatory practices, the discount operators have demoralized retail pharmacy and small business in general, and—in the public interest—Congress should call a halt.

You may have been told that the discount operators are able to function more successfully than conventional small businesses because they are more efficient. But this isn't true. All available statistics show that independent retail pharmacy is an extremely efficient segment of the business community. If it were not, it would have been put entirely out of business long ago.

If you ask how the discount operators are able to get by when their operating costs are so high and their merchandising policies are based on price juggling and deception, the ready answer is that many of them do not get by.

For example, within the last few months, the business press has reported the bankruptcies of such celebrated discount operators as Masters of New York, Bargain City, Towers, Grayson-Robinson, and many others.

All of these discounters had pharmacy departments which played an essential part in their merchandising schemes. In many cases, the entire pharmacy departments were run for loss-leader purposes, to lure traffic into the store in the hope that people would purchase other, higher margin items.

It isn't always the drug department that's used as a loss-leader lure. Sometimes the discounters turn to foods, sporting goods, or appliances. Obviously, small businessmen dealing exclusively in these fields cannot meet this kind of predatory competition and survive.

These four justly celebrated operators have gone out of business, and we do not mourn their passing from the retail scene, but unfortunately they took with them into bankruptcy many small, independent retailers in varied fields.

I have my own personal knowledge of bankruptcies that have occurred in retail pharmacy and in other small businesses. They are happening in Richmond, and right across the Potomac River in Arlington.

But bankruptcies are not the only measure of the economic health of retail pharmacy. I keep in touch with economic conditions—involuntarily, at times—when I have to listen to drug wholesalers and other

suppliers complaining about the slow pay of one struggling drug store proprietor or another. I hear of stores quietly closing their doors. Their owners then have to go to work for some chain or discount operator.

It's a sad fact that few of the retailers who were forced out of business by the discount operators will ever be replaced. The small businessman, helpless in the face of predatory price cutters, sees no future for himself or his family in a venture which can be wiped out almost overnight by unfair competitive techniques.

Others besides independent retailers can read the handwriting on the wall. The Nation's banks, which traditionally have been an important source of financing for small businesses, are not unaware of the facts of today's commercial life. They are less and less willing to risk their depositors' capital in the financing of retail business enterprises—they're afraid the would-be borrower will become the next victim of the predators in today's marketplace.

What would the quality stabilization bill do to correct this situation?

It would strengthen our antitrust laws by outlawing certain unfair methods of competition that promote monopoly in distribution.

The bill would let the owner of a product identified by his trademark or brand name stop distributors from, first, making misrepresentations about it; second, using it as bait merchandise; and, third, selling at other than the established resale price.

This would allow the product owner to prevent damage to his trademark or brand name and to the goodwill it may have taken him years to build up.

Whenever a trademark or brand name owner discovered his products being used by a distributor in any such violation, he could revoke the distributor's right to use his mark or brand in resale. If the offending distributor disregarded the notice of revocation and continued the challenged sales practices, the owner could get a court injunction to stop him.

Essentially, the bill would do no more than recognize, first, the property values inhering in business goodwill and in the trademark or brand name adopted to maintain and extend such goodwill; and, second, the need to give trademark or brand name owners a means of protecting their rights from injurious marketing practices. It is merely an extension of our historic trademark and copyright law.

We in the National Association of Retail Druggists would welcome your consideration of one change in the provisions of H.R. 3669 and associated bills. Paragraph 16(D) specifically excludes from the provisions of the quality stabilization bill sales of prescription drugs and medicines.

Because of the manner in which many large discount operators have used prescription drug departments for loss leader purposes, the National Association of Retail Druggists believes this exclusion should be eliminated.

Chairman, I have some examples of what I am talking about here in some ads which I have with me. One is from Woolco, in which the prescription department is advertised along with fishing tackle, camping equipment, baseball shoes, and other sporting goods items.

Woolco is, as you know, a discount branch of the F. W. Woolworth Co. I have one other that I did want to mention, if you will bear with me a minute.

We have one here in which Miltown, a tranquilizing tablet, is sold for $2.90 for a bottle of 50. I cannot buy them at less than $3.25 a bottle, and I don't think that Mr. Woolco can buy them for $2.90 either. He sells it at $3.35. I have another one here, $2.90. But the wholesale price is $3.25 on that particular item.

If we accept the basic American right to own property and the corresponding right to protect it, then we must accept the objective of the quality stabilization bill—the protection of valuable investments in trademarks, brand names, and goodwill from ruinous marketing practices.

Nothing in the bill 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, as long as he does so without making use of another's goodwill.

We believe that the quality stabilization bill would simply reestablish economic fairplay in the marketplace.

Mr. Chairman, in the interest of saving time, I will skip over to page 7.

In all honesty, it must be conceded that this bill, when enacted, is not going to be a panacea for all the ills of small business.

It also needs tax justice, more capital, and credit assistance, and greater antitrust protection generally.

The quality stabilization bill would be, however, a truly significant element of the antitrust program that is sorely needed if small business is to emerge, healthy and strong, from its current environment of catastrophe.

It is the responsibility of Congress and the administration to maintain, through wise national policies, an economic climate favorable to the birth and the growth of small business.

Without a sound and thriving community of small, independent business, our free enterprise system cannot function along its traditional lines.

In behalf of the 36,000 independent drugstore owners who belong to the National Association of Retail Druggists, I urge you, Mr. Chairman and members of the committee, to take immediate steps to enact H.R. 3669, the quality stabilization bill.

It can help to preserve and strengthen the hard-pressed but still vital, small business segment of our national life.

I thank you, Mr. Chairman.

(The complete prepared statement of Ralph R. Rooke is as follows:)

STATEMENT OF RALPH R. ROOKE, CHAIRMAN OF COMMITTEE OF NATIONAL LEGISLATION, THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

Mr. Chairman and gentlemen of the House Commerce and Finance Subcommittee, my name is Ralph R. Rooke, and, for 42 years, I have practiced pharmacy in Richmond, Va., where I now own and operate two community drugstores. I am a past president of the National Association of Retail Druggists and also of the Virginia Pharmaceutical Association.

I appear here as chairman of the NARD Legislative Committee. The NARD, as you know, is a small business organization having a nationwide membership

of more than 36,000 independent drugstore owners. The NARD speaks for its membership of family druggists on all legislative matters affecting their professional and competitive interests.

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In all candor, though, the Nation's small entrepreneurs have but slight reason for hope and encouragement—to the extent today's business trends are in fact forming the business world of tomorrow.

However reviewed, not much opportunity for business independents can be foreseen in the business world being shaped by such anticompetitive forces as predatory pricing, monopolistic mergers, price discriminations, fraudulent advertising, credit and capital deficiencies, and unjust tax treatment.

We in the small business community need your help to stop the destruction, by mass merchandisers who call themselves discount operators, of small, independent business firms. The predatory pricing practices of these "operators" menace not only the retail druggists but all small retailers.

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You may have been told that the discount operators are able to function more successfully than conventional small businesses because they are more efficient. But this isn't true. All available statistics show that independent retail pharmacy is an extremely efficient segment of the business community. If it were not, it would have been put entirely out of business long ago.

If you ask how the discount operators are able to get by when their operating costs are so high and their merchandising policies are based on price juggling and deception, the ready answer is that many do not get by.

For example, within the last few months, the business press has reported the bankruptcies of such celebrated discount operators as Masters of New York, Bargain City, Towers, Grayson-Robinson, and many others.

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It isn't always the drug department that's used as a loss-leader lure. Sometimes, the discounters turn to foods, sporting goods, or appliances. Obviously, small businessmen dealing exclusively in these fields cannot meet this kind of predatory competition and survive.

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Others besides independent retailers can read the handwriting on the wall. The Nation's banks, which traditionaly have been an important source of financing for small businesses, are not unaware of the facts of today's commercial life. They are less and less willing to risk their depositors' capital in the financing of retail business enterprises—they're afraid the would-be borrower will become the next victim of the predators in today's marketplace.

What would the quality stabilization bill do to correct this situation?

It would strengthen our antitrust laws by outlawing certain unfair methods of competition that promote monopoly in distribution.

The bill would let the owner of a product identified by his trademark or brand name stop distributors from, first, making misrepresentations about it; second, using it as bait merchandise; and, third, selling at other than the established resale price.

This would allow the product owner to prevent damage to his trademark or brand name and to the goodwill it may have taken him years to build up.

Whenever a trademark or brand name owner discovered his products being used by a distributor in any such violation, he could revoke the distributor's right to use his mark or brand in resales. If the offending distributor disregarded the notice of revocation and continued the challenged sales practices, the owner could get a court injunction to stop him.

Essentially, the bill would do no more than recognize, first, the property values inhering in business goodwill and in the trademark or brand name adopted to maintain and extend such goodwill; and, second, the need to give trademark or brand name owners a means of protecting their rights from injurious marketing practices. It is merely an extension of our historic trademark and copyright laws.

We in the National Association of Retail Druggists would welcome your consideration of one change in the provisions of H.R. 3669 and associated bills. Paragraph 16(D) specifically excludes from the provisions of the quality stabilization bill sales of prescription drugs and medicines.

Because of the manner in which many large discount operators have used entire prescription drug departments for loss-leader purposes, the NARD believes this exclusion should be eliminated.

If we accept the basic American right to own property and the corresponding right to protect it, then we must accept the objective of the qaulity stabilization bill—the protection of valuable investments in trademarks, brand names, and goodwill from ruinous marketing practices.

Nothing in the bill 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 another's goodwill.

We believe that the quality stabilization bill would simply reestablish economic fairplay in the marketplace.

Another important point: the bill's provisions are permissive. There is no obligation, for example, upon the trademark or band-name owner to avail himself of the rights accorded under the proposed legislation.

This is not compulsory legislation; it is permissive. It is conceivable that the owner might not be interested in protecting his goodwill, trademark, or brand name from the unfair methods of competition defined in this bill.

Whether he does so or not would be his own decision, provided his products are in free and open competition with other similar products.

Also, those engaged in merchandise distribution—that is, the wholesalers and the retailers—would not be obliged to handle trademarked or branded merchandise subject to the quality stabilization bill. As always, they would decide for themselves what products to stock and offer for sale. Consumers, too, would enjoy full freedom of choice to pick and choose between so-called protected and unprotected products.

What about the interests of the consumer? Is it in the interests of the consumer to have a bill which protects trade names and fair prices from the merchandising practices of the unscrupulous? Consumers are interested in a large number of convenient outlets for goods, in widespread points of distribution.

You need outlets; but what's more, you need quality. A brand name, a trademark product, carries with it the reputation of the manufacturer and with that goes his character and the quality of the product. There is no substitute for good character or quality.

A system which includes hundreds of thousands of independent retailers, in which the market and merchandise quality standards of the product are known, where a fair price is the prevailing practice, where you are not fooled and hoodwinked, but where you are dealt with honestly by your merchant, is a system which protects the consumer against illicit practices and against monopolistic tendencies.

When people get a big appetite and start eating up the competition, it gets habitual. The tendency toward monopoly that comes as a result of one small firm after another being destroyed, one after another eaten up, knows no end. We who believe in the kind of competitive enterprise system that made America great want to help preserve that system through the quality stabilization bill.

In all honesty, it must be conceded that this bill, when enacted, is not going to be a panacea for all the ills of small business.

It also needs tax justice, more capital and credit assistance, and greater antitrust protection generally.

The quality stabilization bill would be, however, a truly significant element of the antitrust program that is sorely needed if small business is to emerge, healthy and strong, from its current environment of catastrophe.

It is the responsibility of Congress and the administration to maintain, through wise national policies, an economic climate favorable to the birth and the growth of small business.

Without a sound and thriving community of small independent business, our free enterprise system cannot function along its traditional lines.

In behalf of the 36,000 independent drugstore owners who belong to the NARD, I urge you, Mr. Chairman and members of the committee, to take immediate steps to enact H.R. 3669, the quality stabilization bill.

It can help to preserve and strengthen the hard-pressed but still vital, small business segment of our national life.

Mr. DINGELL. It was a pleasure to have you with the committee this morning, Mr. Rooke. I very much appreciate your testimony here.

I would like to ask you a couple of questions, however. That is, I would like—you discussed at some length the antitrust laws and the strengthening of the antitrust laws that would be accomplished by this bill. Are you an antitrust lawyer, sir.?

Mr. ROOKE. No, sir. I am a pharmacist.

I have with me my antitrust expert, Mr. Jehle.

Mr. DINGELL. Are you a scholar of the antitrust laws?

Mr. ROOKE. As a small businessman only.

Mr. DINGELL. Have you ever read the antitrust laws?

Mr. ROOKE. Some portions of it; yes, sir.

Mr. DINGELL. But you are only vaguely familiar with the antitrust laws? Only slightly familiar?

Mr. ROOKE. Not completely; no, sir.

Mr. DINGELL. The reason I ask is you mentioned this will strengthen the antitrust laws, and it has been the consensus of every one of the assistant attorneys general that I have ever met who handle antitrust

matters that this is pro tanto repealer of the antitrust laws, vertical and horizontal pricefixing in defiance of the antitrust laws and that they literally riddle the antitrust laws for purposes of enforcement by the Department of Justice. I wanted to make that very plain so that you would be aware that there is a split of view on these points.

Mr. ROOKE. Senator Humphrey, who happens to be your colleague and a pharmacist, seems to feel that enactment of this legislation would strengthen the antitrust laws.

Mr. DINGELL. I was asking for your views, sir. I am well aware of Senator Humphrey's.

Mr. ROOKE. I have to pick it up as it passes to me.

Mr. DINGELL. There are a couple of questions I would like to ask you on this bill.

I am sure you are aware of the provisions of the bill and I am sure you are keenly aware of the section dealing with the price differential which is authorized. I wonder if you feel that price—rather, the manufacturer should be allowed to fix different prices in different parts of the country, as provided by this bill? Do you think that is a proper thing in the interest of the small businessman?

Mr. ROOKE. Mr. Chairman, viewing it from a practical standpoint, I cannot see that that would be harmful. I have not known, in my 40 years——

Mr. DINGELL. You dont' think it would be harmful, then, for the manufacturers under this bill to exercise their authority to fix different pricing levels on the same commodity in different parts of the country, then?

Mr. ROOKE. You are speaking of in different geographical areas?

Mr. DINGELL. Right. You feel that is proper?

Mr. ROOKE. Yes, sir.

Mr. DINGELL. You do feel, then, that manufacturers should have the right to discriminate between small businessmen similarly situated?

Mr. ROOKE. No; I don't believe that; but in my experience, I have never known a price to be established in Virginia and another one in California on these standard brand products. I have never known that to happen. That might not——

Mr. DINGELL. Do you think it is wise to authorize manufacturers to fix different prices in different parts of the country on the same commodity?

Mr. JEHLE. Mr. Dingell, if I may clarify that point, I think there is a misunderstanding. First of all, this paragraph you referred to does not authorize the fixing of different prices.

Mr. DINGELL. I am delighted to hear you say that. For that reason I would like to ask you a couple of questions about your comment.

The paragraph we are referring to on line 3, page 8, says as follows:

> Each such currently established resale price and retail price furnished shall be uniform in each level of distribution within each marketing area, determined by the owner of the brand name or trademark.

I am reading from the bill.

Now, this authorizes the owner to fix, first of all, prices; is that correct?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. Then it authorizes him to establish marketing area, does it not?

Mr. JEHLE. To establish marketing areas? Yes.

Mr. DINGELL. All right.

Then it authorizes him to fix different prices in different marketing areas, does it not?

Mr. JEHLE. No, sir; not necessarily. He may or may not.

Mr. DINGELL. But he may if he so chooses?

Mr. JEHLE. Last year when this bill was reported out, a similar bill was reported out of your committee——

Mr. DINGELL. I understand.

Mr. JEHLE. There was a report in which only one member dissented, but the majority of committee members, in referring to that paragraph, stated "That this paragraph provides that currently established wholesale resale prices and retail price ranges shall be uniform within geographic areas."

It has now been changed to marketing areas.

Mr. DINGELL. Now, within a geographic area, the price would be the same?

Mr. JEHLE. I think it is what is a competitive area. And the currently established resale prices and retail price ranges shall be uniform within geographic areas.

The purpose here is to prevent discrimination between merchants located in the same geographic area.

Mr. DINGELL. Let's take Washington, D.C., and Arlington, Va. They are different geographic areas, are they not?

Mr. JEHLE. But the language of the proposed statute is "marketing area," which I interpret to mean competitive area. I do not think the District of Columbia and Arlington are in different competitive areas.

Mr. DINGELL. Let's say I was a manufacturer and I would say I am going to denominate Washington marketing area and I am going to denominate Arlington, Va., another marketing area, and Falls Church another and Silver Spring still another, and I will fix a price at $1 in Washington, D.C., $1.10 in Arlington and $1.25 in all the rest of them. Where in this bill would I be denied the privilege of so doing?

Mr. JEHLE. You have two problems there, Mr. Dingell. No. 1 is the practical problem. No manufacturer would do that because, as one witness said earlier, the manufacturer would be cutting his throat. That is the practical problem involved.

Secondly——

Mr. DINGELL. But you tell me——

Mr. JEHLE. Secondly, the legal problem is—I think that it would be a violation of one of the conditions, one of the essential conditions laid down for use by a manufacturer of this quality stabilization bill. I believe there would be a violation, there would be a failure to comply with an essential condition of this proposed statute, and I know that the Justice Department——

Mr. DINGELL. Tell me where it is. You name the essential conditions and tell me where it is in the bill. You tell me where there is language in the bill denying the right to a manufacturer to engage in the kind of discriminatory price practices that I mentioned to you.

Mr. JEHLE. In the last——

Mr. DINGELL. Tell me where in the bill——

Mr. JEHLE. In last year's committee report it says that "the purpose here is to prevent discrimination between merchants located in the same competitive geographic area."

Mr. DINGELL. All right. Now, I gave you a factual situation and I want you tell this committee where there is language denying the manufacturer the right to engage in this kind of discriminatory price practice. Where is there—where is there language in this bill? I am not asking about last year's report. I am asking you where there was language in this bill denying the manufacturer the right to engage in that kind of discriminatory pricing.

Mr. JEHLE. I am using your facts, sir. I am not going to fight the facts.

Mr. DINGELL. I hope not. I am just asking you to tell me where in the bill is the manufacturer prohibited from engaging in that kind of rascally price discrimination against a small businessman. You tell me where.

Mr. JEHLE. Well, sir——

Mr. DINGELL. You point to the language in this bill that denies the manufacturer the privilege of engaging in that kind of rascality. You are representing small business.

Mr. JEHLE. Yes, sir; yes, sir.

Mr. DINGELL. I want you to tell me where the manufacturer is denied the right to engage in that kind of rascally price discrimination. This is your bill, not mine.

Mr. JEHLE. Sir, I would like to also point out that in amendment——

Mr. DINGELL. Don't point out. Just tell me——

Mr. JEHLE. Added by the committee—all right. We will use your——

Mr. DINGELL. Tell me where in the bill he is denied. You just cite the language in H.R. 3669 where he is denied the right to do so.

Mr. JEHLE. Which is the same language that you just quoted. "Each such currently established resale price and resale price range shall be uniform at each level of distribution within each such marketing area determined by the owner of the brand name or trademark."

Mr. DINGELL. All right. Now, you tell me where he is denied in that language or in any other language in the bill from establishing marketing areas as he chooses and fixing prices within those respective marketing areas according to his own feeling. I will be happy to have you tell me where he is denied that right so that he won't fix $1.10 in Arlington and $1 in the District of Columbia.

Mr. JEHLE. No, sir, because——

Mr. DINGELL. You tell me where he is forbidden to do that in this bill.

Mr. JEHLE. One of the conditions——

Mr. DINGELL. Mr. Jehle——

Mr. JEHLE. One of the conditions that must be met—this is important because I am concerned about the legislative history, too, Mr. Dingell. One of the conditions that must be met by a manufacturer before he may lawfully use this bill is that in setting his resale prices or

resale price ranges, that such prices or ranges must be uniform within a particular competitive area.

Mr. DINGELL. All right. Now, it doesn't say that. It says within a marketing area. Within a marketing area it says it has to be uniform. What is to stop him from saying Arlington is one marketing area and the District of Columbia is another, or Hackensack is one marketing area and New York City is another or New York City is one and Scarsdale, N.Y., is different, a different one, fixing a different——

Mr. JEHLE. I think, sir, it would be fairly obvious to any student of marketing or for that matter any antitrust lawyer that all products sold in Arlington, and in the District of Columbia, would be sold in the same competitive area, within the Metropolitan Washington area. Now, notwithstanding that——

Mr. DINGELL. All right.

Mr. JEHLE (continuing). That basic marketing fact, if the manufacturer set two different prices, the Justice Department I am sure without hesitation would move in and say that this manufacturer was violating the provisions of this act, that he wasn't eligible to quality stabilize his product.

Mr. DINGELL. You tell me, then, where in this bill the Department of Justice is authorized to move.

Mr. HARRIS. I think, Mr. Chairman, if I might be permitted to interrupt, I think we forget about the fact that this is not a Government price control bill. This is a bill to write the rules under which business may conduct their business. I think we forget one aspect which is inherent in the economy of this country and that is that these goods are in free and open competition with each other. It is a competitive thing that we are talking about.

Mr. DINGELL. I am grateful to the chairman for his comments, but I would be happy to have him show me where in these bills——

Mr. HARRIS. I will read it. On page 2—

> If goods usable for the same general purposes are available to the public from sources other than the owner of such brand name, trademark, and are in free and open competition therewith, the right—

and we have this matter of competition that is stressed throughout this bill.

Mr. DINGELL. I recognize that very well, but I am still waiting for somebody to tell me where in this bill there is something which will preclude a manufacturer from setting Arlington up as one marketing area, Washington, D.C., as a different marketing area, and establishing different prices in both. Now, you tell me where it is, Mr. Jehle, and I will be happy to support the bill.

Mr. JEHLE. This is a proposition that I find very inviting.

Now, I hate to answer a question with a question but, Mr. Dingell, I believe you would agree that if a product were not in free and open competition, the manufacturer of that product would not be authorized to quality stabilize that product under this bill, isn't that correct?

Mr. DINGELL. Mr. Jehle, I don't think you understand my question.

Mr. JEHLE. Wait a minute.

Mr. DINGELL. I asked you—we have very limited time here, a time problem this morning——

Mr. JEHLE. The point I am trying to make——

Mr. DINGELL. I want you to tell me, Mr. Jehle, if you will—and I think it would be very helpful to the committee—where in this bill is there any language which precludes a manufacturer from establishing one price in Arlington, Va., and establishing Arlington, Va., as one marketing area, and establishing Washington, D.C., as another marketing area with completely different prices. Now, you tell me where in the bill there is a prohibition against that.

Mr. JEHLE. Sir, if you are looking for exact language along that line, you won't find it. This is a question of construction.

Mr. DINGELL. Well, now, I am construing it, I am asking you to tell me where the language is——

Mr. JEHLE. But, Mr. Dingell——

Mr. DINGELL (continuing). That would preclude that.

Mr. JEHLE. What you must understand is the Department of Justice is going to watch very closely the administration of the statute. When the Department of Justice believes that one of the conditions laid down in this statute is not being met, the Department of Justice is going to move.

Mr. DINGELL. What is the Department of Justice going to do if they find a manufacturer under this bill is exercising the authority which it clearly written into the bill to fix different prices in different areas, in different marketing areas? What are they going to do in the language of H.R. 3669 to protect the small businessman in those two areas from this kind of discriminatory pricing? You are a lawyer and very competent, Mr. Jehle. You tell me where in the bill the Department of Justice has any authority to go in and stop that.

Mr. JEHLE. Just by pointing out——

Mr. DINGELL. But you haven't——

Mr. HARRIS. Let the witness—I say, Mr. Chairman, the witness has the right to answer the question.

Mr. DINGELL. I am anxious to have him.

Mr. HARRIS. Well, will you give him time, then. You have got to be fair to any witness.

Mr. JEHLE. Well, the Justice Department will charge that the manufacturer is not meeting an essential condition of the statute.

Mr. DINGELL. All right. You tell me the essential conditions.

Mr. JEHLE. This bill it does not immunize from antitrust attack that particular practice.

Mr. DINGELL. This bill is an amendment to the antitrust laws, is it not?

Mr. JEHLE. Yes, sir. It is an exemption and it is going to be very strictly construed. Judge Loevinger said that in his testimony 2 days ago.

Mr. DINGELL. You feel, then, that this bill should be very narrowly construed, is that correct?

Mr. JEHLE. Whether we want it or not—I know that it will be, sir. I have read——

Mr. DINGELL. Is it your expectation that it will?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. As a matter of fact, is it your hope that it will, that it will very narrowly be construed and the exemption of——

Mr. JEHLE. I hope in a manner reasonably consistent with the objectives, sir.

Mr. DINGELL. I see. And then you expect that the free and open competition, the language to which you referred in section 2, will also be very narrowly construed to the protection of the——

Mr. JEHLE. Yes, sir. I believe that it will be.

Mr. DINGELL. Now, one more question I want to ask you about and that is this. That is the exemption from the *McKesson & Robbins* decision which appears in this bill. You and I had some discussion about it last year.

Mr. JEHLE. Yes. With your permission I would like to have that discussion put in the record at this point.

Seriously, I think it was a very enlightening discussion last year, sir. I have that before me now.

Mr. DINGELL. Just briefly referring to that, is it your feeling that a manufacturer ought to have an opportunity to wholesale and retail in competition with his outlets on the wholesale and retail level and fix their prices?

Mr. JEHLE. Do I feel that is good?

Mr. DINGELL. Yes.

Mr. JEHLE. Beneficial? No, I don't. And we have discussed this sir, on many occasions, not only before this committee but in your office and elsewhere.

Mr. DINGELL. Correct.

Mr. JEHLE. I do not. What I would like to see you introduce, sir, is a bill which would make unlawful dual distribution as a practice.

Mr. DINGELL. My other committee, the Small Business Committee, is going to hold hearings on this precise point.

Mr. JEHLE. Yes, sir; I know it is.

Mr. DINGELL. If you feel this is so bad, why do you endorse it in the committee?

Mr. JEHLE. But it is very important, sir, to understand that the vice of dual distribution—and you are going to get a great deal of testimony on this when your hearings are held—the vice of dual distribution lies in the supplier undercutting the price which he has set for his customers. So long as they sell at the same price, there is no real competitive evil involved.

Mr. DINGELL. Isn't it also, Mr. Jehle——

Mr. JEHLE. And that is what this bill requires. I want to make that clear. This bill requires both the supplier and the customer to sell at the same price. No unfair competition there, sir.

Mr. DINGELL. Isn't it also possible, however, under the language of section 15 of this bill where a manufacturer can fix the resale price of his—let us say his wholesale competitors, when he wholesales in competition with them, at such a level that they will not be able to continue handling his merchandise if he so chooses? Isn't this a distinct possibility?

Mr. JEHLE. No, sir. It is not a distinct possibility. We have got to discuss this as a practical matter.

Mr. DINGELL. As a matter of fact, what is the wholesale markup? The markup of a wholesaler?

Mr. JEHLE. Roughly 15 percent.

Mr. DINGELL. All right. It is then possible, let us say, that the manufacturer can fix the price of his wholesalers at, let us say, 15 to 17 or 20 percent if he chooses, right?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. It is not equally possible under this bill if he chooses to enter that market himself to fix the markup of the wholesaler at as little as 12 or 14 or 10 percent, is it not?

Mr. JEHLE. Yes, sir; but what would be the purpose of doing that? Why bleed the man to death? Why not just cut his juglar, cut him off, refuse to sell?

Mr. DINGELL. This effectively does that.

Mr. JEHLE. I don't know any manufacturer who would do this. And, sir, I have had 6 years' experience with the Senate Small Business Committee. I have been with the National Association of Retail Druggists for over 4½ years and in all of that time I have yet to have any example brought to my attention where a manufacturer would do that.

Mr. DINGELL. But it is——

Mr. JEHLE. Why fool around with it?

Mr. DINGELL. Distinctly within the realm of possibilities that it could be done under the language of the bill. This is definitely possible.

Mr. JEHLE. Yes, sir. It would happen about as soon as there will be two moons in the sky.

Mr. DINGELL. There is a large wholesaler that just went out of business in New York is there not?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. Just now. As a matter of fact the wholesale part of the drug industry is in very difficult straits.

Mr. JEHLE. This wasn't a principal reason by any means.

Mr. DINGELL. No, but it is possible.

Mr. JEHLE. Yes, sir.

Mr. DINGELL. In this very chaotic industry wherein at this moment the manufacturers are now going into dual distribution in a much more heavy way, conceivably this could be used as an economic tool and device against——

Mr. JEHLE. But, Mr. Dingell——

Mr. DINGELL. Against the wholesaler, isn't it?

Mr. JEHLE. The supplier-customer relationship the manufacturer-wholesaler relationship is like a two-way romance. The manufacturer is just as much interested in the wholesaler as the wholesaler in the manufacturer. The manufacturer is not going to weaken competitively his wholesaler. He wants a strong distribution system, and he wants every unit within that system to be strong and thriving and prosperous. Without such a group of distributors there is no sense for him to have distributors. He would set up his own distribution.

Mr. DINGELL. Let us take the *Secatore* case. In that case Esso fixed the prices of one of their outlets and opened up an outlet not very far distant where they gave all manner of special discounts to induce people to buy direct, did they not?

Mr. JEHLE. Yes, sir.

Mr. DINGELL. This isn't always a two-way street. Sometimes it is a one-way street. Am I right?

Mr. JEHLE. As a practical matter, Secatore—and really you have to stress the practicalities of some of these situations—Secatore never sold any of those commercial accounts and I don't think he is selling any now.

Mr. DINGELL. Mr. Jehle, thank you very much.

I want to recognize the distinguished chairman of the committee if there are any questions he would like to ask.

Mr. HARRIS. I don't think I will take the time of the committee, Mr. Chairman, to ask questions. It would be repetitive. We have had it over and over again, and I can see no purpose in continuing to build up a repetitive record.

Mr. DINGELL. Thank you, Mr. Jehle.

Mr. JEHLE. Thank you, Mr. Dingell.

Mr. DINGELL. The Chair will recognize Prof. Alfred R. Oxenfeldt of the Graduate School of Business of Columbia University.

Professor Oxenfeldt, you are most welcome at the committee this morning. We welcome any comments you might give us.

STATEMENT OF ALFRED R. OXENFELDT, PROFESSOR OF MARKETING, COLUMBIA UNIVERSITY GRADUATE SCHOOL OF BUSINESS

Mr. OXENFELDT. Thank you, sir.

May I introduce myself before I summarize my remarks. I realize we are behind schedule and I shall try to be very brief.

My name is Alfred R. Oxenfeldt and since 1956 I have held the position of professor of marketing at the Graduate School of Business at Columbia University. I received my undergraduate degree from the University of Pennsylvania and my graduate degrees from Columbia University.

My teaching has been concentrated in the fields of marketing and pricing, areas in which I have done research, writing and consulting work for industry. A list of my published works is appended to my statement.

Among those that may be of particular relevance to the bill under consideration are two books, one entitled "Industrial Pricing and Market Practices," published by Prentice-Hall in 1951; "Pricing for Marketing Executives," published in 1961 by Wadsworth Publishing Co.; two articles, one called, "Can the Small Tobacco Dealer Meet Large Store Competition," published in the Journal of Retailing in the summer of 1961, and "The Retailing Revolution: Why and Whither," published in the Journal of Retailing in the fall of 1960.

At present I have two books in press. The research for one, tentatively titled, "Behind the Scenes of TV Set Marketing," has given me considerable information and I hope some insight into a retail sector in which price cutting has been rampant for many years.

I have served as a marketing consultant to many firms such as American Airlines, New York Telephone Co., and Imperial Oil, Ltd., and in addition I am cochairman of the Economics of Distribution Seminar at Columbia, a seminar not for students but for fellow academicians and leaders of the world of business who meet every 2 weeks to discuss important marketing problems.

Appended to my statement is a full list of my publications. These are selected references.

Mr. DINGELL. Professor, without objection, your full statement will be included at this point in the record, and then you are, of course, recognized for further comments. That includes the insertion of your publications.

Mr. OXENFELDT. Thank you, sir. I shall try to single out just a few points from that statement, in view of the shortage of time.

As I understand the bill, it seeks to help small businessmen and owners of trademarks by eliminating price cutting and deception. I think it is essential that you match, as I am sure you have done, the provisions of the bill with its objectives, and consider alternative measures for achieving those objectives.

Since this bill essentially attempts to eliminate price cutting above all else, we must ask who is it that would be helped by this. Frankly, I want to question the assumption that it mainly helps trademark holders on items that are being footballed and small businessmen.

I think it may perhaps be helpful, though somewhat academic, to distinguish many different types of price cutting. I repeat that this bill would eliminate all of them, or attempt to. There are very important differences in the economic effects of these different forms of price cutting that are possibly being overlooked.

Mr. HARRIS. Would you permit an interruption, or do you want to let them go ahead?

Mr. DINGELL. Feel free, Mr. Chairman.

Mr. OXENFELDT. Mr. Chairman, I am very happy to be interrupted, if that would be your desire.

Mr. HARRIS. Well, I am very much interested in your comments and your approach in the discussion of this subject. I really don't know what your position is yet, but you are not overlooking the facts, Doctor, that this is a purely voluntary proposition.

Mr. OXENFELDT. Yes, sir.

Mr. HARRIS. You just made the statement that this bill within itself eliminates all discounts or price cutting whatsoever.

Mr. OXENFELDT. No, I did not mean to say that, sir. I don't believe that. I know that there would be——

Mr. HARRIS. I understood you to say that.

Mr. OXENFELDT. I would say the bill moves in that direction. It gives the power to, and I would maintain on the basis both of history and forecasting that this power would be used by, a very large number of firms. It would have this effect over a wide sector of industry. This is my settled, considered judgment.

Mr. HARRIS. Well, I think we should have it in perspective—you are talking now about an option of industry. This bill does not require any manufacturer to take advantage of it.

Mr. OXENFELDT. I am aware of that, sir.

Mr. HARRIS. It is purely a voluntary matter and it does not in any way affect any private brand, trade, article, or anything that some discount house or anybody else might want to develop.

Mr. OXENFELDT. I am quite aware of that fact and I would think that what this bill does is offer an option that is very attractive to many businessmen and they will use it. I would not say on the other hand that every single businessman would use it. I would be hard

pressed if you asked me to set a percentage, though I would be interested if you could.

Mr. HARRIS. Yes. I realize that.

Then I wanted to get back to the basic purpose of the legislation, which is to prevent someone who does not have an interest in a trade or brand name article from destroying that article through predatory price cutting against the wishes and desires of the manufacturer or the individual who developed it.

Mr. OXENFELDT. I would say, Mr. Chairman, that if the bill has that as its central purpose, then the provisions of the bill are at variance with that objective. This is precisely my point, and what I was about to do was list a very large number of different forms of price cutting which in the areas where these powers were invoked, would be eliminated beyond the one you are speaking of.

Let me say at the very outset that I agree with you that there are such cases—I might mention, terribly few; the ones that have been cited and have turned out to be unauthenticated. But where they exist, where a trademark holder is injured by the footballing of his item, I think that should be stopped and I think there are ways of doing it without eliminating the benign forms of price cutting.

Mr. HARRIS. Well, that is the purpose of it, and we who have worked on it over the years feel that that is what we are doing—maintaining competitive free enterprise.

Don't let me interrupt you any more.

Mr. OXENFELDT. I wish you would.

Mr. HARRIS. I wanted to get this basic thing in because your discussion seems to be very appropriate.

Mr. OXENFELDT. I feel that your comments were extremely fitting, sir, and I would like to just mention that the statement I have submitted offers a program, one of a large number that I think would more directly achieve the objective you speak of without running the very considerable risks that I see in this kind of legislation. And with your permission, I will retire to the role of a fuddy-duddy college professor and read you a list of different forms of price cutting which, if one distinguishes them in his thinking, will permit him to see that this bill can do considerable damage and unnecessarily so, even while it gets at, in rare cases, the kind of abuses of which you speak.

These forms of price cutting are, first, cuts in price below the minimum operating costs of efficient retailers for the specific purpose of driving other retailers out of business. This form I would refer to as predatory price cutting, and we know that this is already illegal.

Second, cuts in price far below usual price and possibly even below the minimum costs of efficient retailers for the purpose of building store traffic by the offer of an attractive bargain. These price cuts represent a considered merchandising policy, and such price cuts are often employed as an alternative for other forms of sales promotion.

These types of price cuts I would refer to as loss leaders. (By the way, this material is on page 12 of my statement.)

Now, two types of loss leading price cutting ought to be distinguished. There is an infrequent type of loss leading that is so severe and persistent that many retailers either stop carrying the

items whose prices are cut or they sell against these items, thereby depriving the producers of those items of market exposure and retailer sales support. This is, I think, the kind that Chairman Harris was referring to before—the "footballed" trademarked item whose margins are cut so low that retailers no longer wish to carry the item. They bury it or won't carry it at all.

In the very much more common type of loss leading, the items selected as loss leaders are varied and prices are cut only for short periods, so that these items do not lose, indeed they may gain, sales and sales support in the process. I would say this is a different kind of loss leading and creates no important economic or social problems.

Third, there are cuts in price at the retail and distributor level that are so deep they filter back to the manufacturer, exerting strong downward pressures on his price. Two types of situations can also be distinguished here. In the first and rare case his prices must be cut so low that he is compelled to deteriorate the quality of his product, and this is what I understand to be the rationale behind calling this a quality stabilization act. In the second and more usual case, the pressure on the manufacturer keeps him from charging excessive prices and exerts strong pressure on him to reduce his costs of operation, a type of price cutting I do not think the committee would want to eliminate.

A fourth class of price cutting consists of price cuts that reduce retailers' margins below their traditional level.

Fifth, there are cuts in price below any level that the manufacturer might choose to establish for the resale of his merchandise.

What I trust this list does, as I said before, gentlemen, is distinguish between the many different kinds of price cutting that one finds in the marketplace, suggesting that some are indeed objectionable and others highly benign, and urging that your legislation single out only those that are objectionable for correction, and leave the others intact. Frankly in my opinion, and I think it is shared by economists as a profession, we suffer from too little rather than from too much competition in retailing as well as in other sectors of the economy.

Now, I deal with many other things in my prepared statement that I pass over, like any other author with deep regret, but I would like to make another set of distinctions. I think that there are four types of competition—I am not now speaking of price cutting—that we should separate. Again I find that the bill destroys certain kinds of price competition or would in those areas where invoked, that it is highly desirable that we retain.

First, there is competition among dealers and distributors who handle the same brand of a given product. (I might mention I am here on page 15 of my statement.) An illustration of this would be the retailer of Zenith television sets on First Avenue and the retailer on Third Avenue in any city, or the distributors that carry any given brand of air conditioners, or what have you. This is the most direct and severe form of competition. Where the manufacturer requires that within a single marketing area—and I should like to talk to the point that was raised by Mr. Dingell before in a moment—the different retailers that carry his brand should charge the same price, this kind of competition—which is the most direct and forceful—is destroyed.

Then you have competition among dealers and distributors of different brands of the same product. This is not necessarily affected by the bill.

Third, there is competition among manufacturers of different brands of the same product, also not necessarily affected by the bill; and, fourth, you have competition in the form of pressure exerted by distributors and retailers upon manufacturers to reduce price to them on the threat of dropping the brand.

I might mention that in the rationale behind your own bill, gentlemen, this fourth type is the kind of pressure that may compel a deterioration in product quality. This is another form of competitive pressure that would be eliminated by the bill aand one which in most sectors of industry contributes to the intensity of competition which is still insufficient in the opinion of most economists.

My point again is if you distinguish the different forms of competition, the four that I have outlined you will see that this bill does hit at two vital forces that keep our economy vigorous.

May I, in the few minutes that remain, make a few rather disjointed statements?

First, I would urge you not to assume that all small business is in need of protection from price competition. Indeed, there are important segments of small business that owe their very survival and growth to price competition and to the offer of price incentives. I should mention that this bill also helps big retailers quite as well as small ones. The bill helps prosperous retailers as well as those that are profitless. I think this is an essential point and the parallel to agricultural legislation is very close here. Also, I urge you to distinguish between short-term palliatives and basic correctives. A price umbrella generally sets forces in motion that create holes in that very umbrella. The ultimate result of this legislation could very well be an expansion of retailing capacity and an increase in the number of retailers, thereby causing resale price maintenance to become unworkable, and the field of retailing to become even more competitive and profitless than it was before the legislation went into effect.

Also, the bill lacks any provisions that would really strengthen small business and make it better able to compete on equal terms with large firms. My statement contains suggestions of what might be done to strengthen small business, and urges that it be done.

So I arrive at the following kinds of conclusions: rather than protecting the owner of the trademark and the small retailer, the bill greatly enlarges the powers of manufacturers to control price. In the event that this bill should become law, I foresee competition among manufacturers taking the form of offering wider margins to retailers in order to have them push certain brands rather than taking the form of lower prices to consumers. This would reverse the usual competitive process and produce upward rather than downward pressures on prices.

As I said, H.R. 3669 virtually bans all types of price cutting on fair-traded merchandise, even though most of those methods of achieving lower prices are benign and essential to a free enterprise economy.

The bill validly is directed against predatory price cutting and price pressures that result in deterioration of product quality but these are relatively rare and exotic types of price cutting. These abuses can

be dealt with directly in ways which will not dampen healthy competition which, if anything, is already insufficient in most lines of distribution.

I would therefore conclude that the fair-trade concept which this bill implements is a step backward in marketing practices. It would undo and reverse the present trend toward more efficient mass marketing. It would represent a move backward for retailing and would return retailing to the cartelized regulated market prices that we usually associate with the ingrown European economy of the first half of the century. The resources involved in distribution, it seems to me are far too great for the economy to be able to afford to stifle efficiency and innovation. This bill may be considered a clumsy attempt to tamper with the very juglar vein of our economic system.

I therefore urge the committee to find a solution more directly related to the avowed purpose of the proponents of the bill It must not drop an atomic bomb in order to strike down a rabbit.

Mr. DINGELL. Doctor, your statement has been most helpful. I think perhaps the distinguished chairman of the committee might have some questions for you.

Mr. HARRIS. No, not at all. I want to thank you for your statement, Doctor, and your approach and your viewpoint on this.

Off the record, Mr. Chairman.

Mr. DINGELL. Off the record.

(Discussion off the record.)

Mr. HARRIS. I am glad to have your comments and discussion. I think it is a very logical approach to the subject under discussion. It is, I might say a little different, as a matter of fact, substantially different from the approach taken by some other professors and economists. I have looked over your statement and you are to be complimented for the work that you have done on this matter and the considerations which you have brought up raising questions about the method in this particular bill and the effect it would have. I gather that you feel there is a need for something to be done in line with the objectives of this bill.

Mr. OXENFELDT. Yes, I do.

Mr. HARRIS. From that standpoint I think that you have contributed a lot to it, and I am sure that not only the committee but the staff will give it close study and attention to your statement.

Mr. DINGELL. Doctor, I had a couple of very brief questions to ask you. You mentioned the section I have been discussing with witnesses here, on page 19 of your statement. You discuss the bill under consideration, that it specifies that different prices may be charged in different marketing areas of the country.

Mr. OXENFELDT. Yes, sir.

Mr. DINGELL. Page 19 of your statement. And you say:

> Consequently, manufacturers who enjoy benefits of high prices with the help of resale price maintenance are not frustrated by noncooperative competitors. They merely set "competitive" prices in areas where the "noncooperators" control an important amount of business. Then, in areas where the "noncooperator's" goods are not sold, or are weak in share of market, they take full advantage of the powers bestowed by this bill.

Then you go on and say there is no definition of marketing area in the bill.

I wonder if you would like to discuss this point a little more extensively for the benefit of the committee.

Mr. OXENFELDT. What I have tried to suggest here briefly is that this bill in giving the manufacturer powers to define market areas and to set different prices in different market areas allows him to charge low prices selectively in those markets where he does face strong competition; and in those markets where he possesses strong market power he can charge a much higher price. In that way you not only have the discrimination to which you were referring and which would seem to me to be legal under the bill, though I am no lawyer; but you, in addition, remove or weaken the kind of competitive forces which would make the manufacturer lower prices across the board.

Competition as I see it is something that works essentially through weak links. As you gentlemen doubtless know, the forces that counter competition are very, very strong, even as competition itself is sometimes extremely strong. When you permit a manufacturer to ride with the forces in certain markets and take his beating there and permit him to get all that the market will permit him to get in another area, you reduce the probability of competition exerting its usual effect.

I was just going to add the point that the bill also is a kind of an invitation to gerrymander your market areas in a way that will permit you to capitalize on what I have just been speaking of.

Mr. HARRIS. Mr. Chairman, will the gentleman yield?

Mr. DINGELL. I will be very happy to.

Mr. HARRIS. Doctor, first, I have observed the outstanding work that you have done in this field involved, as you have indicated in the appendix. You mention the fact that you are a professor. I assume that your major subjects have been in the fields of economics, marketing, and so forth.

Mr. OXENFELDT. That is right, sir.

Mr. HARRIS. But I also assume from this that you have never actually engaged in conducting any business yourself.

Mr. OXENFELDT. Oh, I have, sir, and I am not going to boast about it. I was once a small businessman and met payrolls. As a matter of fact, among other things, I was an executive vice president of a consulting firm with a payroll that used to frighten me to death. I know the rigors of competition. I have also been an active pricing consultant with large and small firms and have been making pricing decisions as if I were on the firing line; my income to no small extent depends upon the correctness of those decisions.

Mr. HARRIS. That emphasizes the importance of your position. You have had actual experience with marketing and competition. But in El Dorado, Ark., where I live, we are in a more rural area. Even though the income level in my part of the State is higher than it is in most parts of our State, it is different from Washington, D.C. Now, the cost of living in Washington, D.C., is much higher than it is in El Dorado, Ark.

Mr. OXENFELDT. I learned that.

Mr. HARRIS. Our competitive system includes small retailers, chainstores, and large retailers, though I must confess small retailers are becoming more and more extinct. Thirty years ago we had nothing

but small retail grocery stores. There is only one small retail grocery store in my town of more than 25,000 population today. There are no small department stores.

The point is the cost of living in my hometown is less than it is in Washington, D.C. I don't think there is any question about that. But in our competitive free enterprise system, you do not think that the Federal Government should be taking any action through a general Federal control proposition to do anything about that, do you?

Mr. OXENFELDT. If I understand your question, sir, I would say that I understand the Federal Government does take the position that price discrimination is objectionable and I do not believe that the Federal Government takes the position that a seller in open commerce should charge less in El Dorado, Ark., because incomes are lower there than in Washington, D.C., where perhaps incomes are higher. I don't think the Government does, and if you want my opinion, I do not believe that the Government should, in this kind of case, interfere with the——

Mr. HARRIS. In other words, our economy is based on competition and free enterprise. Economic conditions vary from one area to another. We have got to recognize that and that is part of our system. Is that not right? Or would you disagree with that?

Mr. OXENFELDT. There are differences among economists. I wonder, Mr. Harris, whether the facts would show that the prices on the same articles are significantly different, if at all, in your hometown and in mine, which are very different, you know, in location and economic level. I think the differences in cost of living arise from other sources. You may very well find that the prices on the same item are higher. I would wager they are higher, on the basis of no special knowledge, in Arkansas, on the same item, than they are on Long Island—which is known as the jungle of retailing.

Mr. HARRIS. Well, let me ask again, do you think that the Federal Government should have a policy to say to Long Island, that your situation here should be identical with that in El Dorado, Ark.? Or that El Dorado, Ark., should be identical with that in Washington, D.C.?

Mr. DINGELL. As a matter of fact, if the gentleman will yield, the Robinson-Patman Act says that area price discrimination is a violation of the antitrust laws, is subject to abatement by the Federal Trade Commission. It also constitutes a violation of the Sherman Act and the Clayton Act.

Mr. HARRIS. Well, of course, we are talking about economic theories now, but I was trying to get to the economic proposition. The distinguished chairman of the subcommittee, the chairman of this hearing, brought up the question whether or not it should be different prices in different areas. I believe in this system and you do, too, and Mr. Dingell. We believe our system is the best. We don't believe in the other types.

I might give you this experience about the theory of the thing. I was in Russia one time about 7 years ago. We were in a rather large department store in Moscow and observing what was going on, and one of the fellows proposed to buy a particular article and there was some question about the price and he said, "Well, I will let it go

until I get to Kiev," and this man in the store just laughed rather amusedly and said, "It is going to be interesting to get to Kiev. You are going to find it is the same price."

Now, that is the difference in the kind of economy that they have which is nothing like our system, and I do make this comparison, not to get into an argument but to show you that under our system there are differences from one section to another because the economy differs to that exent. I don't think there is anything we can do about that.

Mr. OXENFELDT. Well, my point, sir, was that there is something that this bill would do about that. This bill to a modest degree—I will not say that it threatens the survival of the United States or the free enterprise system for all time but this bill does put in the hands of individual manufacturers power roughly equivalent to that of an economic planner in Moscow who decides that in his Kiev that we will charge a lower or a higher price or the same price that he——

Mr. HARRIS. If he had only one business like they have in Moscow, yes, but we have competition, and we say in this bill that it does not apply unless the goods are in general competition with similarly produced goods.

Now, you have got to keep that in mind.

Mr. OXENFELDT. I have that very much in mind, sir, but I understand that the chairman of the hearing had an important engagement that suggests that I ought to minimize any further conversation.

Mr. HARRIS. Well, pardon me for taking the time.

Mr. DINGELL. Please disregard that last point.

Mr. OXENFELDT. I think this is essential. I would like to carry this further but I don't think we could do it justice in the time.

Mr. DINGELL. As a matter of fact, I think the Chair is going to suggest that we still do hear another witness. Your comments are very appropriate. I still have one other area that I want you to address yourself to and that is the economic impact of this area price discrimination upon small businesses.

Mr. OXENFELDT. My basic thesis is that attempts to draw lines between small and big business are generally going to fall to the ground. I do not see area pricing here as hurting small businesses necessarily more or less than big ones from one area to another. And indeed, you remember one of my theses was that this bill helps both big and small businesses and hurts small and big businesses to the extent that it causes injury.

Mr. DINGELL. All right. Now, one more question. Can you give us any idea of what it will cost an average firm in relation to, let's say, its gross sales, or any other statistics you would choose, to enforce the provisions of H.R. 3669?

Mr. OXENFELDT. This is a very interesting question, sir. I do not know the answer. A former colleague of mine worked for a very large corporation that was famous because of its efforts to enforce fair trade. He did tell me that the sums were staggering and they nevertheless had a substantial number of violations. This is one of the costs of the bill that should be reckoned. They could hardly be small.

Mr. DINGELL. You don't have any cost estimates.

Mr. OXENFELDT. I don't know of any reliable information other than the experience of one company at a particular time.

Mr. DINGELL. Doctor, your testimony has been most helpful to the committee this morning and I personally appreciate it and I am sure the committee does, too. Thank you very much.

Mr. OXENFELDT. Thank you.

(The statement of Mr. A. R. Oxenfeldt follows:)

STATEMENT OF PROF. A. R. OXENFELDT, OF COLUMBIA UNIVERSITY

My name is Alfred R. Oxenfeldt. Since 1956, I have held the position of professor of marketing at the Columbia University Graduate School of Business. I received my undergraduate degree from the University of Pennsylvania and my graduate degrees from Columbia University. My teaching has been concentrated in the fields of marketing and pricing, areas in which I have done considerable research, writing, and consulting work for industry. A list of my published works is appended to my statement. Among those that are of particular relevance to the bill under consideration are: "Industrial Pricing and Market Practices," published by Prentice-Hall in 1951; "Pricing for Marketing Executives," published in 1961 by Wadsworth Publishing Co.; "Can the Small Tobacco Dealer Meet Large Store Competition," Journal of Retailing, summer, 1961, and "The Retailing Revolution: Why and Whither," Journal of Retailing, fall 1960. At present I have two books in press. The research for one, tentatively titled "Behind the Scenes of TV Set Marketing"; has given me considerable information, and I trust insight, into a retail sector in which price cutting has been rampant for many years. During the last few months I have served such firms as American Airlines, New York Telephone Co., and Imperial Oil, Ltd., as consultant on marketing and pricing problems. In addition, I am cochairman of the economics of distribution seminar at Columbia; this seminar is composed of academicians and leaders of the world of business who meet every 2 weeks to discuss important marketing problems.

INTRODUCTION

Almost everything that might be said about resale price maintenance has been said over and over again in prior hearings. From year to year, essentially the same evidence is cited, some of it now almost three decades old. We do not need new lines of argument and new data. Rather we must use what we know, putting it in perspective and relating it to the central questions that are raised by this and similar bills. Most important, we must avoid the black and white statements that both proponents and opponents of resale price maintenance feel compelled to make—possibly to attract attention, or to get their basic ideas across in the limited time and space allowed to them.

Resale price maintenance is extremely complex for it involves at least five parties: the manufacturer, the distributor, the retailer, the consumer, and Government. Moreover, it is concerned with the jugular vein of our economic system—prices, which affect almost every aspect of our economy including profits, volume of sales, unit costs, level of investment, number of firms, standard of living, etc. Sweeping generalizations about resale price maintenance consequently know an enormous number of exceptions.

BASIC ECONOMIC QUESTIONS THAT MUST BE RESOLVED BEFORE ASSESSING RESALE PRICE MAINTENANCE

It appears to me that you must decide what kinds of distribution arrangements would serve the community best before you can take a position on the bill that is before you. Some key economic questions on which this committee will pass judgment by its vote on H.R. 3669, the quality stabilization bill, are the following:

(1) Do we want more or fewer retailers engaged in moving the current volume of goods? To encourage economic growth and development, we must economize resources in all possible ways; efficiency considerations also dictate that we have fewer retailers. If we think of providing employment for those who cannot survive under competitive conditions we would want more retailers.

(2) Do we believe that the weeding-out process is central to our economy? If so, do we believe that this process is operating too severely at present—driving many efficient retailers out of business? Or, do we believe that it is not sufficiently severe, leaving in business many persons who possess limited skills,

experience, training, and dedication? Or do we think that it is necessary to mitigate this weeding-out process during some transition period—say until the distribution system adjusts to the great changes in recent years that are associated with the emergence of the discount house?

(3) Do we regard present distribution arrangements as highly progressive and innovative—and possibly too dynamic? Or, do we consider them relatively backward compared with manufacturing and other industry segments?

(4) Is distribution a heavy user of productive resources whose performance exerts a strong and perceptible influence on living standards? Or, is it an insignificant business sector in which we can easily tolerate inefficient methods?

(5) Do we believe that loss-leader and price-promotion selling is good, bad, or indifferent in itself? If not uniformly good or bad, under what circumstances would we allow it and when would we want to ban it?

(6) In peacetime, what circumstances would justify Government involvement in the pricing process? Is its involvement in permitting vertical price-fixing by manufacturers rightly considered a high or the highest priority on the list of conditions calling for Government involvement in pricing?

The foregoing questions require answers before one can evaluate the quality stabilization bill. Most discussion of similar bills in the past failed to deal with these questions; I hope that this committee will face them frankly and frontally.

My answers to the foregoing questions will emerge from the comments that follow. I should emphasize that these are knotty problems and glib answers can hardly be valid ones.

MAJOR DEVELOPMENTS UNDERWAY IN U.S. RETAILING

My position on the quality stabilization bill reflects my analysis of current developments in retailing—and in particular what I consider the conditions and practices that may need improvement. Accordingly, I shall list 15 major developments or circumstances in retailing. Then I will discuss what might be done to correct the conditions that require remedy.

(1) There is much more "discounting" than ever before in the last 50 years or so—though list prices are a relatively new phenomenon, and without them discounting has little meaning. Retailers' margins have been shrinking in many types of retail establishments, though a few continue to obtain traditional margins.

(2) The low-margin limited service retailer appears to have won a secure place for himself in the retailing structure. He is now very numerous, and a whole production complex has grown up around him. Many consumers are extremely loyal to him, because he has reduced substantially and perceptibly the cost of many things that they buy.

(3) Some classes of retailers have developed methods of cutting costs at least as much as margins have been cut. In particular, supermarkets and discounters have operated with relatively low operating cost levels.

(4) Sales volume per square foot and per employee are substantially higher in the retail outlets that charge the lowest margins. Low margins apparently attract high volume; in turn, high volume makes for low unit cost. Moreover, low margin retailers have cut their costs by eliminating some of the services provided by traditional retailers.

(5) The operating costs per unit of some types of retailers are declining less than their prices, causing a drop in profits and an increase in failure rates in certain retail trades.

(6) Entry into and exit from retailing continues at an extremely high level. The trades entered tend to be those that are new and growing with some preponderance of exit from maturing trades—though business discontinuance is heavily concentrated among new entrants into business, regardless of line.

(7) A great reshuffle of retailing organizations has occurred between the downtown and the suburb. Also, there has been an enormous growth in the number of retail stores in areas in which population growth has occurred. On the whole, the number of entrances into retail trade has exceeded the number of failures.

(8) Retailers within a trade that have attempted to retain traditional margins have, on the whole, lost volume and suffered a decline in numbers. Interestingly, the trades that suffered the greatest decline in margins and numbers are not those that are most actively supporting this legislation. In particular, drugstores have been relatively free from turnover and bankruptcy.

(9) We must ask whether it is either wise or fair or even reasonable to require low-cost, low-service retailers to charge the same price or to offer the same service as high-cost retailers.

(10) Retailing has become increasingly concentrated in chains and large independents whether they be department stores, discount houses, supermarkets, appliance stores, etc. These large organizations employ the most modern business methods, facilities for the storage and movement and display and preservation of products—and have turned retailing into far more of a professional field of activity than ever before. The small traditional retailer competes at a great disadvantage with these professionalized retail organizations.

(11) The commodity line distinctions among retail trades are becoming blurred. All trades have been adding some of the high margin items carried by other retailers, taking advantage of the usual store traffic. As a result, the margins of some trades may have appeared to increase, even though margins on its traditional items have been reduced because of competitive pressure.

(12) The caliber of persons engaged in retailing is probably more mixed than in any other sphere of business. Retailing is more a way of life than a business occupation for many retailers. Distressingly large numbers of small retailers—and some large ones—have no special training or skill or experience in business methods and feel no obligation to overcome their shortcomings.

(13) In many parts of retailing, and particularly in medium sized and small cities, tacit and overt price collusion is quite rampant. Retailers are aware of their interdependence and therefore avoid price cutting. In such communities, consumers have very limited alternatives among which to choose.

(14) Some low-margin retailers employ questionable sales promotion tactics. Foremost, among them are "bait-and-switch," loss-leaders, "nail down models" and deception. These practices are also used by some high margin operators.

(15) In recent years, some new institutional arrangements have developed to strengthen the resourceful small independent retailer. Particular reference is made to cooperative buying groups and especially those which provide management aids.

As one reviews the foregoing list, he can appreciate the essential nature, strengths, and weaknesses of this Nation's distributing system. Above all else, it is characterized by change of virtually all types and in almost all conceivable forms. This dynamic quality of American retailing explains, more than anything else, its steadily improving productivity in the face of a caliber of retailer that frequently leaves much to be desired.

In appraising the Quality Stabilization Act, one should ask how it will affect the basic character of our system of distribution. In particular, does it contribute to its vigorous and dynamic quality? Does it increase or reduce the number of alternatives available to consumers—does it widen consumer choice of amount and quality of service, breadth of assortment, easy access, etc.? Does it above all, increase the economic efficiency of retailing or have a contrary effect?

THE HUMAN BENEFITS OF ECONOMIC EFFICIENCY

Economic efficiency is not an end in itself. If won only at the cost of human misery it represents a pyrrhic victory. However, it would be an even greater mistake to consider only the obvious effects of legislation and ignore what may be its greater but indirect effects. One should be concerned that large numbers of individuals are forced to close their doors because of the competition of more efficient retailers—even if most of them failed because of their own lack of business skill. One should, however, be equally concerned for the living standards and total way of life of the entire population depends upon what their money will buy. A business system that permits people to buy the major items of their diet at markups of, say 11 to 20 percent rather than 30 to 50 percent makes life more bearable for all and especially for millions of low-income families.

To be more specific, it was the weeding out of inefficient stores and the relatively unhampered growth of modern food retailing that brought about great reductions in the cost of basic diet items, thereby helping a large part of our population to win the unending battle against poverty and hunger. Economic efficiency, however cold the words may sound, relates to human welfare and progress; it basically helps people, though some (usually the inefficient) are injured in the process of increasing efficiency.

Let us return to the question of how the quality stabilization bill would effect the basic nature of our distribution system. Let us first recognize some of its

worthy objectives. It attempts, specifically, to correct deceptive practices, bait-and-switch selling, and predatory price cutting.

On the other hand, the law would, in my opinion, go far toward obstructing the progress in distribution that represents the chief strength of our retailing system. Although this bill permits manufacturers and distributors to establish a range of resale prices as well as a single price, the bill's ultimate effect would be to require highly efficient distributors to charge substantially more than their costs would require. Consequently, it would weaken, and possibly eliminate, the chief attraction that new types of retailers have offered throughout American history to win a place for themselves in the marketplace. In short, the Quality Stabilization Act would help us to transform U.S. retailing into the unprogressive type that prevails in much of Europe.

I would now like to cover a few central points in some detail. Specifically, I am strongly impressed by the lack of connection between the provisions of the quality stabilization bill and the causes that it purports to correct. Also, I shall suggest what seems to me more appropriate and effective methods of correcting these abuses.

EFFECTS OF THE BILL ON PRICE CUTTING

The chief abuse against which this bill is aimed is price cutting. However, it is difficult to identify the particular forms of price cutting that the bill seeks to eliminate. One can distinguish at least five different types of price cutting that have been attacked by proponents of this bill which are quite different in their economic effects. These are—

1. Cuts in price below minimum operating costs of highly efficient retailers for the specific purpose of driving other retailers out of business. This form will be termed "predatory price cutting."

2. Cuts in price far below usual price—and possibly even below minimum costs of efficient retailers—for the purpose of building store traffic by the offer of attractive bargains. These price cuts represent a considered merchandising policy and such price cuts are employed as an alternative for other forms of sales promotion. These types of price cuts will be termed "loss leading." Two classes of loss leading should be distinguished. In the infrequent type, loss leading is so severe and persistent that many retailers either stop carrying the items whose prices are cut or sell against them, thereby depriving the producers of those items of market exposure and retailer sales support. In the very common type of loss leading, the items selected as loss leaders are varied and prices are cut only for short periods so that these items do not lose—indeed they may gain—sales and sales support in the process.

3. Cuts in price at the retail and distributor level that are so deep they filter back to the manufacturer, exerting downward pressure on his price. Two types of situations can also be distinguished here: In the first, and rare case, his prices must be cut so low that he is compelled to deteriorate the quality of his product; in the usual case, the pressure on his price keeps him from charging excessive prices and exerts pressure on him to reduce his costs of operation.

4. Price cuts that reduce retailers' margins below their traditional level.

5. Cuts in price below any level that the manufacturer chooses to establish for the resale of his merchandise.

It often is difficult to distinguish among various types of price cutting if one is on the outside of an industry. Indeed, they do overlap at times: loss leaders and predatory forms of price cutting may exert downward pressure on manufacturers' prices. Also, the line between predatory price cutting and cuts in price below traditional retailers' margins is generally indistinct. And it is becoming increasingly difficult to determine what is the traditional margin in many trades for particular items. Nevertheless, it is essential to distinguish these different forms of price cutting because they are very different in economic effect.

There would be fairly general agreement that predatory price cutting and that which resulted in quality deterioration are economically injurious as well as harmful and unfair to some manufacturers, distributors, retailers and consumers. On the other hand, one would expect equally great agreement that the last two types of price cutting usually are highly beneficial; indeed, most economists would argue that we have too little, rather than too much of the last

two types of price cutting. I am not sure that there is general agreement about the merits of loss leading if no manufacturers are injured in the process; on the other hand, in the rare case when the owner of a trademark loses sales support, an injury is inflicted that should be prevented if possible.

What I am trying to say is obvious. It is that certain types of price cutting are predatory and unfair; to the extent possible, these should be prevented. (Regrettably, we know very little about the number of such cases; also they are not easily distinguished from other forms of price cutting.) However, other—and far more common—forms of price cutting are extremely beneficial for the economy; they represent the chief regulating and motivating mechanism of our economic system. These types of competition must be protected and extended. Unfortunately the Quality Stabilization Act would reduce both types of competition. If it is necessary to forego the beneficial forms of competition to prevent the objectionable types, then I would definitely not favor sacrificing the benign forms to eliminate the harmful forms. Fortunately, it appears quite feasible to eliminate the objectionable types while preserving the forms of competition that are the source of economic efficiency and progress.

IS SUFFICIENT COMPETITION INSURED BY THE PRESENCE OF OTHER MANUFACTURERS OF SIMILAR PRODUCTS?

It has been argued many times by persons testifying in favor of resale price maintenance that it does insure competition adequate enough to protect the consumer because the power to set resale prices is limited to the firms that sell in open and free competition with others that sell similar products. Those persons may not realize that competition takes many forms in the marketplace. All forms combined are required to obtain the desired level of competition in the face of the many strong forces that dampen it.

Time does not permit my describing actual or hypothetical cases to establish this point in depth. However, I shall list four different aspects which competition may take. Each strengthens competitive pressure and thus encourages economic efficiency. Specifically it is possible to distinguish—

1. Competition among dealers and distributors who handle the same brand of a given product.
2. Competition among dealers and distributors of different brands of the same product. (Both 1 and 2 vary in intensity, roughly in proportion to the proximity of dealers and distributors to one another.)
3. Competition among manufacturers of different brands of the same product.
4. Competition in the form of pressure exerted by distributors and retailers upon manufacturers to reduce price to them on the threat of dropping the brand.

Competition means all of these kinds of rivalry—not any one of them alone. Since many markets are insufficiently competitive today, even in the absence of resale price maintenance, it is essential to preserve competition in all of the nonpredatory forms.

If we examine the avowed objectives of the quality stabilization bill, we find that it would end price competition both among dealers and distributors in any given area who handle the same brand. (True, these firms might make stronger efforts to win customers away from one another by nonprice means, but most of these offer little or no real benefit to consumers.) Accordingly, this act would eliminate the most direct and intensive form of price competition. It would, in addition, eliminate the pressure on manufacturers' prices that comes from a squeeze on dealers' and distributors' margins. This often serves to stimulate price reductions among manufacturers who would otherwise have escaped direct price competition. Once we identify the different forms that price competition takes in the marketplace, we can see clearly two important ways in which the Quality Stabilization Act would dampen it. There are, in addition, more subtle and perhaps more serious ways in which the act would blunt the forces of competition and create upward pressures upon prices.

UPWARD PRESSURE ON MARGINS

It can be argued, and some evidence mustered to support it, that resale price maintenance generates strong pressures that raise retailers' margins. Indeed, competition among manufacturers and distributors of many types of products

becomes largely centered on the size of the protected margin for the retailer. Let me be more specific.

In most industries at anytime, some manufacturers find that others enjoy stronger consumer preference than they do and, as a result, they have difficulty in obtaining as many dealers and distributors to carry their lines, as they desire. In such situations, some of these manufacturers usually try to buy or "bribe" the retailers and distributors into taking on their lines. They will ordinarily do this by offering a higher margin on their merchandise than competitors are offering. Of course, such an offer means virtually nothing unless they can protect that margin. In effect, they are required to police the higher margins—what the quality stabilization bill is designed to facilitate. If these manufacturers are successful in winning retailers and distributors by offering and protecting higher margins, other manufacturers' sales would decline. They then would be forced to offer protected, higher margins. This process sometimes occurs even in the absence of resale price maintenance. Competition in the form of offering higher margins becomes vastly simpler and more direct because the margins appear to possess legal sanction and seem to be protected.

The raising of margins is accentuated in trades where retailers are highly organized. In such situations, retailers have been known to make concerted efforts to have manufacturers raise margins. Once a single important manufacturer has been induced to raise margins, ordinarily by the promise of strong sales support, other manufacturers are compelled to follow lest their product end up out of sight, if not outside the store altogether.

HOW MUCH PROTECTION RESULTS FROM MANUFACTURERS WHO DO NOT INVOKE RESALE PRICE MAINTENANCE?

One possible safeguard against dampening competition by resale price maintenance is manufacturers who don't use it or raise margins in order to win retailers' sales support. How strong is this safeguard? First, we recognize that the manufacturers who adopt such a marketing strategy usually have the less popular brands rather than the strong ones. Consequently, their power to check the price and margin increases made by the others would be relatively weak. Also, such firms often are the very ones that must offer the largest bribes to win retailer sales support. For many types of products, active sales support of the salesmen or prominent space on the shelves is absolutely prerequisite for sales success. Consequently, the manufacturer (or distributor) must make it worth the retailer's while to push and display his merchandise—and this is all the harder to do when the brand is not widely accepted. The usual way of winning support from the retailer is to offer a wide margin plus a low price rather than just a low price, for the low price given equally to all may simply mean low prices to the consumer. But, he can guarantee a retailer a wide margin only if he can protect that margin against severe erosion from price competition. Again, one would expect to find irresistible temptations to almost all manufacturers to invoke resale price maintenance and protect high margins in order to win retailer sales support. Thus, the existence of manufacturers who will elect to forgo their resale price maintenance powers cannot be considered a strong safeguard against the dampening of competition under resale price maintenance.

To the extent that there might be manufacturers who do not invoke the resale price maintenance, the present bill even weakens their impact. The bill under consideration specifies that different prices may be charged in different marketing areas of the country. Consequently, manufacturers who enjoy benefits of high prices with the help of resale price maintenance are not frustrated by noncooperative competitors. They merely set "competitive" prices in areas where the "noncooperators" control an important amount of business. Then, in areas where the "noncooperator's" goods are not sold, or are weak in share of market, they take full advantage of the powers bestowed by this bill.

There is no definition of marketing area in the bill. The brand owner is expressly given the power to determine what constitutes a marketing area. Thus, a brand owner can gerrymander to minimize the effect of "noncooperators" in restraining price increases.

OTHER DEFICIENCIES IN THE QUALITY STABILIZATION ACT

The foregoing discussion has tressed the probable effects of the quality stabilization bill upon the nature and severity of competition and indicated that it would discourage both benign and objectionable forms of price cutting. Other,

but lesser, deficiencies in the bill that should not be overlooked, but which can receive only brief mention here, are the following:

1. The bill would protect all retailers from price competition regardless of need. Many retailers do not need to be sheltered from price competition.

2. The bill gives power to control resale prices to any brand owner, and not only those whose products may be "footballed."

3. The bill will tend to keep small many efficient ambitious retailers that are now small because price inducements are one of their principal methods of achieving growth.

4. The bill provides only relatively weak deterrents against bait advertising and similar misleading practices.

5. The bill would help most those who least require and deserve help—namely the manufacturers and retailers who already possess strong market power and who would employ the resale price maintenance privilege to implement their power over a wider sphere.

6. The bill favors retailers that possess wide assortments, prime locations, expensive fixtures, efficient materials handling equipment, etc.—in general, the large retailers. Other retailers lacking these advantages are nevertheless required to demand the same price from consumers.

7. The higher retail margins permitted by the bill would attract added retailing capacity. Consequently, whatever benefits the bill does offer small retailers would turn out to be temporary and largely illusory.

OUTLINES OF A CONSTRUCTIVE PROGRAM

As I have mentioned before, the problem of predatory price cutting is a special one and should be dealt with specifically. One way to do this is to give some administrative agency the power to set temporary minimum prices upon establishment of proof that injury is taking place. The system might function as follows. Retailers or manufacturers suffering net losses on their total operations because of harmful price cutting would petition the agency and provide proof of this. It would then issue an immediate preliminary order setting minimum prices for a designated brief period. After a more thorough investigation into the price cutting, the preliminary order would either be confirmed or lifted. The final order would be binding only for a limited period of time. Specific criteria as to what is unfair, what amount of damage is sufficient to merit action, how floor prices are to be set, and how long the order can run should be provided in the bill establishing this administrative agency.

Instances of bait or misleading advertising should also be subject to the same type of review. Penalties for violating the orders of the agency would be two:

1. Against predatory price cutting, the manufacturer would be given the right to withdraw his line from retailers who do not comply with the price order.

2. Against bait or misleading advertising, the same penalty for noncompliance would apply. In addition, because of the premeditated nature of this abuse, severe penalties—in the form of fines—for those employing these tactics are required. Injured consumers should also be permitted to bring action against this type of retailer and perhaps obtain a portion of the fine.

This type of program would go far to eliminate the specific abuses of which proponents of the present bill complain. This approach should also protect the retailer, while at the same time protecting the consumer.

The small businessman faces other problems that are at least as important as those involving unfair competition. To help him, Congress must take action to overcome these problems as well. The small retailer has himself discovered one important way by which these problems can be overcome. This is by forming voluntary chains or co-ops. These co-ops, such as Certified Grocers in California, Super Valu in the Midwest, and Shop Rite in New Jersey, provide their members with many important services. Their members are able to buy as cheaply as large chains; they are helped in finding new locations and money for expansion and modernization; they are supplied with management aids which help them to price intelligently, keep adequate records, and operate more efficiently. They often run common advertisements, making their advertising dollars go almost as far as do those of the chains.

The co-op, or voluntary chain, is proving successful in other lines. MARTA is a successful co-op owned by appliance retailers. Its members, in 1960, were

able to earn 1½ to 2 percent net profit against the average profit of 0.02 percent in that line because of combined buying power, more efficient operations, and other similar benefits. Druggists, too, have in many instances banded together to enjoy the advantages of cooperative buying and advertising.

This route could help many more small independent retailers if the Government would actively assist the development of co-ops and voluntary chains, especially by helping them to obtain capital at low rates. They could use this capital to establish the facilities necessary for their operations and to make loans to members for expansion or modernization purposes. The Puerto Rican government already has a program of this type.

The Government can also help small independent retailers by providing them with opportunities to obtain training in retailing methods so that they can learn to operate more efficiently. The Government already does some of this, but present efforts are not enough. The people who take advantage of them frequently are the ones who need them least. Methods must be devised to help those who are kept from obtaining assistance out of fear of admitting their lack of knowledge, or by other reasons.

If a positive program is developed that increases efficiency of small retail businesses and the small retailers are protected against unfair competitive methods, then we will have found an enduring solution for the biggest problem facing them.

WHICH SOLUTION IS BEST?

There thus are two ways to keep the small retailer in business: One is put an umbrella over him, protecting him from most price competition; this is the approach used in the quality stabilization bill. The other is to provide a floor for prices in those isolated cases when needed, accompanied by the necessary help to enable the retailer to operate efficiently.

Earlier in my testimony, I have indicated what are some of the present trends and important characteristics of our distribution system. Since the quality stabilization bill would, if enacted, undermine the competitive presures which mold our distribution system and would change its basic character by dampening price competition, we may expect new development including—

1. Generally higher prices.
2. Slower development of efficient new forms of retailing since new retailers are hampered in using price appeal to gain consumer acceptance.
3. Turnover among retailers would abate somewhat for awhile since "sick" retailers would be shielded against direct price competition.
4. An inflow of additional numbers of retailers into the sheltered trades, adding to facilities that are already excessive and ultimately increasing failure rates in retailing.
5. Much more nonprice competition on the retail level—advertising, drawings, door prizes, etc.
6. Unproductive expenditure of large sums to police price maintenance.
7. Growth in importance of private brands.
8. Slower growth of output for higher prices reduce purchases which means that less will be produced and employment will shrink.

Under a selective, positive program along the lines that I have outlined, we may expect, to retain the benefits of the present system and to gain certain new ones from the elimination of unfair competition and from the strengthening of small retailers. Among the gains would be—

1. Generally lower prices;
2. Continuing development of more efficient forms of retailing;
3. Order and stability in retailing with healthy, well-operated retail stores; and
4. An economy operating at a higher level of efficiency and producing more output.

The decision of the committee on this bill will help determine the future shape of the entire economy. It must, therefore, weigh carefully the bill's long-range implications. When it does so, I am sure it will reject the quality stabilization bill in favor of a constructive program that matches remedies against abuses—one that does not undermine important types of competitive pressure in order to eliminate isolated forms of predatory price cutting.

APPENDIX

(Publications of Alfred R. Oxenfeldt, Ph. D.)

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"Industrial Pricing and Market Practices," Prentice-Hall, 1951.
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FORTHCOMING BOOKS (TENTATIVE TITLES)

"Models of Markets," Columbia University Press.
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ARTICLES

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"Professor Markham on Price Leadership: Some Unanswered Questions," American Economic Review, June 1952.
"Valuation of Untraded and Closely Held Securities," The Analyst Journal, August 1953.
"Unemployment in Planned and Capitalist Economies," the Quarterly Journal of Economics, February 1954, in collaboration with Ernest Van Den Haag.
"What the Gift Market Revolution Means," National Jeweler, January 1956.
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"The Retailing Revolution: Why and Whither," Journal of Retailing, fall 1960.
"Scientific Marketing: Ideal and Ordeal," Harvard Business Review, March–April 1961.
"Approaches to Pricing: Economist versus Accountant," Business Horizons, winter 1961.
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"The Special Nature of New Product Pricing," in Developing a Product Strategy, publication of the American Management Association.

"Pricing New Products," management report No. 8, Establishing a New-Product Program, of the American Management Association.
"Can the Small Tobacco Dealer Meet Large Store Competition?" Journal of Retailing, summer 1961.
"Innovation and Public Utility Regulation," Public Utilities Fortnightly, May 24, 1962.

CONTRIBUTIONS TO EDITED VOLUMES

"The Dynamic Element in Consumption: The TV Industry," in Consumer Behavior, edited by Lincoln Clark. Harper & Bros., 1958.
"Advertising's Role in the Pricing Crisis," in Managerial Marketing: Perspective and Viewpoints, edited by E. J. Kelly and William Lazer, R. D. Irwin, 1958.
"Pricing Principle for Small Business," Management for the Smaller Company, edited by Elizabeth Marting, 1960. Published by American Management Association.
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"The Formulation of Market Strategy," in Kelly and Lazer.
"How Will Existing Market Models Meet the Needs of Businessmen?" paper presented to Arden House Conference on Assessing the Market Models of Price Theory, April 1962, and to be reprinted in forthcoming volume to be edited by me.

Mr. DINGELL. Mr. Walter Foulkrod? You are welcome. You may testify to the committee on the bill if you so desire. Do you have a prepared statement?

STATEMENT OF S. WALTER FOULKROD, JR., EXECUTIVE DIRECTOR AND COUNSEL, COUNCIL FOR ETHICAL TRADE PRACTICES

Mr. FOULKROD. Mr. Chairman, I do have a prepared statement. I would like to submit it for the record and then make comments in addition to the prepared statement which will be very brief.

My name is S. Walter Foulkrod, Jr., from Philadelphia, Pa. I am an attorney at law and my office is located in Philadelphia.

It is my privilege to be executive director and counsel for the Council for Ethical Trade Practices on whose behalf I appear and offer for the record the prepared statement and these additional comments.

The Council for Ethical Trade Practices is a nonprofit corporation dedicated to the advancement of ethical trade practices. The membership consists of retail trade organizations whose members are engaged in retail trade. All members of the constituent organizations of the Council for Ethical Trade Practices are small businessmen.

I would like the committee to know that there was with me yesterday and the day before Mr. Philip Seltzer, president of the Council for Ethical Trade Practices, as well as Mr. Sydney Abrams, the vice president, and Mr. Alan Vogenberg, the immediate past president of the council.

Now, Mr. Chairman, I would like to give you an incident from my personal experience as a lawyer involving an actual case, and in order to reveal to the committee the facts of this case, I would like to substitute names rather than reveal the name of the client or reveal the name of the person with whom he did business.

I have a neighbor who is 70 years of age. He is a friend and he is a client, Ed Wilson. He needed a new power mower. He meticulously took care of over a half acre of lawn. He was proud of it but he was no longer able to push a hand mower.

He saw advertised by a Philapelphia discount house a Toro power mower for $99.50. He could afford that price for a Toro power mower and he went to the discount house. He asked for the Toro mower and he was told that they were sold out, and then there was exhibited to him another mower called Cleancut and the salesman said, "We can sell you this mower for $99.95. It is just as good as the Toro."

Eddie Wilson bought the power mower and took it home. He had difficulty in starting the motor and when he began to cut his grass he discovered that the revolving blades did not touch the main cutting blade and it would not cut grass. He then took it to a nearby mechanic who specializes in the servicing and repair of power mowers. He was told of its condition, and he said, "But the mower blades need sharpening." He went back the next day and he was told by the mechanic that there is no use in sharpening these blades. The blades are made of soft metal.

As a matter of fact, we think that you ought to cast this one aside and buy another one. This is shoddy workmanship and this is shoddy material.

I believe, sir, that when Eddie Wilson went into this discount house in Philadelphia he was the victim of bait merchandising. He was sold something, possibly because of his own gullibility, which was trash. It was made outside of the United States and, of course, by foreign labor. And the profit on that item for which he paid $99.95 was a greater profit to the discount dealer than had he sold a Toro power mower for Toro's price of $139.95.

Now, I simply want to point out to the committee what happened as a result of this bait merchandising when my friend and neighbor and client, Eddie Wilson, bought an unknown brand. It affected in the first place one of America's producers of quality merchandise. Here was a sale lost to a segment of American industry. Here was a sale gained by an unconscionable manufacturer fabricating power mowers in Japan, exporting them for sale to gullible consumers in the United States.

Now, the effect of that transaction and that sale upon Toro is this. It could be that Toro will have to meet that kind of competition. It could be that Toro will be required to reduce the price at retail of its power mower; in order to reduce it, they will have to cheapen it. They will have to cheapen it in its materials. They will have to cheapen it with regard to the skillful labor that formerly went into the manufacture of it. And witnesses have been asked why is this bill called quality stabilization? And I think here is the reason why it ought to be called quality stabilization because it will stabilize the quality of not only Toro power mowers but the products of America's best quality producers. Then what else happened as a result of this sale of the Japanese Cleancut power mower? If Toro should be required in the future to reduce the quality of its mower, what effect will this have upon the labor that produces Toro power mowers? I think the answer to that is obvious. Toro will employ cheaper labor, fewer laborers, because they will not need the expert skillful labor force in such quantity to produce a cheaper mower, and therefore, Mr. Chairman, I would urge that this kind of malicious practice be abolished because it is bait merchandising, or at best it is the use of a loss leader.

It will dilute the quality of America's products and it has a very definite and prejudicial effect on the labor force of the United States.

And therefore I urge that this committee give expeditious approval to H.R. 3669 in order to forever abate this kind of iniquitous practice.

I thank you, Mr. Chairman. I shall be happy to answer any questions.

Mr. DINGELL. Thank you, Mr. Foulkrod.

Any questions, Mr. Chairman?

Mr. HARRIS. Thank you very much. We appreciate your testimony.

Mr. DINGELL. Thank you for your testimony before this committee.

Mr. FOULKROD. Thank you, sir.

Mr. HARRIS. I believe you did give him permission for his statement to be included in the record, for which we thank him.

Mr. DINGELL. Yes. Without objection, so ordered.

(The full statement of S. Walter Foulkrod, Jr., follows:)

STATEMENT OF S. WALTER FOULKROD, JR., ON BEHALF OF THE COUNCIL FOR ETHICAL TRADE PRACTICES

Mr. Chairman and gentlemen, my name is S. 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 Council for Ethical Trade Practices on whose behalf I appear and offer for the record these comments.

WHAT IS THE COUNCIL FOR ETHICAL TRADE PRACTICES?

The Council for Ethical Trade Practices is a nonprofit corporation dedicated to the advancement of ethical trade practices. The membership consists of retail trade organizations, whose members are engaged in retail trade. All members of the constituent organization members of the Council for Ethical Trade Practices are small businessmen.

Permit me to express the appreciation of the members of the Council for Ethical Trade Practices for the privilege of presenting the following facts and conclusions in support of the quality stabilization bills currently under consideration by this subcommittee.

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 surpressing various methods of unfair competition and other unethical practices. Other persons appearing before this subcommittee either have or will do this.

WHAT THE QUALITY STABILIZATION BILL WILL DO

Any one of the several quality stabilization bills currently being considered by the subcommittee will accomplish the following:

1. It will acknowledge that the owner of a brand, name, or trademark has a property right therein, even though he no longer owns the product which bears the brand, name, or trademark.

2. It will enable the owner of a brand, name, or trademark to establish a resale price or price range for the product identified by the brand, name, or trademark.

3. It will enable the owner of the brand, name, or trademark to revoke a reseller's right to sell a product identified by the brand, name, or trademark under the safeguards as set forth in any one of the bills.

4. It will enable a manufacturer of a product identified by a brand, name, or trademark to maintain the quality of the product which, in turn, is a factor in the maintenance of a high level of employment.

5. It will prevent the use for bait merchandising of products identified by a brand, name, or trademark for which the owner has established a resale price or price range.

6. It will abolish the publication of misrepresentations concerning a product identified by a brand, name, or trademark for which the owner has established a resale price or price range.

It is respectfully contended that the foregoing accomplishments afford protection to manufacturers, retailers, and consumers.

How the foregoing accomplishments will protect manufacturers, retailers, and consumers is set forth in the bills in complete and unambiguous language and has been carefully and completely explained by other persons who have appeared or who will appear before the subcommittee.

I have carefully studied the bills and, as a lawyer, I am convinced and so state to this subcommittee that any one of them, if enacted, will suppress certain methods of unfair competition, and other unethical practices and will accomplish those results mentioned by Senator Humphrey when he introduced the quality stabilization bill (S. 744) in the Senate on February 11, 1963.

At that time, Senator Humphrey said in part:

"The enactment of the quality stabilization bill 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 to 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 in favor of the consumer."

The opponents of quality stabilization have contended that the provisions of the bills, currently being considered by the subcommittee, deprives them and all sellers of products the privilege of selling the products in the marketplace as they please.

This is a typical irresponsible contention and, in fact, is the same philosophy entertained by operators of an "oriental bazaar." The quality stabilization bills before the subcommittee, are actually the result of the conviction that inherent in privileges are certain responsibilities. Any person, group of persons, or other legal entity should have the freedom of engaging in the sale of most products, but, inherent in that freedom are certain responsibilities. For instance, the freedom should not include the unrestrained right to sell certain products. This is illustrated in the Federal Food, Drug, and Cosmetic Act, in the Federal narcotic law and, to a limited extent, in the Federal Trade Commission Act.

It is, therefore, the contention of the Council for Ethical Trade Practices that in the freedom to sell products, there are these responsibilities:

1. To refrain from impairing the brand, name, or trademark of the manufacturer, providing there are other products for the same general purpose available to the public from sources other than the manufacturer, and which are in free and open competition therewith.

2. To refrain from using such products as bait merchandising to lure unsuspecting customers into a place of business, and then to foist upon those customers an inferior product for an unconscionable price.

3. To refrain from uttering misrepresentations concerning a product identified by a brand, name, or trademark.

The Council for Ethical Trade Practices is aware of the doctrine "let the buyer beware," but contends that sellers and buyers alike must be protected as are users of the facilities and services of public utilities and other monopolies.

This Nation is close enough to the first laws disseminated at Mt. Sinai to expect that not always shall the doctrine "let the buyer beware" prevail, but, shall expect that they will be protected against the devices of unconscionable merchants who either are ignorant of or scoff at the laws of decency. It is difficult for the Council for Ethical Trade Practices to comprehend why or how an opponent of quality stabilization can sincerely contend that a retailer should have the right to impair a manufacturer's proprietary interest in a brand-name, or trademark, which proprietary interest has become a property right. Indeed,

this contention is iniquitous. It is equally difficult for the Council to comprehend why or how a retailer can find no wrong in bait merchandising or in the utterances of misrepresentations concerning a product identified by a brand, name, or trademark. Indeed, this contention is equally iniquitous.

The Council for Ethical Trade Practices, 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 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. You will give added protection to the consuming public.

Mr. DINGELL. The next witness will be Prof. Glen E. Weston of George Washington University, representing the American Bar Association.

Professor Weston, it is a privilege to have you with us this morning for any testimony you might wish to give in this matter.

STATEMENT OF GLEN E. WESTON, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, ON BEHALF OF AMERICAN BAR ASSOCIATION

Mr. WESTON. Thank you, sir.

My name is Glen E. Weston. I am a professor of antitrust and trade regulation law at the George Washington University Law School here in Washington, D.C. I have taught law since 1949 and trade regulation law since 1952.

Before becoming a full-time teacher I practiced law with the law firm of McFarland & Sellers in Washington, D.C. I appear here today on behalf of the American Bar Association. I am currently chairman of the subcommittee on fair trade and implementing Federal legislation of the section of antitrust law of the American Bar Association. I am grateful to you for affording me this opportunity of presenting the views of the association, the antitrust section and my personal views.

On August 9, 1962, at the annual meeting of the American Bar Association in San Francisco, Calif., the house of delegates of the American Bar Association adopted the following resolution, upon the recommendation of its antitrust law section:

Resolved, That the American Bar Association disapproves of and opposes S.J. Res. 159, 87th Congress, and any proposed legislation which would attempt to create a Federal right of enforcement of resale price maintenance by private persons.

Further resolved, That the officers and council of the section of antitrust law are directed to urge such opposition and disapproval upon the proper committees of Congress in connection with any legislation embodying any such concept.

While the resolution referred to Senate Joint Resolution 159 of the 87th Congress, may I call your attention to the fact that it expresses opposition to "any proposed legislation which would attempt to create a Federal right of enforcement of resale price maintenance by private persons." The officers and council of the section of antitrust law, who were directed to urge such opposition upon the proper committees of Congress, are of the opinion that H.R. 3669 and the various other quality stabilization bills currently pending are clearly within the terms of the house of delegates resolution. For this rea-

son I was requested by them to appear before you today to represent the association in urging disapproval of these bills.

The policymaking body of the American Bar Association is its house of delegates, composed of some 250 members, about one-half of whom are delegates elected to represent State and local bar associations. Resolutions, when approved by the house, become the official policy of the American Bar Association. The comments and supporting data included in reports of sections or committees of the association are not a part of the official policy but are the views of the section or committee submitting them. The council of the section of antitrust law submitted a report to accompany its recommendations to the house of delegates.

I do not want to take your valuable time today reading this entire report, but will merely summarize the conclusions for you, and invite you to read the fuller statement which appears on pages 6 through 8 of the report which is attached as an appendix to this statement.

Mr. DINGELL. Professor Weston, without objection your full statement will be included at this point in the record and then you may continue to summarize it in any way you choose.

Mr. WESTON. Thank you, sir.

Let me just briefly summarize the reasons for the conclusions reached by the antitrust law section in this report.

First. The section of antitrust law feels that there are significant uncertainties in the bill. Although a right of revocation and to sue is given for "bait merchandising practices" and "misrepresentation" these terms are undefined. This could provoke considerable trivial litigation and thus result in harassment and injury to business concerns. "Bait merchandising" in particular is an uncertain term. If it were defined merely to include the flagrant type of loss-leader selling it would be somewhat less objectionable but its vagueness may lead to attempts to apply it to many other types of practices and could result in harassing litigation that might injure business concerns whom the proponents desire to protect.

Second. The most fundamental objection of the section of antitrust law is to the granting of power to brand owners to control resale prices. This goes far beyond any requirements needed to control loss-leader selling and is inconsistent with basic antitrust policy of reliance upon price and other competition. Exemptions from the antitrust laws should be enacted only in compelling circumstances.

Third. The antitrust law section feels that the quality stabilization bills would be an unwarranted intrusion upon the public policy of the States. There are now about 27 States plus the District of Columbia and Puerto Rico in which resale price maintenance enforcement against nonsigning dealers is considered contrary to the State's legislative or constitutional policy. Moreover, the present bills by asserting a paramount Federal policy probably deny to the States the right to legislate in this significant area of economic policy. Indeed, in some States such as Montana, Utah, and perhaps Idaho (where the question is, I believe, pending on appeal), there are State constitutional provisions which prohibit resale price fixing. Other States such as Texas prohibit such practices by statute. H.R. 3669 and similar bills would therefore impose upon these States a price maintenance system that such States have declared contrary to their policy.

The Federal courts would also have transferred to them the burden of policing resale price maintenance through litigation without regard to the amount in controversy.

Finally, speaking only for myself as an individual and a teacher of trade regulation law I would like to give my further personal reasons why I think quality stabilization should not be enacted. The remainder of my statement is not to be attributed to the American Bar Association or its antitrust law section. And let me first assure you that I am not paid or retained by anyone. My only interests are those of a teacher, consumer, and citizen who is interested in the maintenance of a strong, free, private competitive enterprise system. I think that the general objectives of those who have introduced these bills of trying to help small businessmen, improve quality and protect consumers against deception are laudable. As a teacher of trademark law as well as antitrust law I also believe that a system of reasonably strong protection of trademarks is a sina qua non of free competitive enterprise. But I believe that these quality stabilization bills will not achieve the objectives that some of you in good faith think that they will. Instead, you are asked to enact one of the most drastic departures from a free enterprise system that has ever been before Congress. It would in reality throw the baby of price competition out with the bath water of the loss leader and bait merchandising. These quality stabilization bills are designed to aid three classes of persons—brand owners, small dealers, and consumers. However, I sincerely believe that there are substantial unanticipated problems in the bills that can boomerang and cause troubles for each of these groups.

Departing from my prepared statement, I might say I have read the hearings held last year and I have studied H.R. 3669 and most of the other bills carefully to try to ascertain what kind of legal problems in particular will be likely to arise and what some of the possible effects may be. I have discussed some of the more serious of these in my written statement and rather than take too much of your time, I will touch briefly on some of these and request again that my full written statement be included in the record.

There are severe problems for brand owners in these bills that ought to make them think twice about supporting these bills or using the bills if enacted.

1. Since these bills do not authorize any agreement or combination a brand owner may find himself violating the Sherman Act and FTC Act when his dealers in complete good faith try to cooperate in enforcement. These bills thus create a dangerous trap for brand owners. I might say I don't believe this has previously been pointed out, at least not in the hearings last year. This is based upon a study of the bills and particularly their effect in the light of the *Parke, Davis* case. Unlike fair trade the trademark owner is the only person authorized to bring suit or enforce the provisions of the bills. This means the brand owner alone must bear the cost of enforcement of his price stabilization system. While he may do this by revocation of the right to sell as well as suit against the price cutting dealer it is doubtful whether he can either invoke or accept any assistance from dealers in detecting violations and policing. There is nothing whatsoever in the bill, as I read it, authorizing agreements with dealers or indicating that dealers may

help. Under *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), a refusal to deal must be kept strictly unilateral to keep it from becoming an unlawful "combination" to fix prices violative of section 1 of the Sherman Act. Unsolicited aid from dealers in detecting violations or even oral assurances by dealers that they will adhere to a manufacture's suggested prices are unlawful as some persons interpret the *Parke, Davis* case. I think there is question as to whether the same thing would happen under a manufacturer's "established" prices. If dealers agree to adhere to those established prices, under this bill, they run the risk, and the brand owner runs the risk, of prosecution under the *Parke, Davis* case. I therefore suggest that this is a serious deficiency in the drafting of the bill, which should be corrected if the bill is to be enacted, which I earnestly urge you not to do.

2. A second danger for brand owners in this bill is that it may cause a substantial increase in product liability claims against them. This danger arises partly from the provision in paragraph (10) of the bill (H.R. 3669) and the identical ones, that subjects the brand owner to jurisdiction in every Federal district in which his goods are sold. This jurisdiction is solely for purpose of suits by consumers arising out of alleged misrepresentations by the owner as to size, capacity, quality, condition, model or age of the goods. Although this does not expressly create a right of action it seems to imply the existence of one. While I do not quarrel with creation of a right of action on behalf of consumers for misrepresentation by brand owners, this provision, coupled with other provisions in the bill giving some control over retail dealers, may arguably go much beyond that. They may result in a substantial increase in the trend toward absolute liability for any defects in the goods, particularly in those States that still cling to the so-called privity doctrine. In other words, the control over dealers provided in this bill may create privity between the brand owner and the retail purchaser that will make the brand owner liable to the ultimate consumer for any defects in the product.

3. A third problem for brand owners is increased difficulty in complying with the Robinson-Patman Act. This involves a complex aspect of the Robinson-Patman Act covered in my written statement, so I will not take your time to discuss it unless you would like to ask me any questions about it.

4. Another serious drawback for many brand owners is that this bill may preclude a brand owner from selling private brand goods to mass merchandisers even though the price differential is fully cost justified or is made to meet competition.

5. Finally, from brand owners standpoint, brand owners may find quality stabilization very expensive and troublesome to enforce. The superimposing of quality stabilization on top of State fair trade laws and the Miller-Tydings and McGuire Acts creates a lot of confusion and uncertainty. Some types of conduct will thus be permitted under some State laws and other types under Federal law. Suits may be pending in both State and Federal courts dealing with similar conduct. The many unanswered legal problems arising out of such a situation will mean many attempted defenses and subterfuges and a high cost of enforcement. Moreover, the bill is completely silent and

therefore ambiguous concerning the status of such things as trade-in allowances and trading stamps which have caused a great deal of trouble in fair trade States. Finally, since discount houses are thoroughly entrenched in most States it is going to take a long, expensive litigation effort to halt their discounting—if it can be accomplished at all.

There are some ways in which small dealers may be injured as a result of quality stabilization:

1. Dealers may be prosecuted under the Sherman Act or be sued for treble damages for "combining" with brand owners if they attempt to help in reporting violations or cooperate in enforcement. As I mentioned earlier these bills do not contain any authorization for agreements or combinations between brand owners and dealers. The Parke, Davis rule requiring strict unilateral action by the brand owner is presumably still in effect. In a recent Federal district court case, *Klein* v. *American Luggage Works, Inc.*, 206 F. Supp. 924 (D. Del. 1962), two retailers were held liable for treble damages along with the brand owner because they "volunteered assistance in the ascertainment of noncomplying dealers" in a refusal-to-deal price maintenance system. The present bills do not contain anything that would change this part of the rule of this case. Therefore there is real danger to dealers under quality stabilization. You have heard testimony previously that these bills will undoubtedly be strictly construed, a principle which the Supreme Court laid down in the *McKesson-Robbins* case, and therefore I think in the absence of some explict authorization for dealers to aid in enforcement of the resale price maintenance system, there is real danger for both the dealers and the brand owners in the bills.

2. Quality stabilization may give some substantial advantages to chainstores, mail-order houses, and large department stores. In some ways mass merchandisers will be given advantages over independent dealers. In some ways it should give greater incentive for the use of private label merchandise by such mass merchandisers. The independent dealer will find his hands tied by quality stabilized pricing so that he is unable to meet the price competition of such private brand products.

3. The lack of a right of action for competing dealers makes them dependent solely upon the brand owner for enforcement. If brand owners are slow to bring suit, the dealer may suffer losses for which he has no right of action against anyone. Experience under fair trade has shown that many brand owners are not enthusiastic about maintaining such litigtion since it is expensive and is largely for the benefit of the dealer rather than the brand owner. Small dealers may find themselves afraid to cut prices because of fear of revocation under quality stabilization, afraid to complain of price cuts by competitors because of possible Sherman Act "combination" claims against them, and unable to bring suit on their own behalf. What recourse do they have under such circumstances?

4. Small dealers may find themselves faced with threats of revocation of their right to resell trademarked articles. There is no requirement that price cutting or bait merchandising be intentional to be grounds for revocation. Mistakes by employees or salesmen might be ground for revocation of a dealer's right to resell. And since brand

owners must use diligence in enforcement, there is some question as to how far they may go in overlooking such violations.

C. CONSUMERS WILL BE DAMAGED BY THIS PROPOSED LEGISLATION

1. Although one of the stated purposes of this legislation is to protect consumers against bait merchandising and misrepresentation, the bills do not provide effective remedies for this purpose. Why is the consumer given no right of action for such practices? More significantly, why isn't the Federal Trade Commission's jurisdiction enlarged to reach such practices merely "affecting commerce" if the real purpose is to protect consumers? Why aren't competitive dealers given a right of action? These significant omissions make the bait advertising and misrepresentation provisions of these bills ineffective as a means of protecting consumers.

2. There is a strange omission of any requirement, guarantee, or assurance of high quality products, except for the rather pretentious title "Quality Stabilization" which seems to imply a paramount intention to achieve quality control. Why isn't it a good defense to a suit by the brand owner for the dealer to show the brand owner's product was of poor quality? Why aren't consumers who will be required to pay fixed prices given recourse against the brand owner who sells a poor quality product? There is little reason to believe that these quality stabilization bills will aid materially in improving quality since the bills signally fail to contain adequate means of assuring quality.

3. Consumers will be damaged because resale price maintenance on trademarked commodities facilitates horizontal price fixing between competing brands even in the absence of actual agreement. These bills purport to permit only the elimination of intrabrand competition but they will significantly lessen competition between rival brands since they contain insufficient safeguards. There is nothing to prevent rival brand owners from announcing stabilized resale prices that are identical or virtually so, as long as they did not agree among themselves to do so. The only limitation in the bill is the "free and open competition" requirement but under fair trade this has sometimes been interpreted as being met even though there were only two competitive producers. Prof. Walter Adams, the most sophisticated economist (in my opinion) favoring fair trade, has advocated more stringent interpretation of the "free and open competition" limitation, but the only State that has applied it with any degree of strictness is Pennsylvania. Insead of the greatly inadequate "free and open competition" requirement, why don't you write into this bill a requirement that there be "free and effective price competition" between the stabilized commodity and similar products produced or distributed by other? This would limit price stabilization to products where a substantial degree of interbrand price competition exists and the consumer has real alternatives.

In conclusion, let me emphasize my personal opinion that the objectives of this proposal are good but the means employed are unsound. A far more effective means of dealing with the loss-leader problem, if you feel new legislation is needed, would be a Federal sales-below-cost statute modeled after those in effect in about one-half of the States—

such as S. 1804 of the 87th Congress. Misrepresentation and bait merchandising affecting interstate commerce could be more effectively dealt with by such legislative proposals as the Lindsay-Javits bill (H.R. 4651 and S. 1038) that would create a right of action for "unfair commercial activities in or affecting commerce." The quality stabilization bills are drastic proposals. They go far beyond "fair trade" because they would create a nationwide price-fixing system to be established by the brand owner enforceable in the Federal courts. They are so replete with legal problems and pitfalls that the main beneficiaries will be lawyers not brand owners, dealers, or consumers. What kind of answer can you give to the unemployed workers, the low-wage laborers, the retired pensioners, the disgracefully underpaid public school teachers, and the underprivileged in our society if they find themselves required to pay higher prices for such items as packaged foods, clothing, aspirin, first-aid supplies, toothpaste, shaving cream, razor blades, and other necessities? I have read a good many economic studies concerning the effects of fair trade and they are conflicting in their conclusions; perhaps no one can say with complete certainty exactly what the long-range effects will be. In my opinion the most objective and reliable studies point to the probability that consumer prices will be materially increased. At any rate it seems to me you should not enact this drastic departure from a free enterprise system unless you are quite certain it will not have such an undesirable result. Can you honestly say that you are certain it will not increase consumer prices? I do not see how anyone can. Thank you very much.

Mr. DINGELL. Professor Weston, we are particularly grateful to you for your very thoughtful consideration of this measure. I wish to express to you my personal gratitude and I am sure the committee's also, and that of the distinguished chairman of the full committee who is here.

I wonder if you want to comment.

Mr. HARRIS. No; except to thank the professor for his statement here. I am glad to have your personal views as well as the views which you have included as a representative of the American Bar Association in connection with this important problem.

Mr. WESTON. Thank you, sir.

Mr. DINGELL. Thank you very much, Professor Weston.

(The full prepared statement of Professor Weston follows:)

STATEMENT OF GLEN E. WESTON, PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY, ON BEHALF OF THE AMERICAN BAR ASSOCIATION

My name is Glen E. Weston. I am a professor of antitrust and trade regulation law at the George Washington University Law School here in Washington, D.C. I am a member of the bar in the District of Columbia and in Virginia. I have taught law since 1949 and trade regulation law since 1952. Before becoming a full-time teacher I practiced law with the law firm of McFarland & Sellers in Washington, D.C. I appear here today on behalf of the American Bar Association. I am currently chairman of the Subcommittee on Fair Trade and Implementing Federal Legislation of the section of antitrust law of the American Bar Association. I am grateful to you for affording me this opportunity of presenting the views of the association, the antitrust section, and my personal views.

On August 9, 1962, at the annual meeting of the American Bar Association in San Francisco, Calif., the house of delegates of the American Bar Association adopted the following resolution, upon the recommendation of its antitrust law section:

"*Resolved*, That the American Bar Association disapproves of and opposes Senate Joint Resolution 159, 87th Congress, and any proposed legislation which would attempt to create a Federal right of enforcement of resale price maintenance by private persons.

"*Further resolved*, That the officers and council of the section of antitrust law are directed to urge such opposition and disapproval upon the proper committees of Congress in connection with any legislation embodying any such concept."

While the resolution referred to Senate Joint Resolution 159 of the 87th Congress, may I call your attention to the fact that it expresses opposition to "*any proposed legislation which would attempt to create a Federal right of enforcement of resale price maintenance* by private persons." [Emphasis supplied.] The officers and council of the section of antitrust law, who were directed to urge such opposition upon the proper committees of Congress, are of the opinion that House bill 3669 and the various other quality stabilization bills currently pending are clearly within the terms of the house of delegates resolution. For this reason I was requested by them to appear before you today to represent the association in urging disapproval of these bills.

The policymaking body of the American Bar Association is its house of delegatse, composed of some 250 members, about one-half of whom are delegates elected to represent State and local bar associations. Resolutions, when approved by the house, become the official policy of the American Bar Association. The comments and supporting data included in reports of sections or committees of the association are not a part of the official policy but are the views of the section or committee submitting them. The council of the section of antitrust law submitted a report to accompany its recommendations to the house of delegates.

I do not want to take your valuable time today reading this entire report, but will merely summarize the conclusions for you, and invite you to read the fuller statement which appears on pages 6 through 8 of the report which is attached as an appendix to this statement.

(1) *The section of antitrust law feels that there are significant uncertainties in the bill.*—Although a right of revocation and to sue is given for "bait merchandising practices" and "misrepresentation" these terms are undefined. This could provoke considerable trivial litigation and thus result in harassment and injury to business concerns. "Bait merchandising" in particular is an uncertain term. If it were defined merely to include the flagrant type of loss-leader selling it would be somewhat less objectionable but its vagueness may lead to attempts to apply it to many other types of practices and could result in harassing litigation that might injure business concerns whom the proponents desire to protect.

(2) *The most fundamental objection of the section of antitrust law is to the granting of power to brand owners to control resale prices.*—This goes far beyond any requirements needed to control loss-leader selling and is inconsistent with basic antitrust policy of reliance upon price and other competition. Exemptions should be enacted only in compelling circumstances.

(3) *The antitrust law section feels that the quality stabilization bills would be an unwarranted intrusion upon the public policy of the States.*—There are now about 27 States plus the District of Columbia and Puerto Rico in which resale price maintenance enforcement against nonsigning dealers is considered contrary to the State's legislative or constitutional policy. Moreover, the present bills by asserting a paramount Federal policy probably deny to the States the right to legislate in this significant area of economy policy. Indeed, in some States such as Montana, Utah, and perhaps Idaho (where the question is pending on appeal), there are State constitutional provisions which prohibit resale price fixing. Other States such as Texas prohibit such practices by statute. House bill 3669 and similar bills would therefore impose upon these States a price maintenance system that such States have declared contrary to their policy. The Federal courts would also have transferred to them the burden of policy resale price maintenance through litigation without regard to the amount in controversy.

Finally, speaking only for myself as an individual and a teacher of trade regulation law I would like to give my further personal reasons why I think quality stabilization should not be enacted. The remainder of my statement is not to be attributed to the American Bar Association or its antitrust law section. And let me first assure you that I am not paid or retained by anyone. My only

interests are those of a teacher, consumer, and citizen who is interested in the maintenance of a strong, free, private competitive enterprise system. I think that the general objectives of those who have introduced these bills of trying to help small businessmen, improve quality, and protect consumers against deception are laudable. As a teacher of trademark law as well as antitrust law I also believe that a system of reasonably strong protection of trademarks is a sine qua non of free competitive enterprise. But I believe that these quality stabilization bills will not achieve the objectives that some of you in good faith think that they will. Instead, you are asked to enact one of the most drastic departures from a free enterprise system that has ever been before Congress. It would in reality throw the baby of price competition out with the bath water of the loss leader and bait merchandising. I am confident of the sincerity of those who have introduced these bills but in my opinion the very name "Quality Stabilization" is misleading because it erroneously implies that the bill will achieve quality control and obscures the stark truth that this is primarily a price-fixing bill. At the moment consumers are blissfully unaware of the purport of this bill. If the real effect of this bill were made known to the American public, Congress would be inundated with protests by consumers. If it is enacted and put into effect I think you are going to witness a severe reaction from consumers all over the Nation.

These quality stabilization bills are designed to aid three classes of persons: Brand owners, small dealers, and consumers. However, I sincerely believe there are substantial unanticipated problems in the bills that can boomerang and cause trouble for each of these groups:

A. QUALITY STABILIZATION PRESENTS SEVERE PROBLEMS FOR BRAND OWNERS

There are severe problems for brand owners in these bills that ought to make them think twice about supporting these bills or using them if enacted.

1. *Since these bills do not authorize any agreement or combination a brand owner may find himself violating the Sherman Act and Federal Trade Commission Act when his dealers in complete good faith try to cooperate in enforcement. These bills thus create a dangerous trap for brand owners.*—Unlike fair trade, the trademark owner is the only person authorized to bring suit or enforce the provisions of the bills. This means the brand owner alone must bear the cost of enforcement of his price stabilization system. While he may do this by revocation of the right to sell as well as suit against the price-cutting dealer it is doubtful whether he can either invoke or accept any assistance from dealers in detecting violations and policing. Nothing in the bill authorizes agreements with dealers or indicates that dealers may help. Under *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960), a refusal to deal must be kept strictly unilateral to keep it from becoming an unlawful "combination" to fix prices violative of section 1 of the Sherman Act. Unsolicited aid from dealers in detecting violations or even oral assurances by dealers that they will adhere to a manufacturer's suggested prices are unlawful as some persons interpret the *Parke, Davis* case. While an amendment might be drafted to overcome this, such an amendment would convert the bills into a mere authorization of price-fixing agreements and also destroy the claim that the resale price maintenance provisions are voluntary with the brand owner. Such an amendment would also unwisely permit dealers to pressure brand owners into price fixing even though brand owners do not desire to do so.

2. *A second danger for brand owners in this bill is that it may cause a substantial increase in product liability claims against them.*—This danger arises partly from the provision in paragraph (10) of the bill (H.R. 3669) that subjects the brand owner to jurisdiction in every Federal district in which his goods are sold. This jurisdiction is solely for purposes of suits by consumers arising out of alleged misrepresentations by the owner as to size, capacity, quality, condition, model, or age of the goods. Although this does not expressly create a right of action, it seems to imlpy the existence of one. While I do not quarrel with creation of a right of action on behalf of consumers for misrepresentation by brand owners, this provision, coupled with other provisions in the bill giving some control over retail dealers, may arguably go much beyond that. They may result in a substantial increase in the trend toward absolute liability for any defects in the goods, particularly in those States that still cling to the so-called privity doctrine. In other words, the control over dealers provided in this bill may create "privity" between the brand owner and

the retail purchaser that will make the brand owner liable to the ultimate consumer for any defects in the products. Now this may be good; in fact, I think it probably is. But is this what you intend, and do brand owners realize its potential effect? Do they realize it could result in substantial increase in their insurance costs? I doubt whether they have even thought about it much.

3. *A third problem for brand owners is increased difficulty in complying with the Robinson-Patman Act.*—Normally a band owner who sells to wholesalers is not responsible under the Robinson-Patman Act for price or service discrimination resulting from the wholesaler's resales to retailers. Retailers who purchase from wholesalers are not considered "purchasers" or "customers" or of the brand owners. But under cases such as *American News Co.* v. *FTC*, 300 F. 2d 104 (2d Cir. 1962) (certiorari denied), the "control" that this bill gives to brand owners over retail dealers who purchase from independent wholesalers may be enough to make such dealers be considered "purchasers" from the brand owner. This could mean that some brand owners will have hundreds or thousands of new "purchasers" or "customers" to whom they must proportionalize all advertising allowances and all promotional services or facilities. It may also arguably make the brand owner liable for any discrimination practiced by his wholesalers. Again I doubt seriously if brand owners would have realized this problem.

4. *Another serious drawback for many brand owners is that this bill may preclude a brand owner from selling private brand goods to mass merchandisers even though the price differential is fully cost justified or is made to meet competition.*—Paragraph 11(B) of H.R. 3669 creates a defense if the dealer shows that plaintiff has sold the same kind of goods of like grade and quality to another person similarly situated under more favorable terms or at lower prices. This would create a Robinson-Patman type defense of discrimination. But there is a notable complete absence of mention of any cost justification or meeting competition privilege. From this it may be interpreted to mean that a brand owner who tries to keep small dealers happy by fixing resale prices with high margins while still maintaining his volume by selling private brand goods may find himself in difficulty. I do not know whether this is intended by the drafters of the bill or whether it is a "sleeper" planted by someone who does not like private brands. They are permissible under Robinson-Patman when any price differential is cost justified and there is no sound reason why this proposed legislation should, in effect, preclude them under such circumstances.

5. *Brand owners may find quality stabilization very expensive and troublesome to enforce.*—The superimposing of quality stabilization on top of State fair trade laws and the Miller-Tydings and McQuire Acts creates a lot of confusion and uncertainty. Some types of conduct will thus be permitted under some State laws and other types under Federal law. Suits may be pending in both State and Federal courts dealing with similar conduct. The many unanswered legal problems arising out of such a situation will mean many attempted defenses and subterfuges and a high cost of enforcement. Moreover, the bill is completely silent and therefore ambiguous concerning the status of such things as trade-in allowances and trading stamps which have caused a great deal of trouble in fair trade States. Finally, since discount houses are thoroughly entrenched in most States, it is going to take a long, expensive litigation effort to halt their discounting—if it can be accomplished. Such subterfuges as covering the trademark with tape, making a few scratches on an appliance and calling it damaged or secondhand, overvaluing trade-ins and the like are likely to be employed.

B. PROBLEMS FOR SMALL DEALERS IN QUALITY STABILIZATION

There are some ways in which small dealers may be injured as a result of quality stabilization:

1. *Dealers may be prosecuted under the Sherman Act or be sued for treble damages for "combining" with brand owners if they attempt to help in reporting violations or cooperate in enforcement.*—As I mentioned earlier these bills do not contain any authorization for agreements or combinations between brand owers and dealers. The *Parke, Davis* rule requiring strict unilateral action by the brand owner is presumably still in effect. In a recent Federal district court case, *Klein* v. *American Luggage Works, Inc.*, 206 F. Supp. 924 (D. Del. 1962),

two retailers were held liable for treble damages along with the brand owner because they "volunteered assistance in the ascertainment of noncomplying dealers" in a refusal-to-deal price maintenance system. The present bills do not contain anything that would change this part of the rule of this case. Therefore there is real danger to dealers under quality stabilization.

2. *Quality stabilization may give some substantial advantages to chain stores, mail order houses, and large department stores.*—In some ways quality stabilization may give mass merchandisers advantages over independent dealers. It should give greater incentive for the use of private lable merchandise by such mass merchandisers. The independent dealer will find his hands tied by quality stabilized pricing so that he is unable to meet the price competittion of such private brand products. A surprisingly large percentage of the suits brought under fair trade laws have been against small dealers—not just chain stores or discount houses. Chain stores and other mass merchandisers also have greater capital to invest in advertising or in servicing stabilized products and thus may grow even more rapidly with guaranteed margins.

3. *The lack of a right of action for competing dealers makes them dependent solely upon the brand owner for enforcement.*—If brand owners are slow to bring suit, the dealer may suffer losses for which he has no right of action against anyone. Experience under fair trade has shown that many brand owners are not enthusiastic about maintaining such litigation since it is expensive and is largely for the benefit of the dealer rather than the brand owner. Small dealers may find themselves afraid to cut prices because of fear of revocation under quality stabilization, afraid to complain of price cuts by competitors because of possible Sherman Act claims against them, and unable to bring suit on their own behalf. What recourse do they have under such circumstances?

4. *Small dealers may find themselves faced with threats of revocation of their right to resell trademarked articles.*—There is no requirement that price cutting or "bait merchandising" be intentional to be grounds for revocation. Mistakes by employees or salesmen might be grounds for revocation of a dealer's right to resell. And since brand owners must use diligence in enforcement, there is some question as to how far they may go in overlooking such violations. Consequently there may be some danger that small dealers may find themselves cut off from their sources of supply or being named as defendants in litigation under this proposed legislation.

C. CONSUMERS WILL BE DAMAGED BY THIS PROPOSED LEGISLATION

1. *Although one of the stated purposes of this legislation is to protect consumers against bait merchandising and misrepresentation, the bills do not provide effective remedies for this purpose.*—Why is the consumer given no right of action for such practices? More significantly, why isn't the Federal Trade Commission's jurisdiction enlarged to reach such practices merely "affecting commerce" if the real purpose is to protect consumers? Why aren't competitive dealers given a right of action? These significant omissions make the bait advertising and misrepresentation provisions of these bills ineffective as a means of protecting consumers and create a suspicion that their principal purpose is to soft-pedal the price fixing provisions by equating discounting with misrepresentation.

2. *There is a strange omission of any requirement, guarantee or assurance of high quality products, except for the pretentious title "quality stabilization" which seems to imply a paramount intention to achieve quality controls.*—Why isn't it a good defense to a suit by the brand owner for the dealer to show the brand owner's product was of poor quality? Why aren't consumers who will be required to pay fixed prices given recourse against the brand owner who sells a poor quality product? There is little reason to believe that these quality stabilization bills will aid materially in improving quality since the bills signally fail to contain adequate means of assuring quality.

3. *Consumers will be damaged because resale price maintenance on trademarked commodities facilitates horizontal price fixing between competing brands even in the absence of actual agreement.*—These bills purport to permit only the elimination of intrabrand competition but they will significantly lessen competition between rival brands since they contain insufficient safeguards. There is nothing to prevent rival brand owners from announcing stabilized resale prices that are identical or virtually so, as long as they did not agree among themselves

to do so. The only limitation in the bill is the "free and open competition" requirement but under fair trade this has sometimes been interpreted as being met even though there were only two competitive producers. Prof. Walter Adams, the most sophisticated economist favoring fair trade, has advocated more stringent interpretation of the "free and open competition" limitation, but the only State that has applied it with any degree of strictness is Pennsylvania. Instead of the greatly inadequate "free and open competition" requirement, why don't you write into this bill a requirement that there be "free and effective price competition" between the stabilized commodity and similar products produced or distributed by others? This would limit price stabilization to products where a substantial degree of interbrand price competition exists and the consumer has real alternatives. The courts or the FTC could then preclude resale price maintenance when there was insufficient interbrand competition.

CONCLUSION

In conclusion, let me emphasize my personal opinion that the objectives of this proposal are good but the means employed are unsound. A far more effective means of dealing with the loss-leader problem, if you feel new legislation is needed, would be a Federal sales-below-cost statute modeled after those in effect in about one-half of the States (such as S. 1804 of the 87th Cong.). Misrepresentation and bait merchandising affecting interstate commerce could be more effectively dealt with by such legislative proposals as the Lindsay-Javits bill (H.R. 4651 and S. 1038) that would create a right of action for "unfair commercial activities in or affecting commerce." The quality stabilization bills are drastic proposals. They go far beyond "fair trade" because they would create a nationwide price-fixing system enforceable in the Federal courts. They are so replete with legal problems and pitfalls that the main beneficiaries will be lawyers not brand owners, dealers, or consumers. What kind of answer can you give to the unemployed workers, the low-wage laborers, the retired pensioners, the disgracefully underpaid public school teachers, and the underprivileged in our society if they find themselves required to pay higher prices for such items as packaged foods, clothing, aspirin, first-aid supplies, toothpaste, shaving cream, razor blades, and other necessities? I have read a good many economic studies concerning the effects of fair trade and they are conflicting in their conclusions; perhaps no one can say with complete certainty exactly what the long-range effects will be. In my opinion the most objective and reliable studies point to the probability that consumer prices will be materially increased. At any rate it seems to me you should not enact this drastic departure from a free enterprise system unless you are quite certain it will not have such an undesirable result. Can you honestly say that you are certain it will not increase consumer prices? I do not see how anyone can.

AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW

RECOMMENDATION

The section of antitrust law recommends that the house of delegates adopt the following resolution:

"*Resolved*, That the American Bar Association disapproves of and opposes Senate Joint Resolution 159, 87th Congress, and any proposed legislation which would attempt to create a Federal right of enforcement of resale price maintenance by private persons.

"*Further resolved*, That the officers and council of the section of antitrust law are directed to urge such opposition and disapproval upon the proper committees of Congress in connection with any legislation embodying any such concept."

REPORT

1. Background

On May 18, 1959, the board of governors of the American Bar Association adopted the following resolution:

"*Resolved*, That the American Bar Association disapproves of and opposes any amendment of the Federal Trade Commission Act which would further expand the philosophy of so-called fair trade acts and create a Federal right of action in the enforcement of fair trade contracts.

"*Further resolved*, That the officers and council of the section of antitrust law are directed to urge such opposition and disapproval upon the proper

committee of Congress in connection with any legislation embodying any such amendment."

In February 1962 a proposal by the antitrust section to update this recommendation as a current expression of the association was considered at the midwinter meeting of the ABA's House of Delegates in Chicago. At that meeting consideration of a proposal by the antitrust section to oppose legislation creating a Federal right of action in the enforcement of fair trade contracts was postponed to the August meeting of the house of delegates. (During the 85th, 86th, and 87th Cong. several bills had been introduced which would create in some form a Federal right of action for the enforcement of fair trade contracts entered into under State law.)

Since the February 1962 meeting attention has been directed to Senate Joint Resolution 159, the Quality Stabilization Act proposal introduced by Senators Humphrey, Capehart, and others on February 21, 1962.[1] While hearings were held on S. 1722 on July 25 and 27 and August 28, 1961, it is understood that they will not be printed in the light of the shift of interest to Senate Joint Resolution 159. Hearings on Senate Joint Resolution 159 have been held by the Senate Committee on Commerce. In the course of the hearings the heads of the two principal antitrust enforcement agencies (Lee Loevinger, Assistant Attorney General in Charge of the Antitrust Division, Department of Justice, and Paul Rand Dixon, Chairman, Federal Trade Commission), testified in opposition to Senate Joint Resolution 159.

2. Provisions of Senate Joint Resolution 159

The resolution opens with six recitals setting forth legislative statements of objectives. A key recital refers to unfair or deceptive acts or practices "such as * * * store-traffic baiting and misrepresentation as to the size, capacity, quality, condition, model, or age" of branded goods, "all tending to destroy unfairly the value" of brands[2] to their owners, to smaller resellers, and to the public. Among the effects of these practices recited is a tendency to diminish the volume of branded products moving in commerce, thereby reducing producers' incentive to maintain the value of their goods and producing other value-diluting consequences ("substitutions of inferior labor and materials forced by the downward spiral of unrestrained predatory pricing on popular identified products, in the fields of goods, drugs, and beverages, endanger public health, and in other fields, endangers [sic] public safety"). Recognition of the property right in a brand and the goodwill associated therewith is also recited.

The operative provisions of the resolution would amend section 5(a) of the Federal Trade Commission Act, 15 U.S.C.A., 45(a), by adding eight new paragraphs, (7) to (14). The new paragraphs may be summarized as follows:

"(7) A brand owner is deemed to retain his property rights in the brand and associated goodwill regardless of any transfer of the goods to which the brand relates. Any person who resells branded goods in commerce may use the brand but only in effecting resale of such goods, and subject to (8).

"(8) When goods usable for the same general purpose are available to the public from sources other than the brand owner, the right of any person to use the brand in reselling may be revoked (on written notice) by the brand owner on the ground that the reseller (*a*) has used branded goods 'in furtherance of bait merchandising practices'; (*b*) has with notice advised, offered for sale, or sold such goods at prices other than at the brand owner's currently established resale prices; or (*c*) with intent to deceive, has 'published misrepresentation concerning such goods.'

"(9) Nothing in (8) shall abridge the right of the reseller, in the regular course of his business and within a reasonable time after revocation, to sell the goods in his possession on the date of revocation, so long as he does not violate (8) in so selling. A procedure is etablihed for the reseller to offer his inventory to the brand owner at the price he paid for them; if the offer is not accepted, the reseller may sell the goods without restriction as to price so long as his advertisements or offers state the fact of revocation as to goods not in his possession on the revocation date.

"(10) A reseller who sells under the brand name after revocation commits an act of unfair competition and is liable in a civil action for damages and injunc-

[1] Companion proposals and those who introduced them include H.J. Res. 636 (Harris), H.J. Res. 637 (Mack), H.J. Res. 639 (Tollefson), H.R. 10517 (McMillan), and H.R. 10335 (Madden). (A joint resolution is used ordinarily to effect temporary extension or suspension of existing statutes.)

[2] This report uses the term "brand" as a reference to "brand, name, or trademark" as used in the resolution.

tive relief by the brand owner, in any U.S. district court in which the defendant resides or is found or has an agent, without respect to the amount in controversy; the owner may recover the cost of suit including reasonable attorney's fees.

"(11) Lack of due diligence in revoking as to competing resellers who are violating (8) is specifically set forth as a defense."

The other paragraphs are saving and definitional provisions, and include antitrust exemption language and a statement that the Miller-Tydings and McGuire Acts, inter alia, are not modified or repealed.

3. Objectives of Senate Joint Resolution 159

Senator Humphrey's statement introducing the quality stabilization resolution emphasized the following reasons in support of the legislation[3]:

(1) The resolution is merely an extension of the trademark laws enabling a brand owner to protect his property rights through channels of distribution.

(2) The resolution would permit a reseller to remove the brand from the product—"thus separating the physical property, which he owns, from the goodwill, which is another's property"—and then sell at any price.

(3) The legislation would be permissive and would leave decision as to enforcement in the hands of the brand owner.

(4) The proposal would permit the continuance of independent retailing and provide assurance to consumers that quality tested and reliable products will continue to be available.

(5) In the light of increasing numbers of bankruptcies of small business concerns, the proposed legislation is essential to competitive survival of hundreds of thousands of independent businessmen.

Several of these reasons have been equally appropriate in past consideration of fair trade legislation and have been reviewed in detail by many commentators in the past. The most compelling reason now offered in support of the quality stabilization proposal would seem to be the reference to the current plight of independent retailers, particularly in the light of the present phenomenon of widespread discount selling. The inroads of discount operations on sales of traditional retail stores have no doubt been substantial—"Last year, according to trade sources, discounters grossed more than $4 billion in sales[4]."

The extent to which there has been a substantial causal relationship between retailing of branded goods at prices below those established or suggested by manufacturers and small business failures is, of course, a difficult factual issue involving many and complex considerations. Wholly apart from the question whether the proposal is the appropriate solution, reliable probative evidence of such a relationship would undoubtedly be significant in any differentiation of the present setting from that confronting Congress during its consideration of proposed Federal fair trade legislation in recent years.

4. Relationship to other legislation

The three practices condemned in paragraph (8) as proposed by the joint resolution deserve separate comment.[5]

(*a*) *Bait merchandising.*—The scope of this term, not defined in the resolution, is somewhat vague and uncertain. Ordinarily the concept "bait merchandising" would be thought to embrace only the use of "loss leader" selling by which certain branded goods are offered for sale at less than "cost" in order to "bait" customers into a store in the mistaken belief that all goods in the store are being sold at comparably low prices. This practice may already be subject to various State unfair practices statutes, sales below cost statutes, or fair trade statutes, or to condemnation under section 5 of the Federal Trade Commission Act or common law principles as a species of false advertising or unfair competition. As so limited, prohibition of the practice would seem to be consistent with traditional antitrust or trade regulation principles.

(*b*) *Resale price maintenance.*—While the Miller-Tydings Act of 1937 and McGuire Act of 1952 created a condition permitting State fair trade laws to be effective by providing exemption from Federal antitrust legislation, fair trade is not available in a number of States where no fair trade legislation has been enacted or where fair trade legislation has been rendered ineffective by

[3] Congressional Record, p. 2479–2482 (Feb. 21, 1962). A list of over 50 national trade associations supporting the measure was appended to Senator Humphrey's remarks.

[4] New York Times, Jan. 30, 1962, p. 32.

[5] The legislation would apply "to all acts and transactions in or affecting commerce which Congress may lawfully regulate," in territories and in the District of Columbia.

adverse holdings on constitutional issues.[6] An apparent objective of the proposed legislation would be to supplement the remaining State laws by creating a Federal right of brand owners to effect resale price maintenance on certain goods.

While the proposed legislation provides that "No exercise of any rights or remedy provided [herein] shall be construed to be a violation of any of the Antitrust Acts," it is not clear whether this language is intended to immunize arrangements between manufacturers and retailers as to prices or enforcement of rights or remedies of the brand owner. A significant aspect of this problem is that while a principal reason advanced in support of the joint resolution is the plight of small independent resellers, the rights and remedies are given only to brand owners, who will presumably be urged by resellers to enforce the statutory rights and remedies.

(c) *Misrepresentation.*—The proposed legislation would create a limited private cause of action providing for relief against commission of acts of misrepresentation which would probably be considered to fall within the scope of section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition and unfair or deceptive acts or practices in commerce. In consideration of the effects of the proposed law, the elastic scope of section 5 as it would bear on the content of the private right to proceed against "misrepresentation concerning such goods" and the problems attendant to possible overlapping of or conflict between privately obtained injunctions and the cease and desist order authority of the Federal Trade Commission, would be significant.

5. Obeservations and conclusion

The basic principle of the quality stabilization resolution appears to be that certain desirable national objectives will be maintained by providing specific private rights against three types of activities asserted to be detrimental to maintenance of a valuable property right in a brand name.

With respect to the protection against "bait merchandising practices," a prime difficulty is the lack of precision of the term. If flagrant loss-leader selling is all that is encompassed by the term, the natural question would be whether the practice is sufficiently prevalent and serious to warrant Federal legislation, and whether the legislation would be effective in its apparent objective to protect small retailers against the competition of discount or other operations which may sell all items at a low markup over cost. Substantially there is probably general agreement among most antitrust students that the flagrant type of loss-leader selling should be actionable. But it is unclear whether the scope is to be interpreted as so limited.

With respect to misrepresentation, again a fundamental problem is that the scope of the prohibition should be sufficiently defined. Private enforcement to supplement Federal Trade Commission authority against flagrant types of misrepresentation directly injuring a producer or brand owner, such as undisclosed substitution of goods, might well be useful. But without precise delineation of the scope of the term, problems of vagueness and provocation of trivial litigation[7] similar to those presented by section 5 of the Federal Trade Commission Act could be expected.

With respect to resale price maintenance, the proposed legislation differs in language considerably from existing Federal and State fair trade statutes; however, the fundamental approach seems to be the same—to permit a brand owner to control prices at which resellers may sell branded goods. Since at least 1912 the subject of resale price maintenance legislation has been highly controversial; during this 50-year period retailing and distribution have adapted to a series of drastic innovations. While the fundamental question of the desirability of such legislation may be an economic issue,[8] any such legislation would have important

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[6] Alaska, Missouri, Nebraska, Texas, Vermont, and the District of Columbia do not have fair trade laws. Puerto Rico's fair trade law was repealed in 1959. The laws of at least 19 States have been held in part or generally unconstitutional at some time. See chart 2 Tr. Reg. Rep. par. 6041.

[7] See dissenting opinions of Commissioner Elman in *Matter of Gimbel Brothers*, 3 CCH Tr. Reg. Rep. par. 15,748 (1962); and Judge Friendly in *Exposition Press, Inc.* v. *F.T.C.*, 295 F. 2d 869 (2d Cir. 1961).

[8] "Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles." Brandeis, J., concurring in *Boston Store of Chicago* v. *American Graphophone Co.*, 246 U.S. 8 (1918).

legal ramifications as well. The belief that a general resale price maintenance system goes beyond the requirements for protection against practices such as loss-leader selling and the basic antitrust reliance upon price and other competition, with exemptions enacted only in compelling circumstances, have been strong factors in the opposition to extension of Federal resale price maintenance legislation beyond the enabling principle of the Miller-Tydings and McGuire Acts. In fact, a majority of the Attorney General's National Committee To Study the Antitrust Laws in 1955 recommended congressional repeal of the Miller-Tydings and McGuire Acts. The Department of Justice and Federal Trade Commission have consistently opposed fair trade legislation, and recently specifically opposed the quality stabilization proposals.

Apart from the problems of the judicial administration which may be posed by transferring to the Federal courts the burden of policing resale price maintenance through litigation brought without regard to the amount in controversy, the creation of a Federal cause of action for the enforcement of resale price maintenance would appear to represent one more step in the intrusion of Federal legislative power into the area of control of the public policy of the several States. As noted above, in 24 States as well as the District of Columbia and Puerto Rico, resale price maintenance is incompatible with the State's legislative or judicially construed constitutional policy. Under the provisions of Senate Joint Resolution 159, the right to legislate under the McGuire Act with respect to this significant area of economic policy in the interest of its own citizens is denied the several States by the assertion of a paramount Federal policy in the exercise of the constitutional power over interstate commerce.

There can be no doubt that many small independent businesses are faced with effective "price cutting" competition by discount houses and others which may cause them significant loss of trade. Assuming that maintenance of the traditional independent business part of the retailing and distribution structure is an important national objective, alternative methods of alleviating the situation should be considered. Examples would include Federal legislation designed to prohibit retail selling, of at least specified categories of goods, at prices below defined "cost," or additional financial assistance by the Government to small business; such measures might suffice to alleviate the situation depicted. But it would seem that to date the strong factual justification required to overcome traditional reluctance of Congress and the enforcement agencies to endorse Federal resale price maintenance legislation has not been shown.

A copy of Senate Joint Resolution 159 is attached as an appendix.

Respectfully submitted.

S. CHESTERFIELD OPPENHEIM, *Chairman.*

Paul Rand Dixon and Lee Loevinger did not participate in the consideration.

APPENDIX

[S.J. Res. 159, 87th Cong., 2d sess.]

IN THE SENATE OF THE UNITED STATES

FEBRUARY 21, 1962

Mr. HUMPHREY (for himself, Mr. CAPEHART, Mr. PROXMIRE, Mr. JOHNSTON, Mr. MCCLELLAN, Mr. SCOTT, Mr. RANDOLPH, Mr. MCCARTHY, Mr. MUNDT, and Mr. CASE of South Dakota) introduced the following joint resolution; which was read twice and referred to the Committee on Commerce

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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, condition, 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 receptive 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, endangers public safety; and

Whereas it is recognized that unless fair 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 (a) this Act may be cited as the "Quality Stabilization Act."

(b) Section 5(a) of the Federal Trade Commission Act, as amended, is hereby amended by adding, at the end thereof, paragraphs (7) and (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 committed 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."

Mr. DINGELL. The committee is going to hear one more witness today who is an out-of-town resident. I wish to express the gratitude of the committee to all those who have been so patient in waiting to be heard. The remaining witness is Mr. Bernard J. Mayer, Jr., of Maxam, Inc. Mr. Mayer.

Mr. WILLIAMSON. Mr. Chairman, the witness had to leave and requested his statement be inserted into the record.

Mr. DINGELL. Mr. Dichter's statement will appear at this point in the record.

(The statement of Paul D. Dichter, president, Maxam, Inc., is as follows:)

STATEMENT OF MR. PAUL D. DICHTER, PRESIDENT, MAXAM, INC.

My name is Paul D. Dichter, I am president of Maxam, Inc., of 525 Hyde Park Avenue, Roslindale (Boston), Mass. Maxam, Inc., together with subsidiaries presently operates 20 self-service discount department stores in the eastern half of the United States.

Maxam, Inc., is the successor to Max Dichter, Inc., which corporation in 1955, was among the first to enter the discount department store business. Since that time, Maxam, Inc., together with others who were then in or have since entered the field, has been in the forefront in offering to the consumer first quality merchandise at discount prices, enabling them to purchase their needs at prices they can afford and thereby raising their standard of living.

We have been able to accomplish this because of the basic American principle of free competition in the marketplace. Through free competition, America now has the highest standard of living in the world. Price competition should be encouraged, not destroyed. The destruction of price competition will cause all true competition to disappear.

Adoption of H.R. 3669 would result in the destruction of competition in both distribution and manufacture and give to distributors the authority to maintain fixed sale prices. Legislation of this type is class legislation giving specific advantages to the greedy and inefficient at the expense of the consumer. It will legalize monopolistic price fixing; and price fixing has never meant lower prices.

Once the price is so fixed, the consumer has no choice but to pay the higher prices even if willing to forgo such services as credit, fancy packaging, and delivery. In other words, the customer would no longer have a free choice of paying for less service.

I believe that passage of H.R. 3669 would subsidize a minority at the expense of the purchasing public without benefit to the Nation as a whole, and thereby definitely increase the cost of living and create a situation directly in contradiction to what our Government and President Kennedy have always advocated and fought for.

Thank you for the opportunity to present my views to this committee.

Mr. DINGELL. At this point the committee will adjourn, and we will take the testimony of the remaining local witnesses at as early a date as will be possible. I wish to express my personal gratitude to all who have been so patient in waiting and I am sure that the committee is most appreciative now of your presence here today; not only of your presence here today but also of your patience in waiting. This has been a very difficult time. I am sure you all understand.

At this point in the record I would like to insert a statement by a Member of the other body, the Honorable Jack Miller, U.S. Senator, with regard to the future of fair trade, and also at this point in the record without objection will appear a telegram from the Honorable Robert McEwen, S.J., of Boston College, Boston, Mass.

(The document referred to follows:)

[From the Congressional Record, Feb. 19, 1963]

WHAT IS THE FUTURE OF FAIR TRADE LEGISLATION?

(By Jack Miller, U.S. Senator)

President Petersen, members of the Iowa Retail Hardware Dealers Association, exhibitors, homemakers, and guests, I deeply appreciate the opportunity to be on your splendid program for your 65th annual convention. It is an impressive program which your officers, committees, your able executive secretary, Phil Jacobson, and his staff have put together. Most impressive, perhaps, are the obvious themes of high standards of merchandising, and improved customer service which characterize the convention. The future of small businesses in our country is largely in the hands of trade associations such as yours, and it is clear that the Iowa Retail Hardware Dealers Association is continuing to play a leading role in carrying out this responsibility.

To discuss the future of fair trade legislation involves more than evaluation of the chances of passage of the quality stabilization bill, which was introduced as Senate Joint Resolution 159 in the last session of Congress. First of all, I would like to try to define the problem which has given rise to fair trade legislation.

John W. Anderson, president of Quality Brands Associates, Inc., say that the problem is one of preserving and promoting constitutional incentivism, which stimulates the creative, productive and distributive efforts of our people; that the mushrooming of loss-leader practices in selling is destroying the incentive to produce and distribute products of sound value; and that when left to the mercy of greedy retail competition selling nonstabilized merchandise and relying principally upon deceptive pricing to attract trade, the consumer receives less in value than what he pays for.

Congressman Chet Holifield, of California, says that the problem is the accelerated decline of small businesses merchandising brand-name merchandise and the threatened elimination of the producers of such merchandise as a result of what he terms "unfair sabotage of trademarks and brand name merchandise."

Senator Humphrey, of Minnesota, one of the sponsors of the quality stabilization bill, says that the problem is one of suppressing unfair methods of competition in the marketplace.

I frequently disagree with my able colleague from Minnesota, but I do believe he has put the problem succinctly. However, I suggest that his very statement of the problem poses another problem—and that is defining the word "unfair." In promoting legislation before Congress, it is somewhat dangerous to use labels which reflect opinion. Let me give you an example. Senator Vance Hartke, of Indiana, said this during the course of the hearings on Senate Joint Resolution 159 last year: "The use of strategems to come up with conclusions which are not based on the factual situation really don't impress me. I am not saying that the testimony lacks value as a result, but I would say that it wouldn't be very persuasive with me."

Nevertheless, for our purposes, let us say that the problem which fair trade legislation is directed at is "one of preserving and promoting our free enterprise system by a law or laws that will insure 'fair' competition." Let me briefly trace the history of how this problem has been dealt with—particularly as it relates to our State of Iowa.

Chapter 550 of the Iowa Code relates to the distribution of trademarked articles. It provides that a contract shall be valid even if it provides that the buyer of trademarked or brand merchandise will not resell that merchandise except at the price stipulated by the seller—provided other commodieits of the same general class are available; further that it shall be unlawful to advertise or sell such merchandise at less than the price stipulated in the contract, whether the person doing so is a party to the contract or not; that this is unfair competition and actionable in damages by the aggrieved party.

In April of 1961, the Iowa Supreme Court unanimously held that this law was unconstitutional insofar as it applied to nonsigners of a contract in the case of *Bulova Watch Co.* v. *Robinson Wholesale Co.*

It affirmed the holding of Judge Ray Fountain of the Polk County distrist court. The court recognized that the Supreme Court of the United States had upheld the validity of the nonsigner provisions of other State fair trade acts on the theory that the acquisition of a trademarked article with full knowledge of the contractual price restriction imposed by the producer constitutes the buyer's assent to the protective price restriction even though the buyer was not a party to the contract containing the restriction. It also pointed out that in a great many cases, involving the validity of nonsigner provisions under State constitutions, the State courts have also upheld these provisions.

The court called attention to a symposium on the law of unfair competition appearing in the Iowa Law Review, which begins with these words: "There is probably no term in law or economics which is more difficult to define than 'unfair competition.'" The phrase is obviously more of an epithet than a word of art. Its legal usage embodies a conclusion rather than the means of determining the legality of business behavior.

The court pointed out that previous Iowa cases decided under our Fair Trade Act have upheld the act, but that none of them involved the nonsigner provision. It then quoted the Minnesota Supreme Court in its 1960 decision in the *Remington Arms* case, which said:

"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. If we realistically appraise the act for what it is, it should be recognized as a selective price control act which leaves to the manufacturers of trademark products the arbitrary right to determine if and when it shall take effect. Since one manufacturer and one retailer may fix prices for all retailers, they have the complete power to fix prices regardless of anyone's interest but their own."

And so the Iowa Supreme Court proceeded to declare the nonsigner provision invalid as an unconstitutional delegation of legislative power to private persons.

The McGuire Act of 1912 passed by Congress, made resale price maintenance contracts on branded products binding on nonsigners in States having fair trade laws with nonsigner provisions. Forty-seven States have these fair trade laws. Missouri, Texas, and Vermont have never enacted them. Of the 47, 21, including Iowa, have declared their fair trade laws either partially or entirely invalid. And so the McGuire Act is of no validity in 24 States, including Iowa.

Since 1952 there have been many fair trade bills introduced in Congress. The main thrust of these bills have been to eliminate the problem of the nonsigner clause in State fair trade laws by, in effect, giving a federally recognized property right to the owners and manufacturers of brand name products with respect to goods shipped in interstate commerce, so that prices could be established and controlled by these owners and manufacturers at the retail level, if they saw fit to do so.

In assessing the future of fair trade legislation, we might begin at the State level:

1. There isn't a member of the Iowa Legislature who isn't interested in seeing to it that we have fair competition in our State. But there are a great many views over the meaning of that word "fair." If the word "fair" means that the owner or manufacturer of brand merchandise should have a property right which would enable him to set the price at which this could be sold by retailers, it is going to require a change in the Iowa constitution. As you know, this is, at best, a long procedure. Moreover, the Iowa Legislature is extremely reluctant to delegate legislative powers. In the face of the Iowa Supreme Court's decision, I would be doubtful that the Iowa Legislature would wish to initiate such a change in our State constitution.

2. However, there are other activities relating to competition which might well prompt legislative action. Proponents of the quality stabilization bill before Congress place a great deal of emphasis on what they call deceptive practices. Advertising by some retailers of merchandise quoting list prices that are artificial, or connived through preticketing by manufacturers, along with a "fantastic bargain price" which this merchandise is being sold for are deliberately calculated to fool the consuming public. The line between ethical and unethical advertising can be quite fine, but practices such as I have referred to are clearly deceptive. Granted that the Federal Trade Commission has the power to issue cease-and-desist orders in such cases (and has been issuing a good many of them), a great amount of hardship can nevertheless be caused—not only consumers but honest retailers—before FTC acts. Under such circumstances, it would seem entirely proper for the Iowa Legislature to enact a tough law aimed at such deceptive advertising practices, and I would suggest that upon a good presentation by consumer groups and retailers of the abuses or possible abuses, the legislature would move.

3. Proponents of the quality stabilization bill also place considerable emphasis on "bait" merchandising. It is possible that the legislature might take some action in this area. But there is the problem of defining "bait." If it were defined to be less than cost to the advertiser, there could be a question of deprivation of property without due process—especially in the case of old merchandise or liquidation sales. Assuming this problem could be satisfied, there would remain the problems of enforcement—and uniformity, since not all retailers would likely have the same cost. There would have to be a strong foundation of evidence that such action was not only necessary to protect the general consuming public's interest, but that the formula devised was a reasonable and proper means of providing that protection.

On the State level, then, I would conclude that at this time there would be a good chance for legislative action directed at deceptive advertising, some possibility of action on "bait" merchandising, and no likelihood of a constitutional amendment to overcome the Supreme Court's decision in the *Bulova Watch Co.* case on nonsigner price control.

Moving over to the National Legislature now, what is the future of fair trade legislation?

As a point of departure, let's consider Senate Joint Resolution 159. This bill uses the property right approach—that is, it establishes a federally recognized property right in the owner of a brand, name, or trademark which carries over into the hands of a retailer. It would extend to any merchandise sold under a brand, name, or trademark as long as goods usable for the same general purpose are available to the public from sources other than the owner of such brand, name, or trademark merchandise. The property right would not have to be asserted unless the owner of the brand, name, or trademark merchandise wished to do so. But if he wished to exercise it, he could revoke the right of reselling his merchandise for any of the following reasons:

1. If the retailer used the merchandise in "bait" merchandising practices. However, "bait merchandising practices" are not defined. They would have to be clearly defined or the law would be in danger of invalidity for indefiniteness. At the very least, as presently drafted, it would become the basis for a great amount of controversy and litigation.

2. A second reason which could be used by the owner of the brand, name, or trademark for revoking the retailer's right to resell the merchandise would be if the retailer violated currently established resale prices prescribed by the owner. If this reason were legislated, I would think that the first reason would be unnecessary. In other words, if the owner could establish resale prices, he would naturally establish prices that would be out of the area of "bait merchandising," so it would not be necessary to get into the "bait merchandising" controversy.

3. The third reason for revoking a retailer's right to resell such merchandise would be if the retailer published some misrepresentation concerning such goods, with intent to deceive purchasers. I suggest that this is superfluous. Granted that such misrepresentation would be an unfair trade practice, it would seem unnecessary for Congress to legislate in this area because a consumer already has a remedy against such a retailer; and if the owner of the brand, name, or trademark is damaged, he already has a right of action for damages against such a retailer. Moreover, he could take action to blacklist such a fraudulent retailer.

The remedy provided by the bill for the aggrieved owner of the brand, name, or trademark to revoke the retailer's right of resale, and to have a civil suit for damages and injunctive relief sounds reasonable, but I suggest two difficulties:

(1) The bill provides that it shall be a defense to such a suit for the retailer to establish that the plaintiff did not use due diligence in revoking the right of all other persons in substantial competition with the retailer who are known to the plaintiff to be committing such violations. Put yourself in the shoes of the defendant. You might be able to come up with some examples of violations of other retailers, but how could you prove that the plaintiff knew about them? I would suggest that the mere proof of violations by other retailers would be a sufficient defense without coupling with it a requirement of proof that the plaintiff knew about these violations.

(2) The second difficulty is that there is a great aversion on the part of Congress, and, indeed, on the part of the Department of Justice, to add to the caseload of our Federal district courts. Even with the addition o faround 70 Federal district judges during the past 2 years, there are many of our Federal district courts with serious backlogs of cases—some of them 3, 4, and 5 years behind. It is not difficult to visualize hundreds—perhaps thousands—of additional suits for damages and injunctive relief arising as a result of enactment of this part of the bill. If relief is to be granted, I would think it much more likely for Congress to move through cease-and-desist orders. Granted that such relief might not be as satisfactory, it would be the principal form of relief desired and would have a much greater possibility of acceptance by Congress.

It seems to me that the key question raised by the entire bill is whether or not Congress will take action to provide for a federally recognized property right in the owner of a brand, name, or trademark to establish prices to be charged by retailers. What about this?

Several questions must be answered:

1. Is there already a remedy? There is—in part. It is recognized, I believe, that exclusive sales agreements and consignment sales offer a remedy with respect to some types of merchandise. However, it seems also to be recognized that this remedy is not available with respect to most brand, name, or trademark merchandise because most of it is distributed to retailers through wholesalers.

And so the question is really reduced to whether or not Congress will take action to provide for a federally recognized property right in the owner of a brand, name, or trademark to establish prices to be charged by retailers who do not have exclusive sales agreements or sell on consignment. There does not appear to be a remedy now in this area.

2. The next question is, Should there be a remendy—at least one provided by the Federal Government? And, assuming there should be one—should it exist with respect to all merchandise, where goods for the same general purpose are available to the public (and, if so, what guidelines are to be used to establish whether goods for the same general purpose are available). Or should the remedy not be available with respect to certain types of merchandise—such as those covered by a patent, for example, or those which relate directly to public health, such as medicines and drugs. I suggest this latter category for possible exclusion—certainly to make the proposal more palatable to Congress—because after the disclosures by Senator Kefauver during the debate on the drug bill last year, there is deep concern on the part of Congress over possibly excessive prices being charged for drugs and medicines—especially those covered by patents—and the idea of price fixing by the owners and manufacturers of these items would cause considerable controversy.

But assuming that we reduce the coverage to all merchandise except drugs and medicines, there still remains the question of whether fair competition requires that a federally recognized property right be established with respect to prices that retailers may charge.

There are some good arguments in favor. In fact, if there were not some good arguments in favor, you would not find some of the leading Members of Congress joined together in cosponsoring this legislation. Basically, these arguments are that if the present situation is permitted to continue, our free enterprise system will be destroyed; because the present situation tends to destroy the incentive of manufacturers of brand, name, or trademark merchandise to turn out quality goods; small retailers are being forced out of business because of competition by private brands (not subject to antitrust laws) on the one hand and price cutting by discount houses on the other hand; and the consumer tends to end up paying higher prices for lower quality merchandise.

Curiously, there are similar arguments against. Indeed, if there were not good arguments against, this legislation would long since have been passed out of committee and become law. Basically, these arguments are that the fixing of resale prices by manufacturers would destroy our free enterprise system. Such a system would prevent savings to customers resulting from lower or more efficient costs of merchandising by retailers in competition with one another. Consumers would end up paying more. And finally, the proposed remedy—a federally recognized property right in the manufacturer to fix retail prices would not be effective, since private brand retailers would undercut the price set by brand, name, or trade manufacturers—at least in some areas—thus causing discrimination in those areas as far as the brand, name, or trade retailers are concerned, because they would be forced to compete using manufacturer-set prices; and finally, retailers could get around the set price by using premiums or trading stamps.

I recognize that opponents of the quality stabilization bill have used the epithet of "price-fixing legislation." Just like the use of the word "unfair," I don't believe this necessarily proves anything. The mere fact that it is price-fixing legislation doesn't necessarily mean that it cannot be justified. If it is necessary, in fact, to protect our free enterprise system, then it is justifiable. And in certain situations, I don't believe that price fixing and fair competition are necessarily incompatible.

The big problem is one of persuading Congress by what we might term "hard evidence" in support of the arguments in favor. When, for example, the Assistant Attorney General of the United States testifies against the quality stabilization bill (as he did) and proceeds to present the results of an extensive price survey showing that consumers in non-fair-trade areas paid substantially less for a long list of items than consumers in fair trade areas, it is going to require a great amount of hard rebuttal evidence on the part of the proponents of the quality stabilization bill, who argue that enactment of the bill will result in savings to consumers. This survey, incidentally, was of 8 widely separated non-fair-trade cities, covering 132 rapid turnover, fair trade type, consumer items—such as drugs and prescriptions, toiletries, housewares and small appliances, camera and photographic supplies, jewelry and silverware, pens, waxers

and cleaners. Of the 132 items surveyed, an average of 119 were available in each city. Of the 119 items, some 78 were sold on the average below the fair trade prices. Consumers in these 8 non-fair-trade cities could purchase these 78 items at a savings of 27 percent below their fair trade value. Taking into account all 119 items—the 78 sold below fair trade price and the others sold at fair trade price, consumers could effect a savings of 19 percent below fair trade prices. The Department of Justice suggested, on the basis of this survey, that fair trade prices may afford such wide profit margins as to invite discount house operations. The Department of Justice, incidentally, also stated that large department stores or mail order houses—mass sellers, they were called—could market their own private brands, substantially identical to nationally branded goods, at prices lower than fair trade items, so that fair trade prices would literally provide an umbrella over the market for their own private branded items. It was suggested that Congress make this area the subject of investigation.

Not to be overlooked in evaluating the future of fair trade legislation is the opposition of both the AFL–CIO and the American Farm Bureau Federation to the quality stabilization bill (as presently drafted). When these two large membership groups (ordinarily on opposing sides of legislative questions) join together in opposition to legislation, it does not augur well for the future of that legislation.

From what I have said, I would conclude that there is no immediate likelihood of action by the Commerce Committees of Congress in favorably reporting out the quality stabilization bill—at least in its present form, and probably even if it were reduced to the mere establishment of a property right to set retail prices on merchandise other than drugs and medicines. Hard evidence will be needed to rebut testimony such as that presented by the Department of Justice, and it will take time and expense to develop that evidence.

I would like to close on a hopeful note, however. Hard evidence relating to deceptive practices should not be too difficult to produce, and it will cause Congress to take some type of effective action, even if the State legislatures do not move. During the last session extensive hearings were had with respect to deceptive practices in the area of labeling and packaging. I believe there is a good possibility of some kind of legislation being enacted to stop these practices.

As I stated earlier, the Federal Trade Commission already has authority to move against deceptive advertising practices by issuing cease-and-desist orders. It may well be that more rapid enforcement and more severe penalties can be provided to insure more effective work by FTC. Moreover, I would think that FTC's authority could be broadened to enable it to fight more effectively its battle against the deceptive use of preticketed prices which make the buyer think he has a great bargain. It isn't good when one reads that the Commission suspends part of a cease-and-desist order because the examiner has found that a deceptive practice is so widespread in the watch industry, for example, that if the particular firm under investigation were forced to desist from the practice it might be put out of business. This is an intolerable situation, and I would expect Congress to take appropriate action when FTC makes its recommendations for enlarged authority.

I recognize that some of my observations are not as optimistic as some of you would wish. However, I have reported the situation as honestly as I know how, and I am sure you would not want to be misled by any false, optimism on my part. After all, you people deserve to know the facts. Your able executive secretary, Phil Jacobson, in his report last evening on the future of the proposed Sunday closing bill, was clearly pessimistic. It would have been unfair to you for him to have been otherwise.

I hope that this knowledge of the future of fair trade legislation will enable you to know better how to proceed in the partnership which I hold with you in better serving the people of our State.

(The telegram referred to follows:)

BOSTON, MASS., *April 25, 1963.*

Congressman JOHN DINGELL,
House Office Building, Washington, D.C.:

Pressure of university business prevents appearance at hearing this week. Wish you to convey to committee my continued conviction that Quality Stabiliza-

tion Act is just as objectionable as former fair trade bills. Price fixing is completely unsuitable for the American economy. Urge committee to defeat this measure.

ROBERT J. MCEWEN,
Boston College.

Mr. DINGELL. The subcommittee will stand adjourned pending the call of the Chair.

(Whereupon, at 12:50 p.m., the subcommittee adjourned, subject to the call of the Chair.)

QUALITY STABILIZATION—1963

TUESDAY, MAY 14, 1963

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

The subcommittee met, pursuant to call, at 10 a.m., in room 1334, Longworth House Office Building, Hon. Harley O. Staggers (chairman of the subcommittee) presiding.

Mr. STAGGERS. The committee will come to order.

We have met again to continue the hearings on H.R. 3669, and at this point in the record I would like to include a statement by the American Association of Retired Persons and the National Retired Teachers Association. I would like to present it for the record.

(The statement referred to follows:)

STATEMENT OF DR. ETHEL PERCY ANDRUS, PRESIDENT, NATIONAL RETIRED TEACHERS ASSOCIATION AND AMERICAN ASSOCIATION OF RETIRED PERSONS

It is my privilege and duty as president of the National Retired Teachers Association and the American Association of Retired Persons to submit to your committee for inclusion in the printed hearings the position of our two organizations in opposition to H.R. 3669, the Quality Stabilization Act.

The National Retired Teachers Association consists entirely of persons who have retired from teaching. Total membership for the present year numbers approximately 250,000. Membership in the American Association of Retired Persons is open to persons age 55 or over, and total membership numbers approximately 450,000. National, State, and local or chapter officers of the two organizations number between 500 and 600 persons elected by the members.

NRTA and AARP are dedicated to the purpose of serving the needs of their elderly membership. They are nonpartisan and nonprofit organizations. When our campaign for insurance protection was initiated, there was no hospitalization or medical program exclusively for retired persons, and most programs designed to serve employed men and women arbitrarily excluded them from participation in the plan the day they reached the age of 65, or advanced the premiums with lowered benefits. To break this age barrier to hospitalization protection, the officers of the two organizations worked for 7 years before convincing an insurance company to be daring enough to pioneer with us. The success of this breakthrough is attested by the fact that today more than 350,000 retired men and women, members of our two associations, take advantage of a broad hospitalization insurance program which was denied them until a few years ago, on no more valid ground than that of age.

During the years 1958 and 1959, our members by the thousands protested the high cost of drugs. Many members reported to us at that time that they were paying more for drugs and medicines than they were for hospital and medical care. To assist them with this problem we established and have conducted for several years a nonprofit drug service for our membership. The major functions of our drug service are to fill prescriptions for our members and to provide their vitamin and other medicinal needs.

99-685—63——22

I have related this brief summary of some of our interests and services as background for our concern and alarm regarding the quality stabilization bill now before your committee.

INCOME LIMITATIONS OF OLDER PEOPLE

Many members of our two organizations have a local, State, or Federal pension. Often if they receive social security, it is as an offset against their public pension. Some are employed part time. Those entitled to social security under the terms of the law begin to lose that source of income the month they earn more than $100, and the social security retirement income is sacrificed completely for the year in which the individual earns as much as $2,900.

In any case, the incomes of older people generally are much less than half of those to which they were accustomed during their working years. Half of all the people aged 65 and older—more than 8½ million people—have less than $1,000 in cash income a year. Unfortunate as it is, we cannot overlook the fact that one out of eight, or more than 2 million, persons over age 65 who must depend upon public assistance receive approximately $60 per month which must be stretched to buy as much food and other of life's necessities as it will buy.

Regardless of the source of the retirement income—be it pensions or annuities, interest or dividends—it is usually a fixed figure. The 85-year-old retired schoolteacher who qualified for her pension of $100 a month 20 years ago finds that the pension check now buys less than half of the services and necessities that it paid for in 1943.

We think it is remarkable and a source of pride in our economic system and in individual lifetime planning that some 15 million of the over-65 population are self-supporting in the sense that they are not dependent upon local, State, or national welfare. We believe the passage of H.R. 3669 would result in an unnecessary but certain increase in living costs; and, furthermore, that it would incite an artificial and dangerous inflationary trend. Older persons living on fixed incomes have every right to live out their years in a reasonably stable economy. One way by which the Congress can hold the line, protect all consumers, and help older persons to maintain their independence, their personal dignity, and their self-respect is to reject price fixing which is the main thrust of the fair trade bill, H.R. 3669.

MORE BUSINESS FAILURES IN FAIR TRADE STATES

The proponents of the fair trade bill year after year have contended that the number of business failures was one of the strong planks in their platform for price fixing by congressional approval. It does sound impressive until we make a simple but objective State-by-state check of the real significance of these annual business failures. Such a check, the test chosen by the promoters of fair trade, shows incontrovertibly that business failures are significantly higher in those States having fair trade laws in effect than in those States without any fair trade protection for the manufacturer.

In support of the above statement, we call your attention to no less reliable a source than Dun & Bradstreet quoted in your committee report on the Quality Stabilization Act of 1962, page 51, report No. 2352, dated September 12, 1962. The Dun & Bradstreet statistics show that among the 23 fair trade States there were more than 100 business failures per 10,000 concerns in 1961. In Arizona, 102 businesses per 10,000 failed, in California 124 per 10,000 failed, and in New York 130 per 10,000 failed.

If we accept the promoters' case for a Federal fair trade bill, we might logically expect to find a higher percentage of business failures among those States which do not have fair trade laws in effect. On the contrary, however, the Dun & Bradstreet data show a very much smaller number of failures in those States. Among the non-fair trade States, Texas, District of Columbia, and Utah had the most business failures. The number per 10,000 for District of Columbia was 34, for Texas 36, and for Utah 34.

A summary of these facts is even more damaging to the case of the fair trade promoters. The average business failure rate in the 23 fair trade States was 75 per 10,000 businesses, but the average failure in the non-fair-trade States was less than half of that figure, or 30 failures per 10,000 businesses.

FREE AND OPEN COMPETITION BEST

Our members believe in the principle of free and competitive trade. Except in extreme national emergency, they resist price fixing by congressional action or by Executive edict. They are even more determined that one or many purely private interests should not be legislated as much power by the U.S. Congress as is proposed in the Harris bill, H.R. 3669. We believe that the interests of our members and, in fact, the interests of all consumers and the interests of the Nation can best be served if all consumers are permitted to retain the right to buy the necessities of life in a free and open competitive market. We are also firmly convinced that free and open competition is best for small business in particular and for the whole national economy.

The proposed Quality Stabilization Act has the characteristic of class legislation. It is designed for the special benefit of a well-organized minority, large manufacturers, at the expense of both the small independent retailers and the millions of consumers of all ages.

HARRIS BILL VIOLATES STATES RIGHTS

The Harris bill proposes to invade an area which has always been reserved to the States. Texas, Missouri, Alaska, and Vermont have never passed fair trade laws. Alabama, Montana, Nebraska, Utah, and Wyoming do not have fair trade laws in effect because their respective State courts have declared such laws unconstitutional. State courts in 19 other States have declared unconstitutional the most objectionable feature of their fair trade laws. Nevertheless, and in definance of the bill of the people in these States, the Harris bill would fly in the face of the principle of States rights and force upon the people of each of the 50 States a nationwide system of price fixing with its selfish and monopolistic characteristics.

FAIR TRADE MEANS HIGHER PRICES

Evidence presented year after year on the fair trade proposal has shown that the customer pays a high price for the protection afforded the manufacturer by existing State fair trade laws. Again, on April 23 of this year, Judge Lee Loevinger, testifying for the Department of Justice, said:

"Finally, the Department of Justice has found by economic surveys that consumers in States with price maintenance, or so-called fair trade, laws pay from 19 percent to 27 percent higher prices than consumers in States without such laws. Projecting an average price increase of 20 percent for all sales that may be covered by the operation of a national price maintenance law shows that it would cost the American consumer billions of dollars and have a powerfully inflationary effect."

Detailed price comparisons presented on the 1962 fair trade bill, June 11, 1962, by the Honorable Emanuel Celler, Representative from the 10th Congressional District of New York, shows the effect on retail prices when a State adopts a price-fixing policy. Representative Celler showed—

1. After an Ohio fair trade law was invalidated by the Supreme Court, prices settled to a level about 20 percent below the fair trade prices.
2. Virginia and Maryland fair trade prices in 1952 for common household articles were from 11 to 53 percent higher than prices in the District of Columbia, a non-fair-trade area.
3. Surveys reported from South Carolina, Texas, and numerous other States also indicated that drug prices were invariably higher in fair trade States than in non-fair-trade States.

The members of our 2 associations are a typical cross section of the 17 million Americans over the age of 65. Some 9 million of them must live on $1,000 or less a year and another 4 million have incomes between $1,000 and $2,000. These people still want to retain every possible degree of independence and self-reliance. They want an open and free market in which they can compare quality and quantity, and in which there is still a purpose in intelligent shopping. They resent and resist the principle of price fixing by the manufacturer now before your committee in the Harris bill, H.R. 3669.

Older persons in the United States of America, contrary to the practice in some lands today, expect their National Government to preserve for them the freedom and opportunity to shop and find the retailer who for one reason or another is in a position to undersell his competitors. They want to retain the

alternative, for example, of buying the article of their choice in a more pretentious shop in December or one operated on more austere lines in January. They take justifiable satisfaction in finding a bargain. They are suspicious of the motives of those who promote fair trade to "protect the small retailer and the consumer." They feel much more secure in their role as consumers under the present condition of open competition and free enterprise than they would if and when this Congress passes any bill to permit price fixing by the manufacturer. For these reasons we are strongly opposed to the quality stabilization bill, H.R. 3669.

Mr. STAGGERS. The first witness this morning is our colleague from the State of Washington, the Honorable Thor C. Tollefson. Mr. Tollefson, we will be glad to have your statement.

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 gladly testify in behalf of the quality stabilization bill now pending before you. I have introduced a similar measure. No one asked me to do so. It is just that I firmly believe in its principles.

As a prosecuting attorney in my home county, I saw at first hand the bad effects of loss leader and cutrate sales methods. Such methods are harmful to the public. People are literally lured into stores by advertisements leading them to believe they are getting real bargains. More often than not, they are the victims of unscrupulous sales tactics and are sold inferior products or additional merchandise which they did not intend to purchase when they entered the store. They lose. They do not gain.

This country needs to counter the self-satisfaction of cheapness and the pressures toward cheapness. We need a quality stabilization law to encourage a manufacturer to build toward superiority of product.

A trademark is easily damaged. Its manufacturer needs the right to safeguard his reputation symbolized by the good will for that trademark. He does not now have this right.

The quality stabilization bill recognizes 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 in the public interest may deny that reseller further use of the trademark.

The ethical retailer will also be afforded protection from the practices of the unscrupulous merchant. The proponents of this measure who are here to testify in its behalf will supply detailed 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.

Mr. STAGGERS. The committee appreciates your appearance and testimony, Mr. Tollefson.

Mr. TOLLEFSON. Thank you for the opportunity, Mr. Chtairman.

Mr. STAGGERS. I might say that if any of you who are here to testify this morning wish to present your prepared statement for the record and summarize your statement, we would be glad to have you do that.

if you care to; if you want to give the whole thing, of course, that is your privilege.

Our next witness will be Clinton Fair. Mr. Fair.

Mr. FAIR. Good morning, Mr. Chairman.

Mr. STAGGERS. Would you identify yourself for the record?

Mr. FAIR. Yes, indeed, sir.

Mr. STAGGERS. And you may start right in.

STATEMENT OF CLINTON FAIR, LEGISLATIVE REPRESENTATIVE, APPEARING FOR ANDREW J. BIEMILLER, DIRECTOR, DEPARTMENT OF LEGISLATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, WASHINGTON, D.C.; ACCOMPANIED BY ANN DRAPER, ECONOMIST

Mr. FAIR. Mr. Chairman, my name is Clinton Fair, and I am here this morning because Mr. Biemiller is out in St. Louis, Mo.; the executive council of the AFL–CIO is in session today, tomorrow, and Thursday, so I am here to represent him.

I am a legislative representative for the American Federation of Labor and the Congress of Industrial Organizations, and I am here in behalf of our membership and their families in opposition to H.R. 3669, proposed Quality Stabilization Act.

Miss Ann Draper is with me. Miss Draper is an economist with the research department of the AFL–CIO.

We are opposing H.R. 3669 because it is a Federal resale price maintenance bill designed to achieve by somewhat different means the same purposes as other price maintenance bills proposed in the past and usually known as fair trade bills. They all mean higher prices for the consumer.

Some advocates of this bill have insisted that it is not a fair trade bill, and we do not insist on calling it that. We do insist, however, on calling it a Federal resale price maintenance bill, because that is what it is.

Mr. Chairman, I wish to submit for the record at this point the official policy statements of the AFL–CIO on the subject of Federal resale price maintenance. And I have a copy here.

The first statement is a resolution adopted by the AFL–CIO executive council on Federal resale price maintenance legislation (fair trade laws) on February 24, 1959.

The second statement is entitled, a "Policy Resolution on Fair Trade," adopted by the third constitutional convention of the AFL–CIO in September of 1959.

And the third statement is entitled, "Policy Resolution on Consumer Protection," adopted by the fourth constitutional convention of the AFL–CIO, December 1961.

Mr. STAGGERS. Mr. Fair, this is to back up your statement, these three resolutions, are they?

Mr. FAIR. Yes, sir.

Mr. STAGGERS. Well, without objection, then, they will be presented for the record.

Mr. FAIR. Thank you very kindly, Mr. Chairman.

(The three documents referred to follows:)

STATEMENT OF THE AFL–CIO EXECUTIVE COUNCIL ON FEDERAL RESALE PRICE MAINTENANCE LEGISLATION (FAIR TRADE LAWS) SAN JUAN, P.R., FEBRUARY 24, 1959

The AFL–CIO views with grave concern the pending proposals in Congress to prevent price reductions on branded consumer goods through enactment of a Federal resale price maintenance law.

This legislation, as represented by H.R. 1253, is designed to bolster up the nearly defunct State fair trade laws, which have come under increasing attack both by State courts and by the U.S. Supreme Court. It would affirmatively provide Federal sanction for an exception to the antitrust laws, under which manufacturers could fix the retail prices of trademarked products and bring suit in the Federal as well as the State courts against any retailers selling such products below the prices they have set.

The dangers of this proposed legislation to the interests of consumers, of whom wage earners and their families form the greater number, are obvious. Retailers now selling trademarked goods at prices below the manufacturer's list will be compelled to raise these prices anywhere from 10 to 40 percent, if the manufacturer chooses to invoke the law. The average wage earner supporting his family, will be forced to cut his purchases on such items, either going without, or turning where possible to cheaper products and private brands. On some branded goods traditionally subject to fair trading, notably drugs prescribed by a doctor, he will have no choice but to pay the fixed noncompetitive price or go without.

The major functions of resale price maintenance, which is backed by various organized trade groups, notably the National Association of Retail Druggists, and by a number of brand manufacturers, is to provide a specific guaranteed profit to the seller on each item he sells.

This markup is geared to comfortable profits on low-volume sales and certain traditional methods of doing business. But the advance in merchandising techniques since the war, the development of self-service facilities, the diversification of lines carried by single retail outlets, and the development of merchandising policy emphasizing high-volume sales at low unit profit makes this type of economic protectionism obsolete.

Not every manufacturer would wish to use this law if it were passed. Many prefer to place their reliance upon volume sales of their products, which merit and low prices will bring about. Others, however, have developed a system of marketing name merchandise at the highest price advertising can induce, while at he same time tapping the large-volume market by offering at a lower price the identical merchandise under another, but relatively unknown name not subject to fair trading. This latter practice, documented in the recent congressional hearings on the subject, detracts heavily from the argument that manufacturers have a right to protect their trademarked products against cheapening by price cuts at the retail level. Is there an inherent right to enforce a high price, not for the product itself, but for its name?

Significantly, not one consumers' organization has come forth in favor of the proposed legislation, nor have any of the Federal agencies which have studied fair trade legislation over the years testified in its support. They have unanimously recommended against it as tending to raise the price of consumer goods, and to eliminate price competition, not only at the retail and wholesale level, but also at the manufacturers' level.

The noncompetitive retail price system has been widely advocated as vital to the preservation of small business, which will otherwise be driven from the field by predatory price cutting, loss leader practices, and other drastic economic tactics on the part of its larger rivals. But at best, uniform pricing is at least of doubtful value to the typical small businessman. Denied the possibility of competing in prices on trademarked merchandise, he is left to cope with the superior resources of larger businesses in terms of service, credit, advertising, store amenities, and the sale of "house brands," which he is in a less advantageous position to provide. Specific remedies against extreme unfair trade tactics are or can be made legislatively available, but to enact the principle that any price cut, for any reason, even when due simply to superior operating efficiency, is unfair is to establish that competition in itself is unethical.

The problems facing small business are far more complex and difficult than can be solved by a system of uniform prices on branded products. The AFL–CIO favors every constructive aid to the preservation of small business enabling it to offer genuine competition to large enterprises, but believes that blanket price protection, at the expense of the consumer, is no answer.

POLICY RESOLUTION ON FAIR TRADE, ADOPTED SEPTEMBER 1959, BY THE THIRD CONSTITUTION CONVENTION OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

With the breakdown of so-called fair trade laws in several States under pressure of the courts, a movement has quietly arisen to enact substitute and supplementary legislation at the Federal level. This proposed legislation is a direct threat to the interest of millions of wage earners in their capacity as buyers of consumer products sold at retail.

The proposed Federal fair trade law would enable manufacturers to fix minimum prices on their branded products, below which wholesalers and retailers could not legally sell. All price competition on such products by the different retail outlets would be eliminated. This would inevitably mean higher prices for workers and their families to pay for any products they buy on which a manufacturer chooses to invoke the law.

Despite the protestations of the organized retail druggists, who are the main proponents of such a law, we are not convinced that price fixing at the expense of the consumer is a proper remedy for the problems of small business. It is an attempt to eliminate not just the unfair competition on branded products, but to do away with all price competition whatever on such products. We believe that it would ultimately prove to be of main benefit, not to small retailers, but to the large chains which sell most of the branded products as well as unbranded and privately branded house products, and that it would strengthen the already dominant influence of large manufacturers over other parts of the economy. We believe that it would retard the further development of high-volume, low-cost merchandising techniques and thus slow down the advance in American living standards: Now, therefore, be it

Resolved, The AFL–CIO opposes the enactment of resale price fixing legislation and calls upon the Congress to reject the so-called fair trade bills now pending before it.

POLICY RESOLUTION ON CONSUMER PROTECTION, ADOPTED DECEMBER 1961, BY THE FOURTH CONSTITUTION CONVENTION OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

In the field of consumer protection, organized labor must take a leading role in behalf of its own members and in support of programs to benefit the consuming public at large. Through its own program of consumer counseling, sponsored by the AFL–CIO community services and the union label and service trades departments, the AFL–CIO seeks to educate union members and their families in wise budgeting and buying so that they may obtain the full value of the dollars they spend for consumer goods and services. Through support and sponsorship of consumer cooperatives, in which members democratically join together to supply for themselves such basic necessities as housing, medical care, drugs, consumer credit, and insurance, union members are able to obtain high quality consumer goods and services at reasonable cost. By supporting public programs and legislative proposals to protect the consumer against misleading advertising, deceptive merchandising practices, excessive prices, and against products unsafe or unfit for human use, organized labor makes common cause with the public interest of the community as a whole.

The most glaring of the consumer interest issues arising over the past 2 years is that of the high price of prescription drugs, based on monopoly patent rights, restrictive licensing agreements, brand-name promotion and vast outlays for advertising. Drug industry profits, running at 18 percent on stockholders' investment, outstrip those of all other manufacturing industries in the country. Further, the drive for profits has led to irresponsible advertising claims, concealment of dangerous side effects of powerful drug agents, and the subordination of research on useful drug products to the development of inconsequential

sales gimmicks of little value to the art of medicine or the ultimate welfare of sick patients. Reforms are clearly called for in behalf of the consuming public.

A second highly important issue is the need for remedial legislation in the installment lending field. Public controls over the vending of installment credit are still lacking or inadequate in many States, debt poolers flourish, legal protections for consumers are inadequate, and harsh garnishment and wage assignment laws remain the rule rather than the exception. Confusion reigns as to what credit actually costs the borrower or buyer on the installment plan and as to what sources offer credit on the most reasonable terms.

These two problems, important as they are, by no means exhaust the consumer interest issues which should command the attention and best efforts of individual citizens, unions, consumer interest groups, and government. Misleading advertising and deceptive practices continue to be inadequately regulated. Recent hearings before a special Senate subcommittee have documented widespread confusion techniques in the packaging of consumer products so as to mislead buyers as to quantity and price, quite apart from the perennial problem presented by short weights and measures. Inadequate legal powers still prevent the Food and Drug Administration from assuring maximum safety and wholesomeness of products regulated by the Food, Drugs, and Cosmetics Act. On the price front, proponents of so-called fair trade continue to press for a Federal law, which would permit manufacturers including those in the drug industry to fix the prices that consumers must pay at retail on branded items, thereby assuring further increases in the cost of living.

Finally there remains the problem of better representation of the consumer interest in Government. The wide range of consumer interests and problems receive the attention of no one coordinating agency or office of the Federal Government and no special committee of the Congress. Now, therefore, be it

Resolved:

1. This convention pledges its support to the cause of the consumer and calls upon affiliates to cooperate in efforts for consumer education activities and to lend their support to consumer interest programs in both State and Federal Governments. Further, we commend and support the consumer cooperative movement and favor widespread extension of its principles.

2. We call upon the National Congress to enact legislation that will bring down the high price of prescription drugs, combat misleading advertising by drug companies, and improve the safety and usefulness of drug products generally. To this end we endorse the provisions of S. 1552 and H.R. 6245, pending in the current Congress.

3. We call upon the Congress to enact a Federal "truth-in-lending" law which will require a full disclosure of all finance charges on consumer installment purchases and loans, both in dollars and cents and in terms of a true annual interest rate. States should act to improve existing consumer credit laws and to enact laws where they do not now exist. States should act also to curb debt poolers, repeal wage-assignment laws, and reform unreasonable wage-garnishment laws. We call upon our affiliates to give aid and support to the further establishment of credit unions, as a proven means of encouraging thrift and as a source of personal loans at a low rate of interest.

4. Greater authority and appropriations should be accorded to the Federal Trade Commission to strengthen its activities in policing misleading advertising and deceptive merchandising practices. In particular, it should be given power to issue temporary injunctions in flagrant cases of abuse. We endorse pending legislation to require truthful labeling of imitation hardwood products. We commend the congressional investigation of deceptive packaging techniques and urge the development of appropriate remedies to curb these practices.

5. We urge new amendments to the Food, Drug, and Cosmetics Act to strengthen the powers of the Food and Drug Administration in behalf of the consuming public, including these provided by S. 1552. In addition, power is needed to require manufacturers to pretest therapeutic devices and cosmetic products for safety before putting them on the market. In the field of food protection, amendment is needed to the Federal Meat Inspection Act, administered by the Department of Agriculture, to expand the scope of the law.

6. We urge defeat of all proposals to permit the fixing of retail prices under so-called fair trade laws, whether State or Federal.

7. Finally we call upon both Federal and State Governments to give greater representation to the consumer in the machinery of government such as has been done in some States through a department of consumer protection or an office

of consumer counsel. We specifically endorse a Department of Consumers in the Federal Government and the creation of select committees in the House and Senate to investigate and study consumer problems.

Mr. STAGGERS. You may proceed.

Mr. FAIR. Thank you, sir.

These policy statements cover the general subject of resale price maintenance of which fair trade was the principal form under consideration at the time.

In addition, the AFL–CIO presented testimony in opposition specifically to the quality stabilization bill in last year's hearings before the Fair Trade Subcommittee of the Senate Commerce Committee.

This year's quality stabilization bill contains certain changes and refinements in the bills introduced in 1962. These include several exemptions designed to meet some of the more specific complaints made against the bill last year, such as the almost certain effect it would have in raising the price of prescription drugs to the public. Prescription drugs would be excluded from the House bill, as would sales to Government agencies and to charitable and certain other nonprofit organizations.

While we appreciate this effort to mitigate some of the most objectionable features of the bill, this in no way alters our opposition to it on general grounds.

H.R. 3669 is a broadly applicable price-fixing bill, allowing private manufacturers absolute power over prices on branded or trademarked articles at all levels of distribution, with no participation by any governmental agency in the price-determination process.

Although the price-setting powers of the bill are vested exclusively in manufacturers, the principal argument, the most appealing argument made in behalf of its provisions, is that it is needed for the preservation of small business, especially small retail business.

In the past, almost every witness on resale price maintenance, whether for or against the legislation in question, has deplored and noted with sympathy the plight of small business in whose behalf this type of legislation is offered, whether in the form of fair trade, fair competitive practices, or the current quality stabilization version. We ourselves share this concern.

The basic argument presented by proponents is that unless retail prices on branded items can be protected from competitive price cuts on the part of large retailers and by discounters, the small independent store will simply have to go out of business. Such price cuts are described as predatory, cut-throat, and unfair, and present remedies under law are claimed to be inadequate.

The manufacturer's interest in the bill is described as dual in nature. It is based on (1) the desire to preserve a large number of distributive outlets and (2) the desire to protect quality name-brand merchandise from debasement and deterioration which is alleged to inevitably accompany lower prices.

Low prices are equated with inferior products and high prices are said to furnish the only incentive and means of producing superior products. Therefore, if we can establish a system under which a manufacturer may, if he chooses, establish a protected resale price on any or all of his branded or trademarked merchandise, small business will be preserved, an orderly distribution system will be assured,

the manufacturer's investment in his brand name will be protected, and the public will be benefited by a reliable flow of superior quality merchandise.

Serious flaws, however, have been shown to exist in this picture of what would happen if Federal resale price maintenance were to become law. Indeed, Judge Lee Loevinger of the Department of Justice flatly predicted in testimony before the House subcommittee last year that this bill would "ultimately eliminate small business."

Surely, testimony of so grave a nature from so responsible a source suggests the need for the most serious appraisal of the theory on which the bill is based.

The dangers to small business pointed out by Judge Loevinger and by others rest on two main points:

1. Small retail business would stand in danger of being delivered lock, stock, and barrel into the hands of the manufacturers. The manufacturers will have the power to enforce any price and any profit margin they wish for all resellers on any product they wish without regard to the interest of any particular reseller. The reseller is wholly deprived of making his own price decisions based on his own costs and his own competitive needs with respect to such products. He cannot, under this bill, move his price up or down from the single price or price range fixed by the manufacturer. If, for example, he wishes to compensate for some special disadvantage, such as poor location or lack of credit facilities, by a price cut on name merchandise, he is prevented by this bill from doing so.

2. Small sellers dependent on sales of name merchandise will be faced with accelerated competition from the large retailers, mail-order houses, and chainstores which can afford to buy and promote unbranded merchandise at lower prices under their own labels, the so-called house brands or private labels. These products are frequently identical to the name merchandise and are even made by the very same manufacturer. The advantage of the high-priced names on particular articles is thus often entirely fictional, as far as the product itself is concerned.

During the 1959 hearings on the fair trade bill in the Senate, Mr. Wilfred I. Meyer, a partner in Schwegmann Bros. Giant Super Markets in New Orleans, gave a very detailed description of Schwegmann purchases of unbranded soap powder from Colgate-Palmolive-Peet Co. This soap was sold under the Schwegmann label as "Miracle" soap and it was exactly the same soap as the well-known brand "Fab," also manufactured by Colgate, but "Miracle" carried a much lower price to the consumer.

Chairman Paul Rand Dixon, of the Federal Trade Commission, has testified to the widespread use of private labels in chain grocery stores. In his testimony last year, for example, he cited a study that showed that 64 percent of the frozen food products sold in the 10 largest grocery chains were sold under private labels.

The large retailers and chains are, of course, capable of handling both name brand and private brand merchandise. To the extent that they might choose to increase their stocks of price-fixed name brand items carrying high retail markup margins, their already strong competitive position would simply be further strengthened by the unneeded windfalls they would get.

We are particularly impressed by the statistical study offered by the Department of Justice at last year's hearings which produced prima facie evidence of the inefficacy of resale price maintenance as a means of preventing business failures. In fact the very opposite relationship was shown to prevail, through a comparison of the rate of business failures in States with and without price maintenance laws and in States where the laws had been partially invalidated by elimination of the "nonsigner" clause to fair trade agreements. For each year, 1946 through 1961, business failures were consistently higher in States with fair trade laws than in States with no fair trade laws or with defective fair trade laws. Those with no fair trade laws all showed the lowest rate of business failures.

Finally we are impressed with evidence that small business itself is by no means solidly behind the proposed legislation, despite the impressive list of business organizations that have officially endorsed it. Again citing the Assistant Attorney General, we refer to a study which he described as follows:

> 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.

For these reasons, we believe the case has not been made that a universally available resale price maintenance system is the key to the preservation of small business. We urge that other measures be developed to help small business survive—measures that hold less danger to the public and to the general economy.

Turning briefly to the allegation that manufacturers need price protection in order to prevent deterioration of their products: we simply cannot put much stock in it. Our general view is that good quality in a product is its own best salesman. Under free competition a genuinely good product will command a sufficient volume of sales at a price adequate to insure its production. Good products, which consumers want, do not need artificial price supports. Our credence of the argument is further stretched by the practice already referred to of selling identical products at high prices with brand names and at low prices under private labels. In such instances the lowering of prices has clearly not altered the product.

Mrs. Sarah Newman, of the National Consumers League, has succinctly observed that these private brand products—

> are hardly made with inferior labor and materials because they are made in the same factories under the same conditions as the fair-traded items.

Our own particular interest in this bill is not, of course, specifically from the standpoint of small business or from that of manufacturers, but from the standpoint of the consuming public of which wage-earner families form so large a part.

All impartial evidence on this issue has indicated that prices of consumer retail products would rise substantially if Federal resale price maintenance were to become law. Estimates range from a minimum of $1.5 to $14 billion a year added cost to the consumer, based on limited experience under State laws. With a possibly much larger volume of products placed under "stabilization" provisions if a univer-

sally available Federal law were enacted, the potential cost to the consumer might vastly exceed these estimates.

The right of the consumer to shop for the lowest price on a distinctly identifiable product would disappear. The field would be increasingly dominated by brand competition—lower priced house brands and higher priced name brands. Costly, competitive brand advertising and, in some instances, competitive efforts by manufacturers to woo their resellers through offering higher resale margins, would increase prices generally, quite apart from the specific price setting to be encouraged for trademarked products.

We are especially disturbed by the fact that the bill does not offer adequate assurance that the public will be protected from retail price fixing by manufacturers of products which are not competitive as to price at the manufacturers' level. The language of the bill which is supposed to insure that price-fixed items at retail are competitive at the producer level is the requirement that goods "usable for the same general purpose" must be available to the public from sources other than the owner of the brand name and they must be in "free and open competition therewith."

The language has been moderately strengthened over the wording of last year's bill by the addition of the phrase "in free and open competition therewith." But no guidance is given as to just how much competition would in fact be required. Last year some of the leading proponents of this bill testified that if there were only one other manufacturer of a particular product, that would be considered "competition."

We believe, in fact, that the bill in itself lends encouragement to the elimination of competition, especially through the system of "price leadership" under which prices move upward in mysterious concert after a price increase has been put into effect by one of the producers. In industries where price competition has been successfully eliminated for all practical purposes and at the same time has resisted definite proof of collusion under the antitrust laws, the consumers' remaining protection—namely, competition among resellers—will have been sealed off by this bill.

At last year's hearings, the Justice Department produced an impressive list of 126 retail products for which the 4 largest manufacturing companies accounted for at least 50 percent of the value of shipments. In all except 16 of these lines, the 20 largest companies accounted for 90 percent or more of output. We consider it a most serious matter to make resale price maintenance generally available to manufacturers in which so few producers account for so large a share of the market. The one specific exception that has been made by this bill is the very special case of prescription drugs in which the availability of alternative products may be precluded by a doctor's order.

If resale price protection were to be written into law, then at the very least strong safeguards to the public should be included. One might think of such devices, for example, as requiring a certification from the Department of Justice that free and open competition actually exist on any product for which price maintenance is proposed. Another alternative might be to require public review and approval

of any proposed resale price that is going to be legally enforced through the public courts.

We trust that your subcommittee will explore less dangerous and dubious routes to the preservation of small business than the one under consideration in H.R. 3669. Such measures might include, for example, strengthening of Federal Trade Commission powers to deal with genuinely predatory price cutting, and we feel certain that constructive programs in such fields as tax benefits, loan programs, encouragement of pooled purchasing arrangements, and other means of improving the competitive capacity of small business could be developed or strengthened.

Mr. Chairman, this concludes our statement on the proposed Quality Stabilization Act. We thank you for this opportunity to be heard before you.

Mr. STAGGERS. We are glad to have you, Mr. Fair.

Do you have any questions, Mr. Dingell?

Mr. DINGELL. No questions, Mr. Chairman.

It is a pleasure to welcome Mr. Fair to the Committee. He is a former constituent and a longtime friend of mine; so it is very pleasant for me to see Mr. Fair here this morning.

Mr. FAIR. Thank you very kindly, Mr. Congressman.

Mr. STAGGERS. Mr. Van Deerlin.

Mr. VAN DEERLIN. Even though he is not a constituent of mine, I have no questions for him.

Mr. FAIR. Thank you.

Mr. STAGGERS. We thank you, Mr. Fair, for appearing.

Mr. FAIR. Thank you, Mr. Staggers.

Mr. STAGGERS. Our next witness is Mr. Angus McDonald. Mr. McDonald, would you identify yourself for the record, sir?

Mr. MCDONALD. I am Angus McDonald, assistant director of legislative services, of the National Farmers Union, the legislative office here in Washington.

I have a brief statement, Mr. Chairman. I think I can get through with it in a very few minutes.

Mr. STAGGERS. Fine. You may proceed.

STATEMENT OF ANGUS McDONALD, ASSISTANT DIRECTOR OF LEGISLATIVE SERVICES, NATIONAL FARMERS UNION, WASHINGTON, D.C.

Mr. MCDONALD. The National Farmers Union throughout its 63-year history has consistently supported the antitrust laws.

Our organization at county, State, and National conventions has affirmed and reaffirmed its support of the Sherman Act, the Clayton Act, and the Federal Trade Commission Act and has reiterated its opposition to any proposal which would weaken these laws.

Over a period of years this witness has appeared at congressional hearings pointing out the need for strengthening our antitrust laws and the economic plight of the farmer because he has not enjoyed the benefits of free competition. The farmer must take whatever is offered to him in the marketplace. He sells in a free market and because in many instances prices of items necessary for production are fixed by

gigantic corporations he has received a disproportionate amount of the Nation's income. General per capita income of the farmer is about one-half or a little more than one-half of those living in cities and towns.

We find it impossible to support any price-fixing device no matter how attractive, no matter how beneficial it may appear to certain economic groups. Competition is the lifeblood of our economy and any restraint of it will redound to the disadvantage of consumers and in the long run to the disadvantage of those temporarily enjoying its benefits.

This legislation opens wide the door to control by large corporations and affords an easy opportunity in industries where a few companies control the production and manufacture of a product to fix their prices. It is well known that the proving of conspiracy or collusion is very difficult and in many instances impossible. Because of the development of our economy the economic power of great combinations is more of a threat to competition than ever in history.

The files of the Department of Justice and the Federal Trade Commission and the records of the courts are replete with instances of price fixing by one huge corporation which tended to create a monopoly and collusive activities of a group of corporations which tended to substantially destroy competition. The passage of the Robinson-Patman act in the thirties was an attempt to plug up a loophole in the Clayton Act and nip monopoly in the bud.

This law, together with the Federal Trade Commission Act which the Farmers Union has supported over a period of many years, has in part remedied the dilemma in which small retailers find themselves when confronted with unfair and discriminatory practices. We have supported, and support now, legislation which would strengthen these laws and prevent unfair and destructive competition at the retail level.

The small retailer, we fear if this bill were enacted, would be relieved of his most important weapon in his fight against large retail competitors. No doubt enactment of the bill would be followed by an increase in private brands by the large companies. The large distributor under a fair trade law would be able to offer his customers comparable products of his own private brand. The small independent retailer, on the other hand, having no private brand to offer, would lose customers by having them tolled away by the large distributors. The small retailer must not be denied the opportunity to reduce his prices in order to retain and attract customers.

The legislation, if enacted, would be very difficult to enforce and would result in a multitude of lawsuits and a great increase in the burdens of antitrust agencies. We believe that considerable progress has been made in recent years in enforcement of antitrust laws and that despite much criticism the antitrust authorities have accomplished a great deal in preventing or breaking up price-fixing practices and combinations.

If the bill were enacted we believe groups not affected by brand names or trademarks would ask Congress to allow them to carry the same kind of practices which are authorized under this bill. Passage of the legislation would undermine all our antitrust laws and possibly lead to their eventual abandoment. Apparently the atempt to legal-

ize fair trade by means of State laws has not been successful. State courts in case after case have denounced these laws as contrary to the public interest and as legislation which would benefit minorities at the expense of the masses of consumers.

Doubts of the constitutionality of the legislation have also been raised. While we do not attack the legislation on its inconsistency with the Constitution of the United States, it would appear to the layman that a person who has purchased a product should have the right to dispose of it in any way he sees fit. This legislation would make every sale of a brand or a trademarked product a conditional sale, subject to control by the manufacturer. As pointed out, there is little doubt that the legislation would result in much litigation. Your attention is called to the following excerpts from court decisions:

COLORADO

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 a free America where the many must yield to the few, so that the latter may make 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*, 301 P. 2d 139 (1956)).

OREGON

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," et cetera, 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 owner is simply an excuse and not a reason for the law * * *. Pressure for the passage of these acts came not from manufacturers or other trademark owners but from distributors—first and foremost the retail drug associations and then other retail and wholesale distributors.

* * * * * * *

It is plainly apparent that the consumer is not benefited, but on the contrary is harmed by the operation of the Fair Trade Act. The consumer is the public. He is compelled to pay a higher price for a given commodity in order that the retailer may be guaranteed a higher fixed, and often unreasonable, profit * * *. It is obvious that the whole scheme * * * is one for private, rather than public, gain, a scheme fathered by highly organized groups, interested not in the public weal, but only in their own selfish ends. (*General Electric Co.* v. *Wable*, 296 P. 2d 635 (1956)).

FLORIDA

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 the protection of the consuming public (*Miles Laboratories, Inc.* v. *Eckerd*, 73 So. 2d 680 (1954)).

ARKANSAS

It is frightful to think a device so easily concocted could destroy the constitutional bulwark protecting our personal liberties and the public welfare * * *. The principal objective * * * is the protection of profit margins for retailers and distributors unwilling or unable to meet the pressure of competition (*Union Carbide & Carbon Corp.* v. *White River Distributors, Inc.*, 275 S.W. 2d 455 (1955)).

MICHIGAN

Can it be said that by the process of reducing prices neither war, destruction or evil are visited upon the public health, safety, morals or the general welfare? * * * Such is not the concept upon which America's competitive economy

was developed (*Shakespeare Co.* v. *Lippman's Tool Shop Sporting Goods Co.*, 54 N.W. 2d 268 (1952)).

SOUTH CAROLINA

It is difficult to find any justification for this legislation based upon considerations of the public health, safety, morals, and general welfare (*Rogers-Kent, Inc.* v. *General Electric Co.*, 99 S.E. 2d 665 (1957)).

LOUISIANA

It also cannot be seriously disputed that the right of an individual to engage in a lawful business and to fix the prices at which he disposes of his own property is guaranteed by the due process clauses of both the State and Federal Constitutions (*Dr. G. H. Tichenor* v. *Schwegmann*, 90 So. 2d 343 (1956)).

Fixing prices at the retail level would tend to restrict consumption and indirectly aggravate the unemployment problem since full employment is dependent on maximum production and distribution. This administration is racking its collective brains to find a way to solve the unemployment problem. Many feel that the source of this problem is the result of inadequate purchasing power. It is obvious that the freezing of prices at the retail level would reduce consumption, particularly in the low income groups. It would, in particular, result in hardships on farmers whose income has been a chronic problem for many years.

That concludes my statement, Mr. Chairman.

Mr. STAGGERS. Thank you, Mr. McDonald.

Any questions, Mr. Dingell?

Mr. DINGELL. Mr. Chairman, no questions, except to commend Mr. McDonald for a very fine statement and for very rare patience manifested during this hearing. I am personally deeply grateful to you.

Mr. MCDONALD. Thank you. Mr. Chairman, we appreciate those kind remarks.

Mr. STAGGERS. Just a moment, will you, please? Maybe the others might have some questions, Mr. McDonald.

Mr. Glenn.

Mr. GLENN. I have no questions.

Mr. STAGGERS. Mr. Van Deerlin.

Mr. VAN DEERLIN. No. Thank you, Mr. Chairman.

Mr. STAGGERS. Well, thank you very kindly for appearing.

Our next witness is Mrs. Sarah H. Newman.

Mrs. Newman, would you identify yourself for the record, please?

Mrs. NEWMAN. Yes.

Mr. STAGGERS. And proceed.

STATEMENT OF SARAH H. NEWMAN, GENERAL SECRETARY, THE NATIONAL CONSUMERS LEAGUE

Mrs. NEWMAN. My name is Sarah H. Newman. I am general secretary of the National Consumers League and appear here today in opposition to H.R. 3669, a bill to legislate retail price fixing on a nationwide scale by manufacturers or owners of any trademarked items, without any control over the setting of those prices.

The trademark law grants to the owner of a trademark certain specific rights. These rights are the exclusive use of the trademark and effective protection against unfair competition, and against deceptive and misleading use of such marks in commerce.

Nothing in the Trade Mark Act grants the trademark owner the right to control the resale price of the trademarked goods once it has been sold by the trademark owner. If the Congress feels the Trade Mark Act should be amended to give this additional monopolistic control to trademark owners, then it should be done more directly, as an amendment to that act. Even the patent laws of the United States (which are among the strongest in the world) do not grant resale price fixing powers to patent owners. Once a patented product is sold to a retailer, the retailer is free to decide for himself what price to charge the consumer. This is in accord with our long established principles of free competitive enterprise. Adoption of H.R. 3669 would result in elimination of competition at all levels of distribution and is totally inconsistent with our antimonopoly concepts.

The proponents of this legislation do not emphasize the price-fixing aspects. Indeed, by referring to this as a bill to promote quality and price stabilization, they attempt to create a totally misleading picture of the purpose of this bill. This is a true example of what consumers call "misleading labeling." There is nothing in this bill which would stabilize quality or prices. The only result this legislation would accomplish would be higher prices for consumers—and not even stabliized higher prices—since the manufacturer could change prices whenever he wanted to.

I am certain that before these hearings are over, you will have received many illustrations of how such legislation affects prices. In previous hearings, the league has presented figures comparing the prices of identical items sold in Washington and in our neighboring State, Maryland (a fair trade State), often even in outlets of the same chain of stores. In each case, the price charged in the "fair trade" State (Maryland) was higher than the price in the District of Columbia. In 1958, a Washington Star ad showed that Peoples Drug Stores in Maryland were forced to charge $100.22 for a group of 17 items which it sold in its District of Columbia stores for only $71.43. This is an increase of 40.5 percent due to fair trade legislation. Estimates in the past have presented figures showing that the cost to consumers could be anywhere from $1 to $10 billion a year. And you have heard even higher figures per year this morning.

For the Congress of the United States to give manufacturers a right to fix prices which might result in such tremendous costs to the consumer, without reserving for itself any jurisdiction over the establishment of these prices, would be anti-consumer legislation of the worst kind. When in times of emergency the Congress has adopted price-fixing legislation, it has reserved for itself the right to take part in the setting of the fixed prices. Under this bill, with no present emergency, it would abdicate such rights, while giving the manufacturer sole jurisdiction over the retail price.

Proponents frequently use the argument that small business needs this type of legislation to survive. The National Consumers League is not opposed to helping small business, but we contend that this legislation would not really benefit small business. The large retailers, who are the cause of the dilemma facing small business, can easily use this legislation to increase their "take" of the consumer's dollar. A large retail chain can buy the same product as a fair trade product—from the same manufacturer—but under its own house label, and then

sell it at a price so competitive that the small businessman would not have a chance. The District of Columbia, and those States which at present have no fair trade legislation, have not shown any unusual demise of small businesses.

I know that Dr. Stuart Lee testified here earlier and indicated what the actual situation was in regard to bankruptcies, comparing those States in which there is fair trade and those in which there is not. And although his study has not yet been finished, it certainly points to a conclusion which would indicate that the bankruptcies do not increase where there is no fair trade.

In fact, should this bill become law, many small businessmen, now operating under imaginative and progressive economies, and passing these along to consumers in price reductions, would no longer be able to count on their ingenuity to attract the consumer. All recorded enforcement activity under fair trade legislation has been specifically directed at requiring retailers to charge higher prices than they had been charging before. Savings made by selling for cash, not giving delivery, or other special services, could not be passed on to consumers by small mrchants, and would result in a decreased volume of sales for them.

The league has another objection to this bill, since it would force onto States which have repealed State fair trade laws, or which have never enacted such legislation, a law which it seems to us should properly be left to each State to decide on for itself. A look at the record shows that many States have repealed such legislation, and the Federal Government should not be usurping States rights in this field.

In secion 8(A), the bill refers to "bait merchandising practices" without even defining the phrase. The league feels that true bait advertising is already illegal, and protection against such practices is available under the present Federal Trade Commission Act. The Robinson-Patman Act states it to be—

> unlawful for any person engaged in commerce * * * to sell * * * goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor—

and many of the States have passed unfair practice acts which would prohibit true "bait merchandising."

The National Consumers League believes that consumers should assume an active responsibility for the protection of our living standards. For over 60 years we have supported legislative programs to promote the well-being of our society, and our concern for the protection of consumers dates back to our leadership in the campaign for establishment of the Food and Drug Administration in the early 1900's. We know that consumers are vitally and deeply concerned, not only with the quality and safety of the products they purchase, but with the cost of these products. The league is, therefore, strongly opposed to H.R. 3669 since we believe that passage of this bill would operate not only against the best interests of the consumer, but against the strength and vitally of our entire economic system. We believe this bill would merely enable an orgaized 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 H.R. 3669.

The league appreciates the opportunity to appear before you.

Mr. STAGGERS. Thank you, Mrs. Newman.

Do you have any questions, Mr. Dingell?

Mr. DINGELL. No question, Mr. Chairman, except to thank Mrs. Newman for a very fine statement and very rare patience in appearing before the committee.

Mr. STAGGERS. Mr. Glenn.

Mr. GLENN. Yes, Mr. Chairman.

Mrs. Newman, I have always been hopeful that we would have such an organization as yours representing the unorganized purchasing public, which I think is what you attempt to do. But is your organization on a nationwide scale?

Mrs. NEWMAN. We are a national organization. At one time there were some 60 local leagues affiliated with us, and at the present time the membership of the national is really nationwide. We have members from coast to coast and from Maine to Florida.

There are only three State leagues—the New York State League, the Ohio State League, and the New Jersey State League. There are no city leagues affiliated with us.

Mr. GLENN. Now, how do you obtain the necessary funds for the operation of your National and State leagues?

Mrs. NEWMAN. We have a very loyal membership, many of whom have belonged to the league for as long as 50 years, and fortunately they consider the work of the league very important.

Two years ago, when one of our members died, she left us a very nice legacy, which helped to take care of the expenses of running; and we have a membership charge.

Mr. GLENN. Do you have dues?

Mrs. NEWMAN. Yes, we do.

Mr. GLENN. Is your membership composed of individuals or organizations?

Mrs. NEWMAN. Largely individuals.

Mr. GLENN. And you also accept organizations?

Mrs. NEWMAN. Oh, yes. Yes, anybody interested in our objectives may join the league.

Mr. GLENN. Can you name some specific organizations that are members, of a national size?

Mrs. NEWMAN. The industrial union department in the AFL–CIO, which has long worked with us, also is a member of the league.

I cannot at the moment—I would be glad to look——

Mr. GLENN. How about the National Association of Manufacturers? Are they a member?

Mrs. NEWMAN. You know, we have never written them and asked them to join. We have a very limited staff—myself and a secretary; and our needs are not very great, unless we increase the size.

Mr. GLENN. How about the U.S. Chamber of Commerce?

Mrs. NEWMAN. No, sir.

Mr. GLENN. May I sugguest that you send them some of your literature and see if they would be willing to join?

Mrs. NEWMAN. I would be glad to, if you think they might be interested.

Mr. GLENN. I wish you would. After all, consumers is something we all are. I am sure they would be much interested in this.

Mrs. NEWMAN. Actually, all of these organizations seem to be interested in enrolling the consumer. But I guess they realize the consumers, as unorganized as they are, do not always act in a way which is for their own benefit. Many of them are not informed. Most of them do not know how to act on their own behalf. We are trying to do it for them.

Mr. GLENN. Thank you very much.

Mr. STAGGERS. Mr. Van Deerlin.

Mr. VAN DEERLIN. I have been receiving some mail in recent weeks on the subject of this legislation, surprisingly enough from a great many individuals outside my district and outside my State. I was wondering if this might be in part due to the encouragement that they have received from this organization?

Mrs. NEWMAN. It could be. We have a newsletter which goes out, not very regularly but about every 2 months during the time that Congress is in session. And in the newsletter we usually inform our readers about the legislation which we are working on, and sometimes we have sent out a special fact sheet on a specific bill, although we have not on this bill.

Mr. VAN DEERLIN. And do you list the names on the subcommittee that are considering it?

Mrs. NEWMAN. We indicate which subcommittee it is; and many members, I am glad to say, are informed and have copies, of the committees in Congress.

Mr. VAN DEERLIN. I presume the league is interested in a number of other topics at the present time?

Mrs. NEWMAN. Oh, yes.

Mr. VAN DEERLIN. How would you compare the intensity of your feeling on this bill with the intensity of feeling you may have on truth in packaging legislation?

Mrs. NEWMAN. We think they are both important. We think, however, that the opposition to truth in packaging is not as strong as the opposition—I mean as the proponents for this kind of legislation.

So if I had to decide as to which I would spend more time on, personally I would spend more time on this.

Mr. VAN DEERLIN. You really feel that this is where the ramparts are?

Mrs. NEWMAN. Well, I think this needs the most opposition from consumers.

I think that industry, by and large, is not going to fight the truth in packaging legislation quite as much. I think many people in industry are enlightened enough to see that that legislation would help them.

Here, I do not know; those groups which are organized to get fair trade legislation are very—persistent, shall I say? They have also, it seems to me, persuaded some people on both sides of the Congress to feel that this is going to help small business. And I am sure you are well aware that most people in the Congress, in both houses, are quite concerned about small business. And they sort of grasp desperately at any straw that might help small business.

Now, we are aware of the plight of small business, and if we were assured that this would help it, we would be in favor of this too. We are convinced it will not help it.

But I think, because this is the argument used, and we know that all Congressmen and Senators do not have the time to completely inform themselves about every bill that they have to act on, I suppose that many Congressmen, you know, take their colleagues' words for it that this will really help small business, so they will go along.

Therefore, I think we on the outside who oppose it have to make our position known.

Mr. VAN DEERLIN. Thank you, Mrs. Newman.

Mr. STAGGERS. I understand Matt Triggs is here, the assistant legislative director of the Farm Bureau.

Do you care to testify now?

Mr. TRIGGS. Thank you, sir.

Mr. STAGGERS. We are glad to have you. Would you identify yourself for the record?

STATEMENT OF MATT TRIGGS, ASSISTANT LEGISLATIVE DIRECTOR, AMERICAN FARM BUREAU FEDERATION

Mr. TRIGGS. I am Matt Triggs, assistant legislative director for the American Farm Bureau.

We certainly welcome the opportunity to present Farm Bureau's views with respect to resale price maintenance legislation (quality stabilization) under consideration by the committee.

At our last annual meeting the voting delegates of the member State Farm Bureaus unanimously reaffirmed their opposition to resale price maintenance practices.

THE INTEREST OF FARMERS

Farmers would be more adversely affected by the enactment of this proposal than any other group. Farmers buy essentially the same consumption items as other consumers. Most of these consumption items could be covered by price maintenance programs under the authority of H.R. 3669 and similar bills. In addition, farmers spend about $7 billion annually for production supplies, the prices of which could be determined by manufacturers if the bill were to be approved.

COMPARISON OF "FAIR TRADE" AND "NONFAIR TRADE" PRICES

The most recent survey we have been able to locate of the differences between consumer prices in "fair trade" cities as compared with "nonfair trade" cities was presented by the Department of Justice to the Senate Select Committee on Small Business on June 25, 1958. This survey probably provides a more accurate indication of the impact of resale price maintenance programs than might be indicated by a later survey because of the extent to which such price maintenance programs have been abandoned in recent years.

The following excerpts from the survey indicate the differences between consumer prices in "fair trade" and "nonfair trade" cities:

Total consumer prices of 119 selected items

In "fair trade" cities	$2,829.46
In "nonfair trade" cities	2,280.34
Savings to consumers in "nonfair trade" cities	549.12
Percentage savings to consumers in "nonfair trade" cities	19.41

In the above summary, even in "nonfair trade" cities, many items sold at "fair trade" prices. The Department therefore made a separate comparison of only those items that were sold below "fair trade" prices, as follows:

Total consumer prices of 119 selected items

In "fair trade" cities	$2,033.20
In "nonfair trade" cities	1,481.73
Savings to consumers in "nonfair trade" cities	551.47
Percentage savings to consumers in "nonfair trade" cities	27.12

I have heard some witnesses disparage this survey. But I haven't heard anyone rebut it. The size of the increases in prices in fair trade cities above those in other cities indicates there is little comfort for consumers in this bill. If the bill were enacted it would clearly accelerate the relentless upward trend in the consumer price index.

IMPACT ON THE ECONOMY

The magnitude of the increased margins reported by the Justice Department's study indicates that the enactment of Federal resale price maintenance legislation would have a significant effect with respect to: increasing consumer prices; reducing aggregate demand; reducing total production and employment, and deterring economic growth.

Most economists would agree that purchasing power is a key element in promoting economic growth and high levels of employment. Thus the Council of Economic Advisers says—

> Higher rates of unemployment, slower advances in output, excess industrial capacity, reduced growth of incomes—these features of our economy in the past several years are not separate phenomena. They are all part of the syndrome of persistently sluggish demand.

Other economists might give more emphasis to other factors, but probably none would disagree that aggregate demand is a major factor.

Many excerpts from the writings of economists with respect to the adverse effects of resale price maintenance practices might be submitted. Thus Edward F. Dennison, in a CED report, "The Sources of Economic Growth in the United States" includes in his list of measures that would aid to maximize economic growth: "Eliminate resale price maintenance."

The committee has heard from the people in the executive branch who are closest to the operations of antitrust laws. But you have not heard from the people in the executive branch whose major responsibility is to evaluate the impact of proposed legislation on the growth and development of the whole economy and on the employment of workers by that economy. We, therefore, respectfully suggest that the committee seeks the views of the Council of Economic Advisers on a question such as this: "What would be the effect on (1) consumer purchasing power, (2) aggregate demand, (3) employment, and (4) economic growth, which might result from the enactment of national legislation authorizing manufacturers to establish resale prices at retail and other distribution levels?"

Alternatively, or in addition, may we respectfully suggest that the committee seek the counsel of the Nation's outstanding economists either by appearance before the committee or by written statement or questionnaire, as to this issue.

IMPACT ON SMALL BUSINESS

The argument is customarily reiterated at hearings on this issue that the enactment of resale price maintenance legislation is desirable to protect the small retailer against the competition of larger concerns.

Farmers are close to and sympathetic with the problems of small business. They are small businessmen themselves. Beyond that many farmers have branched out into other small businesses of all kinds. Farmers' sons are operators of many small businesses, particularly in rural communities. Many business people have also become the owners and/or operators of farms. Farmers' sons marry businessmen's daughters and vice versa. They are members of the same churches and service clubs. They are friends and neighbors.

But we do not believe that the enactment of resale price maintenance legislation will aid small businesses generally to meet the problems with which they are faced. In support of this view we submit the following arguments:

1. Small retail concerns are usually less adequately capitalized, have a smaller selection of sales items, are often quartered in less desirable locations, have less expensive facilities, and commonly provide fewer credit, delivery, and other services than their large competitors. Their advantage is a cost advantage. If they are not permitted to compete pricewise to offset their disadvantages, their ability to compete successfully is seriously impaired.

2. Large distribution concerns are able to and do extensively resort to the use of private brands that they can sell at prices below the prices at which similar "fair-traded" items can be sold.

3. We suggest that the enactment of resale price maintenance legislation would be accompanied by a substantial loss of customers by most small stores and a corresponding increase in the business of mass distributors. We would suggest that the enactment of such legislation would accelerate the growth of consumer cooperatives. We would suggest such legislation would promote the development of numerous and varied devices to reduce retail margins—such as expanded use of more valuable trading stamps, merchandise gifts, wholesale selling and many others, all of which would be harmful to small business.

Take the Washington situation as a good illustration of this. Such small drug concerns as Dart, Tates, Savemore, Discount, Standard, and others, are able to compete with People's and Drug Fair because they can and do sell at lower prices. If they were not permitted to do this, it appears unlikely they would have grown and prospered.

It is respectfully suggested that the committee may wish to have made a study of the Washington situation in the drug industry as a typical example of the impact of resale price maintenance on small business. Do the managers of such small concerns believe they could have grown and prospered if they had been required to price their merchandise at the same levels as their large competitors? What do they think the enactment of resale price maintenance legislation would have on their future profit and survival situation?

THE DEVELOPMENT OF COOPERATIVE RETAILING

We respectfully suggest that retailers who favor this proposal should take a new look at the umbrella they would be creating to stim-

ulate and accelerate the development of cooperative distribution of the products they sell.

Farm supply cooperatives started on a small scale, in most cases two or three decades ago. They have grown steadily. No one could have assumed they would become the large-scale distributors they have become today. In 1961 there were 3,297 farm supply cooperatives with 3,600,000 members, with an annual business of $2.4 billion. These cooperatives supply farmers with petroleum products, tires, farm machinery, seed, feed, fertilizer, building materials, household appliances, pesticides, hardware and numerous other products. Their development stems from their ability to reduce retail and other distribution costs. Farm supply cooperatives are still growing. Their growth and an expansion in the products they distribute would be accelerated by the enactment of national resale price maintenance legislation.

Whatever the arguments may be for and against the manner in which insurance premiums have been determined, it is a fact that the growth of cooperative and mutual insurance companies was made possible by rate-fixing practices of insurance companies in cooperation with State insurance regulatory agencies. In effect they held an umbrella over the heads of cooperatives. The growth of cooperative and mutual insurance companies in recent decades has been phenomenal. Today they serve most farmers' needs, as well as millions of other participating members. They are still growing, and rapidly. No one could have anticipated this development two decades ago. It would appear that anyone who assumes that the fixing of margins in retail distribution will not be followed by a variety of economic developments to avoid such fixed margins would be disregarding the experience of the past.

In the United States at the present time—

consumers have organized about 1,000 retailer consumer goods businesses to serve not only themselves, but other families with food, drugs, hardware, clothing, and household supplies.

(This quotation and the statistical information in this section is from "Cooperatives U.S.A." published by the Cooperative League of the U.S.A.)

No information is available concerning the total amount of business of these consumer cooperatives. But information is available concerning the growth of one segment of this group, what are termed "major co-op consumer goods centers," in effect neighborhood shopping centers. In 1951 there were 22 such organizations with a total business of $21 million. In 1961 there were 45 such organizations with a total business of $94 million. This development is still small, but it is growing. This development has been facilitated by State resale price maintenance laws. The growth of consumer cooperatives and their expansion into other lines would be tremendously accelerated by the enactment of national resale price maintenance legislation. The potential of this development should not be discounted. Major changes in economic organization are often forecast by small beginnings.

THE INTEREST OF MANUFACTURERS

It is argued that manufacturers have a proprietary right in their products after they are sold to others that warrants legislation to

protect such right by prohibiting sales below prices fixed by the manufacturers.

We do not concur that such a right should be established, or that manufacturers should be given authority to prevent competition at the retail level from benefiting consumers of their products.

When a manufacturer transfers ownership to others, the risk of loss also passes to the new owners, who should therefore have the right to protect their interest by such pricing policy as they see fit to adopt.

If it were a fact that the reputation of brand name products were damaged by competitive pricing, the reputation of thousands of non-fair-traded items would be impaired by such practice. We do not believe this is a demonstrated fact. We have not noted any broad swell of support from manufacturers for the enactment of resale price maintenance legislation.

For example, few if any food products are fair traded at the present time. But the reputation of the thousands of branded food products has not been harmed by the fact that grocery stores engage in sales of such products. We do not believe any resale price fixing legislation is needed either to protect the food manufacturers' reputation or to enhance the earnings of grocery chains.

CONFLICT WITH FREE ENTERPRISE CONCEPTS

The concept of resale price maintenance is not, in our view, in accord with the principles of a free competitive enterprise system. It is a fundamental defense of this system that competition compels the passing on to consumers of any savings made possible by lower distribution costs.

We believe resale price maintenance practices deny the consumer a right and an opportunity to share in any savings made possible by lower cost merchandising.

Many consumers are content to shop in less commodious stores with poorer service and less convenient location if by such means they are able to buy cheaper. The consumer who wishes to save money in this manner should not be denied the right and opportunity to do so.

The argument that the consumer should have protection against loss-leader sales is not in our opinion appropriate to consideration of this bill. This is not loss-leader legislation. It is legislation to prohibit any price reduction. All price reductions are not loss leaders.

We believe that the disciplines of the competitive system are essential guarantees of consumers' interests. Competition should be applicable to distribution margins as well as manufacturer' prices. The competitive principle contributes to the vitality of our economic system by providing a premium for developing new and more efficient ways of doing business.

STATE LAW WOULD BE OVERRIDDEN

Finally, we submit that the enactment of resale price maintenance legislation would override State authority, State law and State constitutions.

Despite the persistent pressures of advocates of resale price maintenance some States have refused to enact resale price legislation. In other cases such statutes have been held to be in violation of State constitutions. The enactment of overriding Federal law would constitute one more major step toward subordinating State to Federal law.

For these reasons we respectfully recommend that Federal resale price maintenance legislation incorporated in bills under consideration by the committee not be enacted.

Thank you for this opportunity of appearing, sir.

Mr. STAGGERS. Thank you, Mr. Triggs.

Mr. Dingell, do you have any questions?

Mr. DINGELL. Nothing except to thank Mr. Triggs for a very fine statement and for his patience in waiting until this late date to be heard. I am personally very grateful to you, sir.

Mr. STAGGERS Mr. Glenn.

Mr. GLENN. Mr. Triggs, are you an economist, by any chance?

Mr. TRIGGS. I do not call myself an economist; I have a good deal of economic training.

Mr. GLENN. I notice on page 2 you speak of the relentless upward trend in the Consumer Price Index.

Mr. TRIGGS. Yes, sir.

Mr. GLENN. Is this so? Is it a relentless upward trend that we are going through?

Mr. TRIGGS. Yes. For 92 consecutive months the Consumer Price Index has advanced above the level of the corresponding month in the preceding year. Advances are not major; they are 1 or 2 percent per year, but it is a continuing relentless upward trend. And I fear that it is going to continue for some time into the future.

This could certainly be accelerated by the enactment of this proposal.

Mr. GLENN. And, of course, the farmers get help from the Federal Government. Do you not think the small businessman, in turn, should have some help, similar to what we give the farmers?

Mr. TRIGGS. We are not opposed to any and all legislation that would help the small businessman. I do not think this bill will do it. I think this is economic suicide for the small businessman.

Mr. GLENN. Thank you very much.

That is all, Mr. Chairman.

Mr. STAGGERS. Mr. Van Deerlin.

Mr. VAN DEERLIN. On the subject of the farmers getting help, I believe the Farm Bureau Federation holds views on this subject somewhat at variance with those of the Farmers Union?

Mr. TRIGGS. Yes, sir.

Mr. VAN DEERLIN. However, you seem to be presenting a united front on this legislation.

Mr. TRIGGS. It is a real pleasure to be on the same side as the AFL–CIO and the National Farmers Union. We do not often have this opportunity, but in a number of instances we do.

Mr. VAN DEERLIN. Would you say that this places the quality stabilization bill in a very special category of importance with the farmers of America?

Mr. TRIGGS. Yes. We feel it is of vital importance. We think that the bill would tamper with the basic economic system that functions

well. Even though we recognize the problems of the small businessman, they are not created by the lack of fair trade pricing or quality stabilization pricing; this is a complicated subject that I would not try to go into at great length.

Mr. VAN DEERLIN. Thank you.

Mr. STAGGERS. Mr. Keith.

Mr. KEITH. Mr. Chairman, glad to see you, Mr. Triggs.

This, I do not feel, is Government assistance; it is permissive—if it is passed, it would permit a manufacturer to market his goods without giving the buyer; that is, the wholesaler a completely clear title. If the retailer did not live up to the agreements that had been entered into with the manufacturer which supplies the goods, the manufacturer could recapture them. The Government would have a very small role in this whole operation, as I see it. This is in contrast to fair trade legislation, where the governmental agencies might be expected to play a much larger role in enforcement.

Mr. TRIGGS. Yes; I agree with that.

This is not basically a Government program. Government would be involved in the sense that there would undoubtedly be numerous court actions; that would be about the extent of it.

Mr. KEITH. Yes.

Now, the Government is involved in other price-fixing arrangements of an industrywide nature, and they not only are responsible for determining what the price shall be, but in effect make up a substantial portion of the cost between what would have been the normal market and what is the maintained market.

There is a third type of approach—that of marketing orders.

Do you approve of marketing orders?

Mr. TRIGGS. Well, your first question; I do not think the experience with price fixing in these other fields has demonstrated that this is a practice which has desirable results either in the farm program field or in the transportation area.

Now, to come back to your second question——

Mr. KEITH. Do you approve of marketing orders?

Mr. TRIGGS. We approve of marketing orders where they are locally administered, not nationwide; where they do not provide for taking from the producer large amounts of money which are then used for trade promotion and surplus handling efforts.

The most successful marketing orders outside of the milk field, which is a special field, are those which involve grower regulation of the quality of the product moving to market, and to some extent regulation of the flow of that commodity. Such marketing orders have not dealt with the question of price.

Mr. KEITH. I am inclined to agree with many of the critics of this legislation insofar as its potential failure to accomplish the security for the small businessman that he hopes to get. I think that the private brands in many instances will defeat the objectives for which some of them hope.

But it does seems to me that there is certainly some constitutional right of a manufacturer to determine the conditions of the sales of the products of his enterprise.

Mr. TRIGGS. Well, I do not know that I would entirely disagree with your generalization. I would disagree that the manufacturer should

have a right to fix the retail price. This is in effect saying to the consumers of his products that they shall not have the benefit of competition in the retail distribution of those products. We do not think this is a right the manufacturers should have; and actually I do not think very many of them want it.

But, of course, if we get such legislation, I expect that many of them will resort to it.

Mr. KEITH. Well, I do not look at it that way. As I have watched the subject unfold, at these hearings, I do not see that it is going to result in frustrating competition. The manufacturers will still compete with varying lines, and Gillette will still compete with Schick.

Mr. TRIGGS. We would not testify that no competition would exist. Certainly I think there would be competition. There would be a lesser degree of competition.

Competition is not a thing that either exists or does not exist; it is a question of degree, and competition in retail markets would be eliminated by the enactment of the bill.

Mr. KEITH. In your opinion?

Mr. TRIGGS. Yes, sir. I do not see how you can avoid that conclusion, though.

Mr. KEITH. In retail markets?

Mr. TRIGGS. Yes.

Mr. KEITH. I would think that some stores would be run more efficiently than others; they would simply be paying the same price for their goods and marketing them at the same price, but there would still be competition and management and other matters of merchandizing.

Mr. TRIGGS. Yes; there would still exist some measure of competition except in retail market pricing.

I suspect that competition, if this bill were enacted, would come into the picture in different ways.

For example, I have here a clipping from the Washington Post. If I take this to Peoples Drug Store and buy $3 worth of goods, I get a hundred extra trading stamps. If I buy $6 worth of goods, I get 225 extra trading stamps. This kind of competition by the big mass merchandising companies will continue and be accelerated. I think that it would be to the disadvantage of small business.

Mr. KEITH. As I said, I am not convinced that a price-fixing job is what the proponents want, but I do not yet see the constitutional objections that were applicable in the case of this bill as such.

Mr. TRIGGS. We have not made the constitutional argument.

Mr. KEITH. Thank you, Mr. Chairman.

Mr. STAGGERS. Thank you, Mr. Triggs.

Mr. TRIGGS. Thank you, Mr. Chairman; we appreciate the opportunity of appearing before you.

Mr. STAGGERS. This concludes our list of witnesses for today.

So the committee will stand adjourned until tomorrow at 10 o'clock.

(Whereupon, at 11:25 a.m., the subcommittee adjourned, to reconvene at 10 a.m., Wednesday, May 15, 1963.)

QUALITY STABILIZATION—1963

WEDNESDAY, MAY 15, 1963

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

The subcommittee met, pursuant to recess, at 10 a.m., in room 1333, Longworth House Office Building, Hon. John D. Dingell presiding.

Mr. DINGELL. The Subcommittee on Commerce and Finance of the House Interstate and Foreign Commerce Committee will come to order.

This morning we are considering H.R. 3669, and continuing hearings on the quality stabilization bill.

Our first witness this morning is Col. William R. Hutton, of the National Council of Senior Citizens.

Colonel Hutton, it is a pleasure to welcome you to the committee.

STATEMENT OF WILLIAM R. HUTTON, DEPUTY DIRECTOR, NATIONAL COUNCIL OF SENIOR CITIZENS, INC., WASHINGTON, D.C.

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

I am very glad to have this opportunity to present the views of the National Council of Senior Citizens with respect to this bill, H.R. 3669.

The council is a fast-growing organization of more than 1,500,000 older people, including individual members and the membership of some 1,500 affiliated yet independent older peoples' clubs throughout the United States. Its national headquarters are located at 1627 K Street, NW., Washington, D.C.

The president of the National Council of Senior Citizens is Aime J. Forand, who for many years prior to his retirement in 1960 because of ill health, was a Member of Congress of the United States and a distinguished colleague and friend of members of this committee. I regret very much that Mr. Forand's current state of health does not permit him to be here today.

The National Council of Senior Citizens is perhaps better known to the public at large as the outspoken champion of the principle of provision of health care for the aged through social security. However, to our membership and to many others, we are also well known for the efforts we are making to increase community and national awareness of many problems of older people.

Though we seek to focus national attention on the unmet needs and the untapped potentials of our senior citizens we do not wish to plead their cause as a special interest or group. I am quoting from

the constitution of the national council, adopted at the founding convention on May 25, 1962, when I say that our objective is—

to promote the interests of senior citizens in the United States in harmony with the national interest.

The headquarters of the national council is pledged to act as a clearinghouse for the exchange of information, ideas, and experiences among affiiated members and groups. Under the constitution we are directed to engage in fact finding and analysis of issues, to publish the results of such studies, and to provide a responsible and articulate voice for senior citizens.

It is under these directives that I appear here today, then, to express the serious concern of our individual members and affiliated clubs on the so-called Quality Stabilization Act. Our membership is overwhelmingly convinced that the net result of H.R. 3669 would be to make price fixing legal on a nationwide basis. It would cause all consumers to pay higher fixed prices for many products which are needed for daily living, and the older people, living on reduced incomes, would be the hardest hit of all.

We are grateful for the opportunity to express our views on this bill and for your kindness in listening to them, because powerful forces—with seemingly unlimited financial resources—are ranged against America's older people in regard to two important legislative proposals now before the 88th Congress.

The pleas of the elderly in support of the desperately needed measure to provide hospital insurance through social security are frequently drowned out by powerful propaganda from some of the same financial sources which, while they are opposing the proposed Hospital Insurance Act, are promoting the enactment of H.R. 3669 which will further increase the already overburdensome cost of medical care for older people.

Mr. DINGELL. I notice the National Association of Retail Druggists have joined the undertakers in opposition to the proposal for hospitalization for the aged group.

Mr. HUTTON. That is right.

Now, at a time when there is a general consensus that the medical problems of the aged cannot be ignored much longer, it is inconceivable to members of the National Council of Senior Citizens that this Congress of elected representatives of the people should wish to consider the enactment of legislation which would add still more misery to their already intolerable burden.

Half of our retired people in America have almost no other income other than their social security payments—averaging $70 per month per person—and they have little in the way of savings. This is hardly enough to provide for basic food, clothing, and housing.

Our members and clubs are located in many States. Some live in States with so-called fair trade laws and some live in so-called free trade States. Others live in States where such laws have been declared invalid as applied to "nonsigner" provisions.

Most of our older people have had experience of fair trade since it was originally spawned by wholesale and retail merchant associations—primarily the National Association of Retail Druggists—in the depression days. They were grateful to see the proponents of resale

price maintenance receive one setback after another since the end of World War II, because they are convinced that fair trade or price-fixing laws work to the detriment of both the consumer and the businessmen purportedly protected by them.

The maintenance of artificially high consumer prices has been exposed in State after State. In States which outlawed fair trade the immediate result was that prices settled in the competitive market at about 20 percent lower than the former fair trade prices.

In many previous hearings on this type of legislation, responsible agencies of Government have frequently demonstrated how much more the consumer must pay in fair trade States than in non-fair-trade States.

To get a rough idea of what the enactment of this bill would mean in higher consumer prices, we followed a procedure as explained by Dr. Stuart Lee, chairman of the department of economics, Geneva College, as explained on pages 415 and 416 of the hearings on fair trade, 1959, of this committee.

Based on a national retail sales of $234 billion for 1962 and an estimate that 7½ percent of these sales would be affected by the provisions of the proposed Quality Stabilization Act (H.R. 3669), a total of $17.5 billion consumer sales would be involved. The average differential between fair trade and non-fair-trade retail sales is 24 percent—but using a more conservative figure of 20 percent, it is clear that this bill, if enacted, would force consumer prices up by $3½ billion a year.

The national council wishes to explain that in asking our member clubs for their reaction to this bill we were somewhat dismayed by the fact that large segments of the general public know little or nothing about H.R. 3669 or its contents.

And we have had to undertake quite a job to get copies of the bill out to them so they discuss it.

Proponents of this bill claim to have spent hundreds of thousands of dollars—largely raised from manufacturers—"for intensified educational work and for conducting vigorous field contacts and repeated mailings to some hundreds of thousands of people who must communicate and activate others to communicate with their lawmakers in Washington."

We venture to suggest, Mr. Chairman, that if but a small fraction of the money purported spent in this so-called education program had sought to spell out to the public the actual contents of the bill, this committee might be sitting today knee-deep in protests.

What has happened to the great spirit of free enterprise which made America great—our senior citizens ask us—when it becomes necessary to seek to legalize nationwide price fixing through a bill which is by far the worst of its type to be brought before Congress?

H.R. 3669 flies in the face of our antitrust laws and the probability is that in seeking to ram this measure down the throats of States which have rejected fair trade laws, the measure is unconstitutional.

The National Council of Senior Citizens intends to support all measures which proclaim a desire to attack deceptive practices, and we commend the activities of the Federal Trade Commission and the

efforts of many States themselves to deal with these deceptions. But we doubt whether this bill will do much to help in this regard.

We noted that President Kennedy, in his special message to Congress on aiding our senior citizens, dated February 21, urged that Congress extend the provisions of the Food, Drug, and Cosmetic Act of 1938 to include testing of the safety and effectiveness of therapeutic devices, to extend existing requirements for label warnings and to include household articles which are subject to the Food, Drug, and Cosmetic Act and to extend adequate factory inspections to cover foods, over-the-counter drugs, devices, and cosmetics.

In this message, the President also said that the Secretary of Health, Education, and Welfare will take the necessary steps to expand measures to supply consumers, particularly aged consumers, with information which will enable them to make more informed choices in purchasing foods and drugs.

In these, and other measures, and in the general spirit of competitive trade, we believe we shall find the best answer to deceptive practices and the improved quality of goods and products.

In fact, the title to H.R. 3669 itself practices deception. The long-odorous words "fair trade" have been dropped and the words "quality stabilization" added for improved propaganda effect.

Our senior citizens clubs who have commented on the bill are asking: Who is for it? All rights are reserved exclusively for the national manufacturers and distributors, those large business enterprises which are the owners of brands. It does not give any rights of protection whatsoever to small business.

It is common knowledge that the large national chains have much greater influence with the national manufacturers than the small retailers. They have a wider range to offer shoppers. If prices are fixed nationally, there will be less inducement for the consumer to shop around; small business will suffer.

It will be a sad day for the people of the United States when Congress enacts a measure which will raise prices of goods rather than lower them. It will be a desperate day for the older people of America living on reduced incomes and particularly for those millions of elderly citizens who live on less than $20 a week. For it is well known that this law will vitally affect the prices of goods and products which are needed for maintenance of good health.

Not all of these items are offered solely on prescription; and while we note that H.R. 3669 exempts prescription drugs, we are extremely concerned that the companion measure introduced into the Senate does not include this exemption. What might happen if this bill should ever get to a conference?

Older people use many more drugs and other medications for health needs—on prescriptions and without prescription—than younger people. In their efforts to make ends meet, many needy senior citizens have taken advantage of a number of projects introduced in several States whereby senior citizens are granted a discount on drugs ranging from 10 to 25 percent. Enactment of H.R. 3669 would not only forbid these discounts—for they are largely on branded products—but would actually raise prices beyond the current level.

This legislation does not answer any of the many problems of marketing; it would probably flood the Federal courts with litigation. It

will create more problems than it will solve. We urge its rejection by the members of this committee.

Mr. Chairman, with your permission, I would like to include some of the individual comments on H.R. 3669 which have reached us from leaders of affiliated clubs of the national council from several States.

I want to inject here another statement, that, in the course of the last few weeks and for weeks ahead now, State councils are holding conventions and this committee will be forwarded resolutions opposing the Quality Stabilization Act from these councils as they are passed in their various conventions.

If this proposal (H.R. 3669) is enacted into law, it will place the fate of the consumer to the tender mercy of the powerful economic tycoons. It will mean economic hardship for masses for the sole benefit of the privileged few who falsely profess support of our competitive free enterprise system. It will mean the end of our free enterprise system and substitute a fixed-price system controlled by big corporations, cartels, and trusts. The defeat of this legislation is important to every man, woman, and child who is a consumer of our industrial products.

This has reached us from Nicholas P. Dapore, and he has asked me to submit it to you, who is the president of the Sun Coast Council of Senior Citizens in the St. Petersburg area of Florida; that is, incidentally, the area of highest incidence of senior citizens in the United States and has a membership of about 15,000 senior citizens.

We are opposed to this bill because the American free enterprise system is basically opposed to price control. Under this bill the manufacturers could set the price for goods at will.

And this from Herman Stassfurth, president of the Pensioners Club of Lakewood, Ohio. Another quote:

Our investigations suggest that most small businessmen do not desire this legislation (H.R. 3669). It would deprive the States of the right to decide whether or not price-fixing laws shall prevail within their borders. It would cost consumers millions of dollars in higher prices and would have a severe inflationary effect.

this from Jack Ossofsky, Congress of Senior Citizens, New York City, a group of about 20,000 members and about 50 clubs.

We cannot find any demand by the public for the enactment of such legislation. H.R. 3669 is being promoted by special interests without any regard for the welfare of the public and merely to protect the profit margins for retailers and distributors unwilling to meet the pressure of competition.

This from Guy Fain, president of the National Association of Retired & Veteran Railway Employees, Glendale, Ohio, an organization of more than 98,000 senior citizens.

This measure (H.R. 3669) would seriously affect plans to allow special discounts to members of Senior Citizens Clubs.

This is from Mrs. Pearl McIver, the retired Director of Nursing, U.S. Public Health Service, Bethesda, Md., and one of our members of the Council of the Greater Washington Area of Senior Citizens.

Instead of free enterprise, the very forces opposed to hospital insurance for the aged under social security want Government protection for monopolistic practices.

This from Jacob Gold, president of the National Association of Jewish Homes for the Aged in Chicago.

Another:

H.R. 3669 cannot fail to result in increased prices for consumers on all branded goods. It will not benefit the working class people of this Nation and will work a serious injustice on older Americans who barely exist on fixed incomes.

This from Peter Austin, who was this weekend elected president of the 40,000-member Florida State Council of Senior Citizens.

The Detroit—

this might interest you particularly, Mr. Chairman:

The Detroit Metropolitan Council of Senior Citizens has just published a statement on the six basic needs of senior citizens. The statement deplores the rising cost of food, clothing, shelter, drugs, and other necessities, and calls for the tax relief for senior citizens. Certainly H.R. 3669 will only add further to our cost of living. Please work hard to defeat this bill.

This from John Fitzpatrick, Secretary, UAW Detroit Council of Senior Citizens, 8000 East Jefferson Avenue, Detroit, Mich.

Mr. DINGELL. The Chair will observe that Mr. Fitzpatrick is not only a constituent of the chairman who is presiding today, but also a very good friend of mine. I have known him with great affection for many years.

Also, I have so known Dave Miller, who is the next person you are going to quote—grand people.

Mr. HUTTON. Yes, sir. They are both very fine leaders of this wonderful council. It has been able to attract wonderful people throughout the land. And these are outstanding personalities in your State in the senior citizen movement.

On behalf of the UAW Retired Workers Council, representing 50,000 retirees, which has tried so hard to reduce cost of everyday living for retirees in Detroit, we oppose H.R. 3669 which can only add further to costs of food, shelter, clothing, drugs, and other essentials in our lives.

This from Dave Miller, UAW Retired Workers Council, Detroit.

And, finally, from Pittsburgh—well, McKeesport, Pa., just outside of Pittsburgh:

This bill is not only a consumer-price-increase bill, but it is an anti-free-enterprise bill. It is sad to realize that many retail associations have been pressured by the National Association of Retail Druggists into supporting a bill which will kill free enterprise in trademarked goods. While this bill, if enacted, would create hardships on all the people of the United States, the heaviest burden would fall on old folks retired on pitifully small fixed incomes.

This from Robert Baron, coordinator, Pensioners' Club, McKeesport, Pa.

Now, since we have taken an interest in fighting this bill, Mr. Chairman, a number of articles have appeared in national newspapers. I might say that these articles were not the subject of press releases in any way by the national council, and we are just gratified—we never thought we would get support from some of these sources, as a matter of fact, who have come in.

But I would like to perhaps submit these for the record—an editorial in the New York World Telegram of May 2 on "Quality Price Fixing."

From the Washington Daily News of May 8, 1963, on "'Quality' Price Fixing."

From the New York Herald Tribune, United Press International, article: "'Fair Trade' Bill Fought By Elderly"; this one dated April 29.

"'Senior Citizens' Fighting Bill to OK Price Fixing," in the Bedford (Pa.) Gazette of April 29.

In the Philadelphia Bulletin: "Senior Citizens Oppose Bill for Retail Price Floor"—April 30.

"'Quality' Price Fixing"—Pittsburgh Press, Pittsburgh, Pa., May 1, 1963.

Cincinnati (Ohio) Post Times Star, April 30: "Minimum Price Tag Protested."

"Senior Citizens Oppose a Bill to Set Retail Prices"—Chicago Sun Times, April 29.

"Aged Group Hits Price-Prop Plan"—Louisville (Ky.) Courier Journal.

Dayton (Ohio) Journal-Herald, April 29: "Senior Citizens Fight Price-Setting Bill."

Sarasota (Fla.) Herald Tribune, April 29: "Senior Citizens Get Into Price Bill Act."

"'Quality' Price Fixing"—Denver, Colo., Rocky Mountain News, May 2.

St. Petersburg (Fla.) Times: "Price-Fixing Plan Target of Senior."

New York World Telegram: "Senior Citizens Fight Minimum Price Plan"—April 29.

"'Quality' Price Fixing"—in the Houston (Tex.) Press, May 2, 1963.

Knoxville (Tenn.) News Sentinel, May 1, 1963: "'Quality' Price Fixing."

And, finally, an article by Sidney Margolius, a very fine commentator on consumer prices in The Machinist, dated April 11, 1963: "'Fair Trade' Under New Name."

If I can submit these for the record, Mr. Chairman?

Mr. DINGELL. Without objection, they will be inserted in the record at this point.

Mr. HUTTON. Thank you.

(The newspaper articles referred to follow:)

[From the New York World-Telegram, May 2, 1963]

QUALITY PRICE FIXING

When the National Council of Senior Citizens was organized a couple of years ago, its chief aim was to push for something like President Kennedy's medicare program.

Now this group has added another purpose: it is out to defeat a price-fixing bill presently before the House Commerce Committee.

This is the perennial fair trade measure, dressed up as a quality stabilization bill. The NCSC probably can do more to help many of its members—it claims 1.5 million—by this action than by pushing medicare.

The intent of the quality stabilization bill is to fix prices—at quality levels, of course.

Congressman Emanuel Celler, chairman of the House Judiciary Committee, testified on this point last week.

Maryland has a so-called fair trade law. The District of Columbia doesn't.

Celler said he went shopping in Maryland for toothpaste, aspirin, insulin, and other drugs. He paid $10.89 for six items. Then he purchased the exact same items in the District of Columbia—total price, $7.20.

This prevention of price competition is precisely the purpose of the quality stabilization bill, despite the "fog of euphemisms," as Celler described it, in which it is garbed.

In the elderly years, drug prices become vital items.

But this bill would apply to everything, so long as the manufacturer wanted to fix the prices for his retailers.

And this price fixing would have the law behind it. No wonder the National Council of Senior Citizens is alarmed.

[From the Washington Daily News, May 8, 1963]

"QUALITY" PRICE FIXING

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[From the New York Herald Tribune, Apr. 29, 1963]

"FAIR TRADE" BILL FOUGHT BY ELDERLY

(United Press International)

WASHINGTON.—The National Council of Senior Citizens has quietly thrown its resources into a fight against legisaltion that would allow manufacturers to set minimum retail prices at which their brand-name products can be sold throughout the country.

The legislation has the backing of organized druggists, jewelers, clothing retailers, and other small businesses. They contend that it is needed to protect independent retailers against unfair price cutting by discount houses and other competitors.

In throwing its weight against the proposal the council broadened the purpose for which it was created in 1960. The initial aim was to rally elderly persons behind President Kennedy's controversial proposal to provide hospitalization insurance through social security.

[From the Bedford, Pa., Gazette, Apr. 29, 1963]

SMALL BUSINESS PUSHES MOVE—"SENIOR CITIZENS" FIGHTING BILL TO OK PRICE FIXING

WASHINGTON.—The National Council of Senior Citizens has quietly thrown its resources into a fight against legislation that would allow manufacturers to set

minimum retail prices at which their brand-name products can be sold throughout the country.

The legislation has the powerful backing of organized druggists, jewelers, clothing retailers, and other small business. They contend that if it is needed to protect independent retailers against unfair price-cutting by discount houses and other competitiors.

In throwing its weight against the proposal, the National Council of Senior Citizens had broadened the original purpose for which it was created in 1960. The initial aim was simply to rally elderly persons behind President Kennedy's controversial proposal to provide hospitalization insurance through the social security program.

William R. Hutton, deputy director of the organization, contends that enactment of the resale price maintenance bill would "further increase the already overburdensome cost of medical care for older people."

"The pleas of the elderly in support of the desperately needed measure to provide hospital insurance through social security are frequently drowned out by powerful propaganda from some of the same financial sources which * * * are promoting this new bill," he said.

The price maintenance bill is pending before the House Commerce Committee. Hutton plans to appear before that group as a witness soon to set forth the objections of his group.

Although the pending bill would exempt prescription drugs, Hutton argues that older people use many drugs—on prescription and without prescription. Moreover, he says that enactment of the legislation would outlaw a procedure under which elderly persons in several States are given a discount on drugs ranging from 10 to 25 percent. The bill, he said, "would not only forbid these discounts—but would actually raise prices beyond the current level."

[From the Philadelphia, Pa., Bulletin, Apr. 30, 1963]

SENIOR CITIZENS OPPOSE BILL FOR RETAIL PRICE FLOOR

WASHINGTON, April 30.—The National Council of Senior Citizens is joining the fight against legislation that would allow manufacturers to set minimum retail prices on their brand-name produces sold throughout the country.

The legislation has the support of organized druggists, jewelers, clothing retailers, and other small businessmen. They contend that it is needed to protect independent retailers against unfair price cutting by discount houses.

In opposing the legislation, the National Council of Senior Citizens had broadened the original purpose for which it was created in 1960. The initial aim was to rally elderly persons behind President Kennedy's controversial proposal to provide hospitalization insurance through the social security program.

The price maintenance bill is pending before the House Commerce Committee.

[From the Philadelphia, Pa., News, Apr. 29, 1963]

THE NEWS AROUND THE WORLD

WASHINGTON

Supreme Court agrees to hear arguments next fall on whether Mississippi Governor Ross R. Barnett is entitled to a jury trial on Federal criminal contempt charges stemming from the University of Mississippi integration riots.

Senator Jacob K. Javits, Republican, of New York, calls on President Kennedy to tell Nation if his hands are tied through any commitment with Russia on U.S. action toward Cuba. Javits also recommends that all channels of communications between Cuba and other American nations be cut off.

National Council of Senior Citizens quietly throws its resources into fight against legislation that would allow manufacturers to set minimum retail prices at which their brand-name products could be sold.

LAOS

Pro-Communist Pathet Lao leader Prince Souphanouvong renews his charges that United States is flying rightwing troops to Plain of Jars and that some have attacked Communist positions.

[From the Pittsburgh, Pa., Press, May 1, 1963]

"QUALITY" PRICE FIXING

When the National Council of Senior Citizens was organized a couple of years ago its chief aim was to push for something like President Kennedy's medicare program.

Now this group has added another purpose: It is out to defeat a price-fixing bill presently before the House Commerce Committee. This is the perennial fair-trade measure, dressed up as a quality stabilization bill. The NCSC probably can do more to help many of its members—it claims 1,500,000—by this action than by pushing medicare.

The intent of the quality stabilization bill is to fix prices—at quality levels, of course.

Representative Emanuel Celler, longtime chairman of the House Judiciary Committee, testified on this point last week.

Maryland has a so-called fair-trade law. The District of Columbia doesn't.

Mr. Celler said he went shopping in Maryland for toothpaste, aspirin, milk of magnesia, insulin, and other drugs. He paid $10.89 for six items. Then he purchased the exact same items in the District of Columbia—total price, $7.20.

This prevention of price competition is precisely the purpose of the quality stabilization bill, despite the "fog of euphemisms," as Mr. Celler described it, in which it is garbed.

In the elderly years drug prices become vital items. But this bill would apply to everything so long as the manufacturer wanted to fix the prices for his retailers. And this price fixing would have the law behind it. No wonder the National Council of Senior Citizens is alarmed.

[From the Cincinnati, Ohio, Post-Times Star, Apr. 30, 1963]

MINIMUM-PRICE TAG PROTESTED

WASHINGTON (UPI).—The National Council of Senior Citizens is joining the fight against legislation that would allow manufacturers to set minimum prices on their brand-name products sold throughout the country.

The legislation has the support of organized druggists, jewelers, clothing retailers, and other small business. They contend it is needed to protect independent retailers against unfair price cutting by discount houses and other competitors.

In throwing its weight against the proposal, the senior citizens council broadened the original purpose for which it was created in 1960. The initial aim was simply to rally elderly persons behind President Kennedy's controversial proposal to provide hospitalization insurance through the social security program.

[From the Chicago, Ill., Sun Times, Apr. 29, 1963]

SENIOR CITIZENS OPPOSE A BILL TO SET RETAIL PRICES

WASHINGTON (UPI).—The National Council of Senior Citizens has quietly thrown its resources into a fight against legislation that would allow manufacturers to set minimum retail prices at which their brand name products can be sold throughout the country.

The legislation has the powerful backing of organized druggists, jewelers, clothing retailers and other small business. They contend it is needed to protect independent retailers against unfair price cutting by discount houses and other competitors.

William R. Hutton, deputy director of the organization, contends that enactment of the resale price maintenance bill would "further increase the already overburdensome cost of medical care for older people."

The price maintenance bill is pending before the House Commerce Committee. Hutton plans to appear before that group as a witness soon to set forth the objections of his group.

[From the Louisville, Ky., Courier Journal, Apr. 29, 1963]

AGED GROUP HITS PRICE-PROP PLAN

(By Vincent J. Burke, United Press International)

WASHINGTON, April 28.—The National Council of Senior Citizens has quietly thrown its resources into a fight against legislation that would let manufacturers set minimum retail prices at which their brand name products can be sold throughout the country.

The legislation has the powerful backing of organized druggists, jewelers, clothing retailers, and other small business. They contend that it is needed to protect independent retailers against unfair price cutting by discount houses and other competitors.

The council created in 1960 to rally elderly persons behind President John F. Kennedy's controversial proposal to provide hospitalization insurance through the social security program. It now claims a membership of more than 1,500,000.

William R. Hutton, deputy director of the organization, contends that enactment of the resale price maintenance bill would "further increase the already overburdensome cost of medical care for older people." The bill is pending before the House Commerce Committee.

Although the bill would exempt prescription drugs, Hutton argues that older people use many drugs—on prescription and without prescription.

He says that enactment of the legislation would outlaw a procedure under which elderly persons in several States are given a discount on drugs ranging from 10 to 25 percent.

[From the Dayton, Ohio, Journal-Herald, Apr. 29, 1963]

SENIOR CITIZENS FIGHT PRICE-SETTING BILL

(By United Press International)

WASHINGTON.—The National Council of Senior Citizens has quietly thrown its resources into a fight against legislation that would allow manufacturers set minimum retail prices at which their brand name products can be sold throughout the country.

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"The pleas of the elderly in support of the desperately needed measure to provide hospital insurance through social security are frequently drowned out by powerful propaganda from some of the same financial sources which * * * are promoting this new bill," he said.

The price maintenance bill is pending before the House Commerce Committee. Hutton plans to appear before that group as a witness soon to set forth the objections of his group.

The council now claims a membership of more than 1,500,000 older people, including individual members and membership of some 1,500 affiliated older people's clubs throughout the country.

[From the Sarasota, Fla., Herald Tribune, Apr. 29, 1963]

GROUP WIDENS AIMS—SENIOR CITIZENS GET INTO PRICE BILL ACT

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[From the St. Petersburg, Fla., Times, Apr. 29, 1963]

COUNCIL BROADENS PURPOSE—PRICE-FIXING PLAN TARGET OF SENIORS

(Times wire services)

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William R. Hutton, deputy director of the council, contends that enactment of the resale price maintenance bill would "further increase the already overburdensome cost of medical care for older people."

[From the Denver, Colo., Rocky Mountain News, May 2, 1963]

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This prevention of price competition is precisely the purpose of the Quality Stabilization bill, despite the fog of euphemisms, as Celler described it, in which it is garbed.

In the elderly years, drug prices become vital items. But this bill would apply to everything, so long as the manufacturer wanted to fix the prices for his retailers. And this price fixing would have the law behind it. No wonder the National Council of Senior Citizens is alarmed.

[From the AMA News, Apr. 1, 1963]

Utah ruling: Drug discounts for elderly persons—or any special group—violate both the Utah unfair practices act and the Federal antitrust laws, Utah Attorney General A. Pratt Kessler said in an opinion issued at the request of the Utah Council on Aging. Two drugstore chains in the State have been granting 15-percent cash discounts on prescription drug prices to Utah residents 65 and over.

[From the New York World-Telegram, Apr. 29, 1963]

"TODAY'S WASHINGTON REPORT"—SENIOR CITIZENS FIGHT MINIMUM PRICE PLAN

The National Council of Senior Citizens is joining the fight against legislation that would allow manufacturers to set minimum retail prices on their brand-name products sold throughout the country.

The legislation has the support of organized druggists, jewelers, clothing retailers and other small business. The price maintenance bill is pending before the House Commerce Committee.

[From the Houston, Tex., Press, May 2, 1963]

"QUALITY" PRICE FIXING

When the National Council of Senior Citizens was organized a couple of years ago its chief aim was to push for something like President Kennedy's medicare program.

Now this group has added another purpose.

It is out to defeat a price-fixing bill presently before the House Commerce Committeee. This is the perennial fair trade measure, dressed up as a quality stabilization bill.

The NCSC probably can do more to help many of its members—it claims 1.5 million—by this action than by pushing medicare.

The intent of the quality stabilization bill is to fix prices—at quality levels, of course.

Congressman Emanuel Celler, long-time chairman of the House Judiciary Committee, testified on this point last week.

Maryland has a so-called fair trade law; the District of Columbia doesn't.

Mr. Celler said he went shopping in Maryland for toothpaste, aspirin, milk of magnesia, insulin, and other drugs. He paid $10.89 for six items. Then he purchased the exact same items in the District of Columbia—total price, $7.20.

This prevention of price competition is precisely the purpose of the quality stabilization bill, despite the fog of euphamisms, as Mr. Celler described it, in which it is garbed.

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[From the Knoxville, Tenn., News Sentinel, May 1, 1963]

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Maryland has a so-called fair trade law. The District of Columbia doesn't.

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[From the Machinist, Apr. 11, 1963]

"FAIR TRADE" UNDER NEW NAME

(By Sidney Margolius)

A new price-maintenance law is slipping through Congress unnoticed and unprotested by the public which would have to pay higher prices as the result. This was the frank warning sounded at the annual conference of the Council on Consumer Information in Washington recently, by a group of consumer-minded Congressmen.

The proposed measure is called the quality stabilization bill. It is really the old fair trade law under a new name, and fair trade itself is really price fixing. If passed quality stabilization would enable manufacturers to revoke the right of a retailer to sell their brand-name products if the retailer cut the prices.

"Quality stabilization" sounds like something desirable. But like the "right to work" name on antiunion legislation, it is an attempt to fool the public as to its real intent. In this case, the real intent is to limit competition among retailers, and require all retailers to sell a manufacturer's brand at the same price if the manufacturer so desires.

The reason some manufacturers and retailers, especially in the drug industry, are pushing to get this new law, is that the State fair trade laws have been declared unconstitutional in about half the States. In the other States, fair trade either was never enacted or is being ignored to a large extent by price-cutting retailers and manufacturers.

But quality stabilization could damage your pocketbook even more than the fair trade laws ever did, because it would make it even easier for manufacturers to fix prices. The manufacturer would not even have to seek price agreements with retailers State by State. His fixed price would apply in all States, including those that previously never had a fair trade law.

The effect on prices you pay would be drastic. Congressman John Dingell, Democrat, of Michigan, warned the educators and organizations at the consumer conference that a shopping survey by the U.S. Justice Department indicated that prices of such goods as household equipment could be raised as much as 27½ percent. Another serious effect would be to freeze prices of medicines at their present high levels.

The alarming fact is the speed at which the quality stabilization bill is moving through the U.S. House of Representatives with no protest from the public. The public itself has had no warning and does not realize the danger that has suddenly developed.

Congressman Dingell reported that he has had heavy mail from his own district in favor of the bill, but not a single letter in opposition. Congresswoman Leonor Sullivan, Democrat, of Missouri, also reported heavy mail in favor of the price-fixing measure but no opposition; Mrs. Sullivan warned that once the bill gets out of committee it will pass the House of Representatives.

Senators Estes Kefauver, Democrat, of Tennessee, and Lee Metcalf, Democrat, of Montana, also warned that the new price-fixing bill could be enacted before the public knew what had hit it, and that they too got heavy mail from businessmen against consumer legislation but little from consumers, supporting their own interests.

The quality stabilization bill is being sponsored by Representative Oren Harris, Democrat, of Arkansas, chairman of the House Interstate Commerce Commitee. He has been trying for some years to get a price-fixing law passed. His bill is known as H.R. 3669, but 20 other identical price-fixing bills also have been introduced by other Congressmen.

The critical stage will come late in April when a House Interstate Commerce subcommittee, headed by Representative Harley Staggers, Democrat, of West Virginia, holds hearings on it.

The Government agencies which have the responsibility for fighting price fixing of the things you buy, are strictly against such laws. The Federal Trade Commission, Justice Department, and Commerce Department all have attacked the quality stabilization bill as a price-boosting measure.

Lee Loevinger, Assistant Attorney General in Charge of the Antitrust Division, last year told a Senate Commerce subcommittee, that quality stabilization would let manufacturers fix prices at high, noncompetitive levels "calculated to yield what the traffic could bear." Moreover, under the proposed measure price fixing could be extended to fresh produce, canned goods, clothing, gasoline, building materials, even meat and potatoes, Loevinger warned.

Some retailers themselves are opposed to price-fixing laws. Writing in Home Furnishings Daily, Maurice M. Cohen, a leading Massachusetts retailer, pointed out that manufacturers would protect quality for their own sakes without the quality stabilization measure, and that even though appliance prices have been reduced by sharp competition, recent models have been improved.

The danger, however, is that several influential Senators often otherwise considered among the Senate liberals, do support price fixing. These include Hubert Humphrey, Democrat, of Minnesota, himself a former druggist; Mike Monroney, Democrat, of Oklahoma, a former furniture merchant, and William Proxmire, Democrat, of Wisconsin.

Thus, unwary shoppers may pay several dollars more for an iron under one name than for a similar iron under another name. In this case the manufacturer has worked out a way to fix prices on the theory that he still owns the merchandise even when it is in the hands of the retailer.

Mr. HUTTON. That concludes the statement of the National Council of Senior Citizens, sir.

Mr. DINGELL. Colonel Hutton, it was a privilege to have you before the committee this morning for this very fine statement.

Mr. Van Deerlin?

Mr. VAN DEERLIN. I agree, Mr. Chairman. I wonder only if Mr. Hutton might be induced to read all the statements that are submitted to this committee. He has the virtuosity of Charles Laughton.

Mr. HUTTON. Thank you very much, Mr. Van Deerlin.

Mr. DINGELL. Colonel, it was a privilege to have you with us this morning. We are most grateful to you for your help. We know you

have to catch a plane. We look forward to seeing you from time to time on matters of interest to your very fine organization.

Mr. HUTTON. Thank you very much, sir. I am very grateful for the opportunity.

Mr. DINGELL. The Chair notes the presence in the room this morning of our good friend and colleague, the Honorable John Dent, of Pennsylvania, who appears this morning to testify on this legislation. I am sure, on behalf of the committee, it would be appropriate for me to observe that you are not only welcome but highly regarded by the members of this committee for your high ability and dedication and purpose. It is indeed a pleasure to have you.

STATEMENT OF HON. JOHN DENT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. DENT. Thank you, Chairman John.

Members of the committee, I requested this time because I am a little disturbed. Perhaps my disturbance and worry goes deeper than the contents of this bill alone; it is because of related matters, I would say.

I am worried, too, that we are suffering from a disease in this country that seems to be bent upon weakening the entire structure.

I have always promoted, even as a member of the Senate of Pennsylvania for many years, legislation along the lines of the quality stabilization bill for what I feel to be obvious and yet very good reasons. I believe right now enactment of this bill is necessary as a hypodermic of penicillin to arrest some of the poison infesting our bloodstream of the national economy.

I cannot understand why many Americans can find reasons to condemn this bill by epithet; to bandy words, phrases, and semantics comparing quality stabilization with fair trade and price fixing, as though they were dirty words. The quality stabilization bill in actuality is no more fair trade or price fixing under the accepted understanding of those phrases than are wages and rents and phone bills, airplane and train fares, farm subsidies, gas, light, water, all utility fixed costs. Regardless of what anyone wants to call this precise and, I think simple, single-purpose bill, it is essential that it have its chance to stave off a fatal cancer gnawing at the very spinal cord of the Nation.

We are drifting into more and more unemployment—this in spite of figures; in spite of the efforts of Congress; in spite of the efforts of the local governments and alltime high investment by the Federal Government in local government for rehabilitation; in spite of every attempt made by the Federal Government to cure the growth of the cancer that has been gnawing at our employment for better than a decade now. In reality, unemployment is not receding, in spite of the fact that some sets of figures tend to show by percentages that it is. Because all you have to do is to take a list of the unemployed of a year ago, 2 years ago, 6 months ago, and now, and you will find that in the main the changes have been to a greater number of unemployed rather than a lesser.

Cheap prices, in my opinion, no matter where they start or where they are offered, cannot do anything but hurt an industrial community. Cheap prices as such are not healthy unless their cheapness car-

ries within it the ingredients of aiding the economy in both the production and the distribution of the product. Where the cheap price is created by reducing the contribution of the producer to the economy or the contribution of the distributor to the total economy, then that cheap price is no bargain.

In plain language, every bit of product in this country, whether it be a service, whether it be a consumer product, a utility product, or an industrial-commercial product, must carry its share of the national total economic need of the country.

And as I go along—and I am just roughing through this presentation so that you will have it—I would like to just talk in a commonsense fashion, if I can, and from my own economic viewpoint.

I can see very little logic in a $3.50 rubber worker or automobile worker, whom I now just heard is against this legislation.

Mr. DINGELL. If the gentleman will yield, I know the individual to whom he is referring. He is an old friend of mine and he happens to be a retired auto worker who is existing on social security pension with no other income. His entire income runs about $320 a month.

Mr. DENT. Well, the witness announced that an automobile worker or somebody was the president of it.

Mr. DINGELL. No; he is a retired auto worker. I just want to keep the record straight.

Mr. DENT. We will keep the record straight along that line, and right at this point say, as to the retirees, that most items that would come under this bill are not the items that are purchased daily in large sums by retired persons, because, if my memory serves me right, under the so-called old fair trade laws in the businesses my father was in, most of the fair-traded items were those used normally and in greater amount by the younger folks—maintaining and building a home and having a family of children to raise.

As to the retirees, they would be hit—probably they would call it "hit"—in the drug fields, and so on. And yet when you stop to think about it, most of the drugs that the old people buy are prescription drugs. And those drugs, as you know, are specifically exempted from this bill.

I do not believe that my regard for, my respect for, and my desire to help the older citizen is diminished by my support of this piece of legislation. These retirees should not be the prime witnesses arguing against this bill.

The prime witnesses against this bill are those who would eliminate a necessary aid and necessary share of the economic load of the country by eliminating the help required to properly service and properly distribute a reasonably priced product made by workmen paid reasonable wages.

I go back to the price structure. Let us talk about a $3.50 automobile worker or steel worker or rubber worker who feels that he has a so-called inherent right, which right is maintained under this legislation, to buy a cheap shirt. If this cheap shirt is made by a worker at 7 to 15 cents an hour in an area that we will not mention for the record at this point, how can the inequitably paid shirt worker in turn buy the product of the $3.50 automobile worker?

It is this vicious cycle that takes place when price alone becomes the determining factor in the distribution of goods. Price alone can-

not stand as an element in our economy that will build stability in the economy or build the growth rate in the economy.

Because, as we go along, we find that, through technical advancement, through automation and through the stabilization of production, we are able to produce more and more goods with less and less productive labor. Therefore we must find additional sources of employment—other than in the production of goods—in the fields of services, in the fields of wholesale and retail trade.

Now, if you will go back through our history, you will find that there has been a complete shift in the employment in the United States. Whereas the majority of workers or wage earners in the country and income makers at one time were producers of goods in the mines, the mills, and on the farms, we now find that the great majority of workers are not the producers of goods but are in reality the distributors, the service people, and the service professions and trades. And therefore the production of goods itself must be stabilized in such a manner that the rest of the economy does not fall flat if production does not carry its share of the load.

Under the quality stabilization bill you give to a manufacturer or a producer of goods, who wants to use this law, reasonable assurance that his trademarked product will receive fair treatment once it gets to the distributor and then from there to the consumer. All of us know what happens without this quality stabilization law.

I will give you an illustration, a perfect illustration. I do not make any bones about it. My wife, like every other American wife, looks for "bargains" and is fooled as many times as anybody else by the so-called discount ads.

Recently she wanted and bought for herself—of course, she was only the agent; I paid for it—she bought herself a dishwasher. Now, I know that dishwasher's source. I know the company that makes it. But it is sold by this firm for about $60 less than their top-quality product sold through independent dealers. However, she bought it because of the discount. Within 3 weeks there developed a little leak in it. She called the store where she purchased the dishwasher, and they sent their own so-called serviceman down. He looked it over, told her what was wrong with it, but refused to touch the machine, because when my wife bought it, she took it home and—oh, Johnny, do it yourself—I installed it.

Since I was not home at the time the leak developed, she called for a repairman. He would not touch the machine because he had not been paid to install it.

Now, if that trademarked product had been under the Quality Stabilization Act, it probably would not have cost my wife $16 to get a man out to fix that machine. With this law giving incentive to the manufacturer to protect his trademark, he probably would have had a guarantee period protecting the consumer against just such experiences.

My experiences are multiplied by the thousands over the United States, but most of the people injured by such treatment are not articulate enough to present their case, nor do they have the sounding board to present it to a Member of Congress or a group of Members of Congress.

Now, if people want to be fooled, then they can be. There has never been, during all the days of fair trade, any shortage of cheap-priced goods, either imitations, or products made by the very same companies who stabilized their price on their top-quality products.

Many big brand name manufacturers had—and still do—their own top-quality trademarked product which they stood behind, and then made hundreds of other models—perhaps of the same patterns and by the same manufacturing process—to be sold at a cheaper or a so-called discount rate. There's nothing wrong with that.

The danger—ever growing more serious—is that innocent people are lured to a store by the advertising of the top-quality brand name at a price of 20 or 30 percent lower than the regular price. The people go in. But in 9 times out of 10 the product advertised is either in short supply or out of sight. And you then buy a "similar" product, perhaps represented as made by the same company, but you will find that it is not the top-grade product. And for these reasons the companies have decided that for their own protection, and for the cost of experimentation, for the cost of research, and for the benefit of the consumer, and for the health of its distributive organization, the quality stabilization bill is needed.

Research can never be maintained in the low-cost product which only carries a manufacturer's cost plus a small profit over cost of manufacture.

At one time I represented the Pennsylvania Rubber Co., and we were the largest manufacturers of tennis balls in the world. Now, in our manufacture of tennis balls, all we did was change the stamp. As we finished Wright & Ditson orders, we went to Maynard or went to Reich or we went to WLS or to the Montgomery Ward order or to our own order. Our own tennis ball sold for approximately 20 percent more than any other tennis ball produced by us; and yet all had the same Australian felt, all were made by exactly the same process, and all had the same ingredients.

But why did ours sell for approximately 20 percent more? Because we had to maintain the experimentation, the research, the development, and reputation. Standing behind each product was our company's responsibility.

These other companies using the ball made by us paid nothing for research, paid nothing for development; they paid only for the price of that ball, whereas we had to assume the cost of research on our product.

The important point is that the consumer is not hurt by this. If he doesn't like the price of the Pennsylvania ball, he buys the Montgomery Ward ball. Our company knowing full well its ball was higher priced was willing to assume the risks of falling on its face. We were willing to take our chances of outmarketing, outpromoting, outmerchandising the people using the private label. And we succeeded. The only reason that there was a demand by distributive outlets for the private label product was that these outfits knew they couldn't be priced out of market by competition for that private label product. They had "exclusive" use of that private label name. They had "exclusive" protection from a brand being forced to compete with itself. That same protection is denied the national brand manu-

facturer today. The quality stabilization bill will give him that protection.

I know something about the suit industry, and I know that the same company that produces a national brand name suit that is sold for $85 nationally may produce 50 private label suits for other outlets that will sell the suits anywhere for $49, $59, $69, and on up. And the goods are exactly the same. For the national brand name product the buttons or the sewing thread might be different or maybe the lining might be different.

And remember, if the national brand name manufacturer prices his trademarked product out of range, he suffers. No one suffers from the quality stabilization bill; no customer is injured, because he can still buy merchandise other than national brand name products at the same prices that he is now paying.

Yes, quality stabilization will increase the price of certain products because they are depressed now because of loss-leader selling, but it will not increase prices to those who are buying the inferior products or the so-called economy-priced products today. Because that product will still be available. It always was; it still will be. The quality stabilization bill makes no change in this.

Have you ever been to the factory of a clothing manufacturer where they cut out 1,500 suits a day? Of the 1,500 suits, they may only take 100 for their own national trade name; the other 1,400 may flow through a dozen different lines. But they cut them together for reasons of economy.

When you compare the national brand name product with the private label, you will find hand tightening of nuts and bolts, or maybe a little bit better work on a Monel metal screw here instead of a galvanized. Or the liner in a particular product may have a better content of textile. These are the things that go into the refined top quality national brand name products.

But remember always that there is no exclusiveness in the United States of any product of manufacture. Every product in the United States is in competition. And if Westinghouse uses this quality stabilization act, Westinghouse must always consider General Electric, must always consider Frigidaire, must always consider its many competitors.

And, therefore, all Congress gives in quality stabilization is a little better product, protected for the consumer. Many of the big corporations will not use this law. They do not want quality stabilization. They would just as soon distribute as much junk as they can and go back, if they could, to the era we chased them out of. And that was a period of stupid economic thinking, in my opinion, a period in which we had planned obsolescence, in which we produced for the American people more junk by the square yard and by the ton than was ever produced in a civilized nation on the face of the earth.

And we filled every junkyard in the world—in the United States with refrigerators and stoves and automobiles that were produced for the junkyard—junkyard, not for consumer use. They held up as a rule only to the time of the final installment payment. And at about that time new ones were bought. But that was the "accepted" theory of economics that we went through.

We are now getting back to the fundamentals of sound economics and producing only goods for the market that the market will bear.

There are in this country enough people that will buy a product which they know will live up to its reputation and live up to its quality standards who will pay any differential in price. This does not deny those who want to buy the cheap products—cheap as to price and as to quality and cheap as to value—if that is what they want or can afford to buy.

Enactment of quality stabilization will not deny this group of people those types of product. They will get exactly what they are paying for today—a run of the mill product.

If they want it that way, they will still be able to get it that way. There has never been, as I said, any shortage, under any conditions, of any diversity of products in the United States—diversified as to price, quality, value, et cetera.

In the old days whenever you made a good mouse trap, the world beat a path to your door. Today, your imitator will be there first, and the consumer will have a cheaper quality mouse trap on the market at all times. But the quality product ought to be there for those who want quality.

This quality stabilization bill is not a guarantee to the producer, it is not a guarantee to the distributor—even if some distributors feel that this is their legislation. I take the postion that this is my legislation. This is my wife's legislaton. If she wants to buy a product stabilized as to quality and as to price she ought to have the right to do it. This bill will provide the incentives to the manufacturer to build better and better—not cheaper and cheaper.

Why do people buy Heinz catsup? Why? Maybe I pay a few cents more for Heinz. But it is stabilized as to quality throughout the year. They have their own price structure, and they keep it. They maintain it.

Only a few of the big companies stand behind their products today to any extent. They leave it in the hands of the distributors, and their guarantee is quite limited because they have no control over who will distribute their product. And if a legitimate smalltown dealer is forced into the position of cutting prices because of the large retailer in the big city close by in a so-called discount house, he cannot afford to give the service that that product rightfully needs. There are no foolproof inventions made by man yet.

Now I have heard this argument of the elder citizen, and I respect the elder citizen's viewpoint. But this bill does not affect the elder citizen. He will be able to buy the same wide range of products and pay the same that he is today.

There are some dealers who only want quality stabilization protection in order to guarantee that no matter who sells the brand name products they handle, that those products will not lose their word-of-mouth reputation. This reputation is basically what sells a product.

It is the same as that which sells you and me to the public in our district.

Both you and I know that we can advertise all we want as candidates, yet we cannot reach 10 percent of the people. If I try to see 30,000 people—a small percentage of the people in my district—from

one election to the other, that is all I would get done. But if I can see 5,000 and these 5,000 see another 50,000, and so on in turn, I can win. And for 30 years that is what I have done.

Now, I want to say to you that, in going through this particular bill, you cannot find a way—you cannot get a way, no matter how much langauge is used—to try to describe our economy or to alibi our failure to maintain a growth rate commensurate with our needs.

This economy of ours must rest upon five simple pillars. Every industrial economy must rest upon them. You cannot say that this is not an industrial economy, yet in every other area of our economy we have so-called price fixing, we have so-called quota limitations.

Try to sell a bushel of wheat under 224. Try to sell a bushel of corn. Try to sell any product that is subsidized by the Government or established in price. We have price fixing.

Try and buy a quart of milk in the State of Pennsylvania under the fixed price by the Pennsylvania Milk Commission.

The elder citizens talk about price fixing. We know that if they took the Pennsylvania Milk Commission out of its position of price fixing, that some merchants would sell milk probably for 3 to 5 cents a quart less. This I will guarantee you means more—means more to the elder citizen—than the price of an electric washing machine.

Now, these are the things that we want to consider: these five pillars must maintain and sustain the growth factors in our country.

What are the pillars we are talking about? We are talking about investment, we are talking about production, employment, consumption, and profit.

Without investment, there is no production. Without production, there is no employment. Without employment, there is no consumption. And without consumption there is no profit. And without profit there is no investment—and you can run around that merry-go-round from now to time eternal, and you will never get away from it.

What we are trying to do is grab a brass ring around here somewhere. Somehow this consumption thing has been pushed out of the way so that we have been running on four pillars. And you cannot operate on four pillars—you have to operate on five.

A six-cylinder car can operate on five, but it cannot operate right on five out of its six cylinders.

So, therefore, Mr. Chairman, I feel very much disturbed over the false information that has been going out. I feel very much disturbed over the great hiatus that has been built up by those who have no direct interest in either the distribution or the production of the goods. We find a mixed emotion in this thing. We find some labor unions for it, some labor unions against it, some farm groups for it——

Mr. DINGELL. Would the gentleman yield?

Mr. DENT. Yes.

Mr. DINGELL. Would he name the labor unions that are for it?

Mr. DENT. The whole Oklahoma AFL–CIO State organization just endorsed it.

Mr. DINGELL. They did?

Mr. DENT. Yes, sir.

And my own locals, incidentally. Of course, that might be blamed on me.

You know, if you want endorsements, they are easy to get. I do not think any of us need to—I mean none of us ever lack for reading material. I do not want to go through the procedure here of reading newspaper stories, because all I heard a few minutes ago from the previous witness were headlines. I heard him say that the Pennsylvania Bulletin says that so and so fights this bill. But what does it say it the column? Does it approve this bill or is it just a news item?

However, let me give you the endorsement of Dr. Joseph Link of Xavier University, if you want endorsements. He says:

Your cause is good and thoroughly American, antimonopolistic, antisocialistic, and pro-Christian.

We can get words of endorsement from anybody. If you want them, we can give them to you. I will fill the record with all kinds of praise for this bill. I can hire and pay for whatever you want; whatever testimony you wish, that is the kind I can give you.

Mr. DINGELL. Well, I say to the gentleman we have had a great abundance of paid witnesses on this subject before this committee.

Mr. DENT. A what?

Mr. DINGELL. I say to my good friend that we have had a great abundance of paid witnesses appearing on behalf of this legislation.

I do not mean to say that my friend is paid—he is an idealistic, thoroughly dedicated Member of the Congress, and I salute him as such.

Mr. DENT. I agree that I am not paid, and I am sorry for it. Because I think that perhaps I am doing a better job than some of them that you say are being paid. Because the fellow that you have paid can tomorrow be on the other side of the picture.

If you want endorsements—heck, I have got Rotary clubs, I have got Hon. Wright Patman, Capt. Eddie Rickenbacker, chambers of commerce—I have got the Glenview State Bank. Now, what the dickens—this is ridiculous.

What does a Congressman care what Kathleen Sabeta—whoever she is—says?

As far as getting the endorsement of any organization, Mr. Chairman, I have a great deal of confidence in you; I have known you ever since, I believe, you first started in the political arena, and I have a great deal of confidence in you. And I can say to you right now that, if this organization needs any endorsements, if they will allow me to sign you up, you will go get them. That is all there is to it.

There is nothing intended in this legislation except to be able to have a quality product that is not bastardized by somebody who has no interest whatsoever in the consumer or in the producer; his only interest is in that intermediate station that he occupies—to take off what profit he can, regardless of what happens before or after his having the product in his hands.

And that is all this bill is for—to see to it that Joe Smith, on Main Street, sells a refrigerator; he can service it because he has received a few pennies more and can stand behind it along with the manufacturer; that he will not be victimized in his business, nor will the consumer by those who used that same product to bring the people in, and then sell them any item under the sun with the leader that they have used in the good name, the good reputation of a legitimate producer of good goods in the United States.

And that is all I have to say, Mr. Chairman.

I would like to have my statement for the record, if it is all right.

Mr. DINGELL. Without objection, it is so ordered.

(The full text of the prepared statement of Mr. Dent follows:)

STATEMENT OF HON. JOHN DENT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, I've requested time to appear today because I'm very much worried—worried about the disease that continues to weaken our great country—and worried because again like last year, talk is taking the place of action to stall passage of a bill—the quality stabilization bill—that I deem absoutely necessary to be immediately enacted. I don't think it is a full cure for the disease. But I do know it is necessary now as a hypodermic of penicillin to arrest some of the poison infesting our bloodstream of national economy.

I simply can't understand why any Americans desire to condemn this bill by epithet; to bandy words, phrases and semantics comparing quality stabilization with fair trade and price fixing, as though they were dirty words. The quality stabilization bill—in actuality—is no more fair trade or price fixing under the accepted understanding of those phrases, than are wages, rents, phone bills, airplane and train fares, farm subsidies, gas, light, water, etc. But regardless of what anyone wants to call this precise—and I think simple single-purpose bill—it is essential that it have its chance to stave off a fatal cancer gnawing into the spinal cord of the Nation.

We are drifting into more and more unemployment. Over a thousand retail businesses are folding each day. It is a cancer. And except for this quality stabilization bill we are trying to cure the cancer without attacking the cause. We seem to have lost all understanding of our economy: the whys and wherefores of our production miracle and its dependence upon the sustaining jobs that are wiped out by cheap goods, importers, deceptive retail practices and price cutting and, above all, the monopolies created by scavenger tactics.

Cheap prices, no matter where they start or where they are offered, cannot do anything but hurt the industrial community. That which tends to weaken the industrial complex must eventually destroy the rest of the national economy. When thousands of persons, in the distribution of goods, are deprived of an opportunity to earn a livelihood because of price cutting at the retail level, it dries up market money and its ill effects flow right back to the corporate setup, the production line and the paycheck.

This economy of ours rests upon five pillars, each as important as the other in maintaining a balanced domestic economy. These five pillars are, in order: investment, production, payrolls, consumption, and profit.

Without profit, there is no investment and without investment, no production and the result is unemployment, stagnation in distribution and consumption, and a further reduction in profit. This can only go so far before the economy becomes so out of balance that a crash is inevitable.

A cancer can be halted by catching it in time and applying drastic surgery or medication. Is there still time? Perhaps. But only if such emergency measures as the quality stabilization bill are tried.

By apathy, by inaction, we are allowing the patient to die. Worse, we are almost demanding the patient die, as time is wasted, as semantics are practiced, theories are preached and statements like "traditional positions" are quoted to further stall the direly needed immediate remedial action. Is it prejudice? Is it fear? Or is it a sort of greed that implies "give me everything and to the devil with the other person?"

Let us hope it is not any of these. Let us hope this not such a country. If there was an accident in front of this building as anyone here was leaving—would he run out to help, or would he stand back and say to himself "It's none of my business. I might get hit myself. Or I might get some blood on my suit and have to pay to have it cleaned?" Yet with respect to the malady at which the quality stabilization bill is aimed, we are standing by and we aren't doing much but talking. And I wonder why this precise bill, which can't kill but can only help to cure, is attacked so much for what it might not do instead of being praised and supported for the good it will do. If the quality stabilization bill doesn't work, it will quietly pass into oblivion. If the quality stabilization bill works, as I believe it will, then it will be a blessing.

Commonsense demands we do something about it right now—let us stop this economic bloodletting into the streets; let us channel instead this vital economic blood into the arteries of trade to keep the patient—our country—alive. Recovery is what we should be talking about as we expedite this bill.

How many witnesses have you heard say: "Our traditional position is to oppose legislation in this area." What does "traditional position" or "traditional stand" mean? I ask the leaders of organized labor where would labor be if tradition had been respected and there was no Wagner Act or child labor laws? I ask those representing the American farmer where the farmer would be if tradition had been respected and there were no subsidies, no guaranteed purchase of his crops, and no price fixing by Government of his products? I ask those representing the retired and elderly, known rightly as our senior citizens, where they would be if tradition had been respected and there was no Social Security Act? Would we not be British subjects today if tradition had been respected?

Tradition is no criterion by which to judge the merits of proposed legislation. Tradition, if correctly interpreted and applied, means adherence to the doctrines of incentive, of individual opportunity, and protection of our free enterprise system.

Today, right now, we have laws—whether good or bad—to protect every phase of enterprise except the final stage of retail sales. Are then the shackles of tradition to be applied only to the independent store owner?

The quality stabilization bill is a precise remedy for a malady eating the vitals of our country. Its enactment isn't going to change our traditional way of life. It proposes to do one positive thing toward saving our way of life. That is all. It will help the small retailer by preventing unfair competition in those brand names on which he stays alive as a businessman by giving the manufacturer of those brand names the right to prevent abuse and degrading of them. It's that simple. But let us look further down the road. Let us promote a healthful economic climate that will tend to keep the brand name factories in this country instead of forcing the manufacturer to take his dies to foreign lands where with foreign materials and foreign labor he will build products to be shipped back here to compete on a price basis in our Nation's present jungle market.

There is not one who has testified, nor is there one Congressman or citizen, who will not proclaim he is indeed the friend of the small businessman. He is saying it now. And as he is saying it, he is watching his friend die.

So, Mr. Chairman, I ask in all sincerity—what is all this hullabaloo that is preventing the application of a simple, straightforward tourniquet that will keep the businessman from bleeding to death until somehow a panacea is devised?

A good example of the stall—the theorizing—the fiddling while Rome burns—was the testimony of Mr. Lee Loevinger of the Department of Justice who, without directly saying so, deliberately created doubts about the constitutionality of this bill while at the same time reiterating the traditional opposition of the Department of Justice to legislation in this area. Have you ever noticed that the Deparment of Justice is usually always opposed to proposed legislation?

The fact that both you and I can obtain opinions from 100 topflight constitutional lawyers disagreeing with Mr. Loevinger—opinions that will say the quality stabilization bill is fully constitutional and the most direct and fully workable concept yet devised—is beside the point. Because under our system of Government it is the function of Congress to make the laws; it is the function of the Government's agencies and bureaus to support and protect those laws; and it is the function of the Supreme Court to interpret those laws. So—what is all this verbal shooting for?

If the quality stabilization bill gives some protection to a brand name and the independent store in the present jungle of massacre, it is then worth the trial. Thus Congress will be reflecting its determination to protect our wonderful way of life and it will most of all be encouragement for the small businessman to continue his long hours and dedication to independence, service and place in the communities that make the backbone of America. What's behind the pressure to halt its trial? That is what worries me today. That is why I am here now. This is the only measure of medication that can immediately help. And the patient, Mr. Chairman, in the final analysis is our country.

I've said before I do not believe anyone wants to hurt the independent merchant. I'm also certain no American wants to harm or hinder the senior citizen to the fullest enjoyment of his twilight days. Plaintive letters are coming into my office in the past few days—and I expect to every other Congressman—stating the quality stabilization bill, H.R. 3669, is evil because surely it will increase the

price of their medicines. Who, Mr. Chairman, is instilling in these good people, these fears? Obvously it is not from their reading or studying H.R. 3669, which states that prescription drugs are excluded. They evidently have not been correctly informed by the inspirers of their missiles—that this bill puts a ceiling on prices as well as a floor. They very definitely have not been informed that this bill is purely voluntary and optional to manufacturers of a competitive product—and that it will give them a standard of value to judge a true bargain instead of being lured into a store on a promise of a well-known brand name at less than cost, yet oftentimes going home with a cheap imitation made to sell for far less than they actually paid.

And they have not been reminded that they are living a longer, and a better and an easier life than did their immediate predecessors because of the incentive—the expensive research and resultant developments—that made these beneficial medicines possible at all. As I remind the senior citizens that the quality stabilization bill, H.R. 3669, carefully exempts their prescriptions, medicines, and drugs, I also want to ask them, Do they really want to exterminate the small businessman, many of whom are brother senior citizens? Would they prefer a welfare state, wherein all business is handled by just a few giant combines or, by ultimate necessity, by the Government? Is this what they want for their children, for their grandchildren, and their descendants? Is this their desired legacy? Are their final days of life on this Earth going to be made happier by the misery, the failure, and the heartbreak of others? I do not think so. I have too much respect for these fine people to believe anything other than they have been duped as to the facts regarding the content or import of this quality stabilization bill.

I have stated that unless something is done soon it will be but a matter of a few years until all retail merchandising will be in the hands of a few giants. Scheduled to testify in these final days of House hearings was the National Association of Consumer Organizations. You of course need not be told that this actually was the association for closed-door discount houses. Now I understand there's a new association—the National Association of Mass Merchandisers. It is members of the Mass Merchandisers who have often been quoted as bragging that it is only a matter of years until they control better than 80 percent of America's retail trade. I can, Mr. Chairman, better understand their interests in wanting to kill this bill—can understand it as I deplore it. I do not want to put them out of business. I do want to create ground rules whereby they have to compete fairly.

In these days of final hearings, it is also deploring to me that the National Farmers Union as well as the American Farm Bureau Federation has requested extra time to be heard—to be heard in testimony against the livelihood of the American retailer—against the crossroads grocer, hardware dealer, druggist, bicycle dealer, gas station operator—the people who meet with him at the town hall, the people whose kids go to school with his kids, the people who join in the parties at his home.

Both of us know, Mr. Chairman, that the Government—ourselves—have fixed the farmer's prices. We've gone further. We've established laws whereby he is paid for not producing—in order to "save our way of life." When the Government actually—not semantically—fixes prices, it is always in "the best interests of the consumer, country, and economy."

A very recent editorial in the New York Daily News, on agricultural Secretary Orville Freeman's wheat-control program on which farmers are requested to vote "yes" this May 21, stated, and I quote "As we understand the Freeman scheme, it would bring all U.S. wheat farmers under the strictest production control ever seen in this country. The Government would fix the prices the farmers would get for their wheat. Any farmer who refused to go along with the control scheme would be frozen out of wheat raising."

Isn't it incongruous that the farmer who gets "fixed" rates for not producing will tell you that the brand-name manufacturer, distributor, and retailer who serves the farmer as a neighborhood or area consumer has no rights to any protection?

How inconsistent can we be—representatives of the farmer demand that domestic cotton producers must sell their commodity to foreign manufacturers about 25 percent lower than to domestic manufacturers—and this, they say, is not price discrimination but instead is neighborly goodwill.

To quote the very able Raymond S. Reed from his column for Home Furnishings Daily on May 10—"One Government bureau calumniates, persecutes, and

prosecutes the manufacturer who merely stops selling a retailer who wrecks his brand name and price structure in the marketplace—while another bureau threatens to put any farmer, who cuts its fixed prices, out of business."

Last year, and again this year, a Washington, D.C., newspaper struck out in its editorial columns against the quality stabilization bill as fair trade "price fixing" under a new cloak. Now, any newspaper has the right to give its opinion and I shall never criticize it for such. But I would rather hope of a newspaper that it would research its material—and do a little reflection as to its own policies—before falling to prejudice or pressured bias. And most interesting was that this editorial was what we used to call "pot boiler"—meaning prepared in some other place and used as filler by newspapers—thereby saving them the expense of mind and money in creating their own stories. This "pot boiler" editorial attacking the quality stabilization bill was used throughout the country. But of most interest and significance to me was that these editorials inevitably appear right alongside or below the very definitely fixed price of the newspaper to the consumer and its fixed advertising rates. The senior citizen who for some reason—such as a requiem mass notice ad for a departed relative—would find no "bargain" at the newspaper—no sympathy at all for his advanced years or lesser income—he would pay the fixed price or get no notice. Where, oh where, is the golden rule of "Do unto others as you would have them do unto you?" I cannot help but be interested in learning of a newspaper's low percentage of advertising income from national brand name advertisers as compared with its income from ads by local discount houses and loss-leader operators. And I wonder again about sincerity and commonsense. And that is why I have taken this valuable committee's time.

It is even more deploring to me that certain members of the AFL–CIO are arguing against passage of this single-purpose lifesaving measure. Here again is a "traditional stand" preventing an objective study as to merits. There certainly are no Members of Congress more dedicated to the salutary principles of the labor movement than Ray Madden, Chet Holifield, Hubert Humphrey or myself. We have joined in introducing, and in fighting tooth and nail for immediate enactment of the quality stabilization bill. We have done so to promote the survival interest of the union movement. We look upon the quality stabilization bill as a means of increasing employment when such is of ultra importance to our national welfare and as a means of implementing the oft-stated code of AFL–CIO president, George Meany, to continue the quality of product, to ever upgrade it, and to create the incentives for new goods as the only way to insure and improve the lot of labor.

My esteemed colleague, Congressman Chet Holifield of California, has most eloquently and positively outlined many, many reasons why labor should be far out in the lead in support of quality stabilization. His testimony before this committee is a must study for every Congressman and certainly for the officers and members of the great AFL–CIO. I am not surprised that the directors of the Oklahoma AFL–CIO organization unanimously voiced their full support of this bill's passage into law. I am surprised that the national organization of the AFL–CIO has not been in the forefront of support for this bill.

I repeat now—where would labor be today if it had not adapted itself to modern needs by forcing experimentation of betterment for the good of the American worker. Where will labor be tomorrow if it continues to abet a cannibalistic marketplace which worsens day by day—not only to put the store owner out of business but to force the manufacturer of brand-name products to move to foreign countries, there to make cheaper products to send back in competition with his own American factory? Where is labor's future in supporting a distributive system that depends on automation, on profit from foreign nonunion products, and on duping the laborer himself, the greatest consumer in number, into buying goods not produced by him or in his interests? What kind of tradition calls for suicide?

Let me quote from Business Week of February 3, 1962:

"Food industry labor groups have sounded the alarm over the discounting invasion. At least 2 unions, the 350,000-member Amalgamated Meat Cutters & Retail Food Store employees and the Retail Clerks International Association, are launching drives to organize discount stores affiliated with food outlets.

"President Toby Coletti, of Meat Cutters Local 342, says the discounters pose two main problems for labor:

"(1) 'They've introduced a number of practices long since eliminated by

unions in the food industry—including extended hours, split shifts, 80 to 90 percent part-time workers, and Sunday openings;

"(2) 'they threaten to turn food retailing into a profitless or nearly profitless industry in which further improvements in wages and benefits would become economically infeasible.'

"Besides stepping up its organizing activities, Coletti says, Local 342 will refuse to permit its skilled journeymen to work in the discount centers and food markets which do not adhere to traditional work practices."

Americans don't want a cheaper product, Mr. Chairman. They, every one of them, want the finest product invention, industry, and genius can produce—they want the brand name superior at the cheapest price possible. And if there be a consistent tradition, it is the economic proof that competition—healthy, not "scab" competition—will give them just that. I ask the AFL–CIO leaders—remembering my own career is representative of labor—to simply but very carefully and honestly consider the jungle warfare on the merchandising streets of America that depresses markets and depresses quality of product in the drive for lower and lower prices; to consider the harmful effects of this upon our productive economy; to consider the link between these conditions, the job shortage in this country, and the ever-increasing employment of foreign labor in American-owned plants in foreign lands making products to compete with the American-made product not only in this country but also in those foreign lands. When traditional stand is equated with 6½ million people out of work—shouldn't labor itself be using commonsense to find a solution?

To everyone against trying this prove-itself emergency measure as a stopgap to industrial and distributive death—are you in reality of the belief that the independent businessman is America's price-fixing bandit? How about the price fixing of the farmer, the union worker, the utilities, the communications and transportation systems, insurance, rent, the freight lines, the newspaper—yes, even salaries including that of the Congressman?

I would think that everyone would know the term "price-fixing" is a term applied to the collusion of all manufacturers of a like product and that the Quality Stabilization Act cannot be used unless there are substitute products in free and open competition available to the consumer.

But if you insist on applying price-fixing to quality stabilization—then be fair enough to apply it every other place as indicated above—and realize very well that this economic life of ours today, and which some are demanding be not now changed, is like protecting by very stringent rules the first three quarters of the football game but to leave the final quarter without any rules at all.

Today, we hear much of the Common Market. Commonsense will tell every one of us in America that we cannot exist without expecting tough competition in such a world market. Does commonsense tell us today that we cannot possibly compete unless we make a continually-better brand name product, so much better than the foreign buyer—whatever his own earning status—will covet above all else for the better bargain of lasting quality?

We live our daily lives placing things and people in the right or left wings. America does—and I hope it always will—have a strong conservative and liberal—a right and left wing. But it also has a middle—and that middle must be solid. It is very soft today.

Some people use language to express thought. Some use it to conceal thought. And some use it instead of thought. I am herein—and from my deepest sincerity—endeavoring to make commonsense transcend language.

As these hearings draw to a close, I'm moved to suggest that those who oppose this quality stabilization bill have given us hours and hours of what for the most part are conjectures concerning the damage that they assert might be done by the enactment of H.R. 3669—accompanied by statements that these conjectures and assertions are indeed facts.

My prime purpose in coming over this morning is to plead with you to be reminded in your deliberations that emerging above all drum pounding are certain key facts.

That the entrepeneur—or independent businessman—is the backbone of America, is the strength on which America was built, is the strength on which its future as a country depends. There is today a cancer—a stinking evil cancer—rotting and ruining the spinal cord—and which, if unchecked, will so weaken this Nation that it no longer can stand.

That as far as our Government is concerned the responsibility for moving to cure the malady resides with this Congress.

That the bill before you reflects countless hours of deliberation by you and your committee, by professional staff, and by committees of prior Congresses.

That before you is the only remedy with any chance for success—a remedy wherein Congress establishes economic policy under which our free competitive enterprise system in a limited area is to operate but Government keeps itself out of the picture.

That while this committee deliberates in these hearings, some businesses hover on the brink of failure and others give their final gasp.

I once heard it said that over every mountain there is a path—but often times that path cannot be seen from the valley. We have a mountain to cross. By staying in the valley and denying the possibility of a path, we cannot progress.

I do not ask you to believe in the quality stabilization bill, I do beseech and implore that all of Congress and even the enemies of the bill, give it a good faith trial to serve a purpose for the good of our country.

I repeat—why do you fight that which can save?

Thank you.

Mr. DINGELL. Mr. Van Deerlin?

Mr. VAN DEERLIN. No.

Mr. DINGELL. The next witness is Mr. Roger Courtland, representing the National Association of Consumer Organizations, Inc. It is a privilege to have you with us this morning.

STATEMENT OF ROGER COURTLAND, EXECUTIVE DIRECTOR OF THE NATIONAL ASSOCIATION OF MASS MERCHANDISERS

Mr. COURTLAND. Mr. Chairman and gentlemen, my name is Roger Courtland and I am the executive director of the National Association of Mass Merchandisers.

The NAMM is a recently organized association whose members have the privilege and pleasure of doing business in 31 of these United States serving approximately 15 million American citizens who deal at their various places of business.

I appear before you gentlemen in opposition to H.R. 3669, the bill that is commonly referred to as the quality stabilization bill.

It is my contention, gentlemen, that there is very little quality stabilization in this bill as it has been written, and as it is currently being evaluated and studied by this subcommittee.

A manufacturer, having produced an item for sale to the general public, is not thereafter affected by the price placed upon that item after he has manufactured it, inspected it, approved of it as to quality, and sold it to either a wholesaler or a retailer.

At this point the product is clearly established as to manufacturer identification and as to the quality he has placed into his products in the past and for which he has gained justifiable recognition.

A Cadillac convertible, sold at the suggested list price or one sold by a dealer at a figure $100 over his wholesale cost, are alike as to quality. There is not any loss in quality regardless of the price accepted by the dealer. This same principle applies equally to any item sold by any retailer in the country.

It has been the experience of the small businessmen who are members of our association that because of our well-known American system of free enterprise a consumer will shop for price when quality is comparable. This latter point of quality is determined by the manufacturer during production, but the equally important subject of "price" can only be decided by the retailer. This is something he de-

cides in order to meet his competition and to make a profit that will permit him to advantageously stay in business and, as an end result, influence the consumer to seek his establishment in the future for additional purchases.

The current quality stabilization bill (H.R. 3669) will permit a price fixing situation to develop in which the small businessman will not be permitted to make a profit on an item that he may consider fair and adequate if it is less than suggested by the manufacturer. He will be bound to increase his selling price to meet the approval of some distant manufacturer without regard to the economic conditions in his immmediate business community and without any consideration for the financial condition of his customers.

This type of legal price fixing will increase the cost of living for all Americans without a comparable adjustment with regard to the individual income of the consumer.

It has been estimated, after study and surveys have been made, that in some localities this bill will increase the cost of living by as much as 32 percent over current expenditures.

In general, low-margin retailers are small businessmen who have cut overhead, eliminated many tangent costs, and are making the products of American manufacturers available to more people at a lower cost per item. Public approval has permitted them to grow to maturity.

Mass merchandising has brought the cost of living down in those areas where legitimate discount business establishments have been developed. The fact that sales in these stores have increased and are increasing weekly indicate that the American public approves of this form of lowering the cost of the merchandise they need, want, and seek to purchase.

And if I may add an aside, Congressman Dent admits that, although he is for a price fixing stability, his wife seeks a lower price range in the items she purchases without seeking the higher price for the same merchandise, which he admits could be purchased elsewhere.

The trite classification of "discounters" into a shabby type of selling operation is not only untrue, but allows for an ostrich-like attitude by some members of the business community.

The reliable and financially sound low-margin retailer gives the same service and assures the same guarantees that are expected from the conventional and nationally known department stores.

The need for Government intervention into the business community, in this instance, is unsound, unnecessary, and detrimental to the consuming public.

Instead of hindering or passing legislation that is harmful to this new industry, the interest of the Government should be focused upon the benefit to the consumer public resulting from the advent of mass merchandising. The lowering of prices, the increased sales of American-made merchandise, the increased profit to industry through the resultant increased sales, the increased earnings of the retailing industry as a whole, the increased profit to the industry, the increased construction resulting through additional entry into the industry by the well-known, established, and nationally recognized retailing firms, the increased standard of living for Americans due to the greater availability of consumer goods at a price they can afford, indicate

that mass merchandising is beneficial to our economy rather than bad for it.

Mass merchandising has assisted in the eliminating of unemployment in some areas while coordinating the activity of the smaller business proprietor into a federated selling unit through which each small businessman increasess his sales potential, his turnover, his profit, and his individual income.

Gentlemen, on behalf of the National Association of Mass Merchandisers, I appreciate this opportunity of presenting our views.

Mr. DINGELL. Mr. Courtland, it was a pleasure to have you before the committee this morning. We very much appreciate your courtesy in coming here.

Mr. Van Deerlin.

Mr. VAN DEERLIN. No; thank you, Mr. Chairman.

Mr. DINGELL. We are grateful to you for your statement, Mr. Courtland. It is most helpful.

The Chair notes that there is a statement here on behalf of Mr. John W. Anderson, president of Quality Brand Associates, in support of the quality stabilization bill.

The Chair has been advised that Mr. Anderson finds it impossible to be present this morning and, without objection, the statement of Mr. Anderson will be inserted into the record at this point in support of the legislation.

(The prepared statement of Mr. Anderson follows:)

STATEMENT OF JOHN W. ANDERSON, PRESIDENT, THE ANDERSON CO. AND QUALITY BRANDS ASSOCIATES OF AMERICA, INC.

Mr. Chairman, this opportunity to submit for the consideration of your committee, in support of the quality stabilization bill, a statement based upon more than 50 years of manufacturing and merchandising experience and observation is appreciated.

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 products marketed through ethical independent resellers—primarily automotive products for original equipment and replacement purposes.

In previous congressional hearings, my testimony has included extended information as to my experience in matters relating to price stabilization and in operations involving the traditional American system of production and distribution of trademarked products. So I shall not likewise burden this record.

I am president of Quality Brands Associates of America, Inc. (QBA), and am active in all of its areas of interest—including the area of legislation exemplified in the pending bill here under consideration.

THE QUALITY STABILIZATION BILL DOES NOT MODIFY ANY STATE CONSTITUTION OR STATE LAW FORBIDDING PRICE FIXING

Under the supremacy clause of the U.S. Constitution, every congressional act may effect a modification of State constitutional and statutory law—unless, in the Federal act the contrary is provided. This is axiomatic under our Federal-State system.

Since the Quality Stabilization bill does not authorize the exercise of any "rights and remedies" that would permit horizontal price-fixing agreements, there, of course, is no conflict between the quality stabilization bill and any State constitution or State law forbidding horizontal price fixing.

Of equal importance is the fact that the quality stabilization bill does not modify, overrule, or conflict with any State law—for the reason that State law does not deal with the subject matter of direct brand-name control, as does the quality stabilization bill. The differences between the quality stabilization approach and fair trade emphasize the lack of conflict between State law and the quality stabilization bill.

The quality stabilization bill permits the establishing of a protective resale price by private action—but only as a condition of the use of the brand. The right of a discounter to cut the price is carefully preserved—his right to continue to misuse the brand (the property of the manufacturer) over the protest of the manufacturer is all that is affected. This poses no problem whatsoever of conflict with State law.

In 1919, the Supreme Court held, in the *Colgate* case, that a seller, acting alone, could announce the prices at which he desires a buyer to resell his branded products, and, acting alone, refuse to sell again to any buyer who did not observe his established resale prices.

Under *Colgate*, the trademark owner (the manufacturer) may neither exact nor accept from any reseller, as a condition of any sale to a reseller, any promise or agreement that the goods will be resold at the manufacturer's preferred prices. But the manufacturer can refuse to sell again—"for any reason or for no reason at all."

HERE'S WHY QUALITY STABILIZATION IS A "MUST"

Many manufacturers make their trademarked products available to retailers only through wholesalers. Wholesalers often supply—to each of many retailers—many products. So wholesalers—understandably—cannot undertake to discard a retailer customer because that retailer may have failed to conform to a single manufacturer's ethical standards.

That's why—to protect the good reputation of his quality product, and to protect all ethical resellers and the public—the quality manufacturer needs the quality stabilization bill to enable him to reach past his wholesalers and terminate all use of his trademark by a subordinate reseller who abuses it.

Thus the quality stabilization bill merely gives effect to a logical extension of the principles of the *Colgate* decision to retailers who, as a matter of convenience to them, are made subordinate to a manufacturer's direct wholesale customers.

An important thing to note is that operation under the *Colgate* doctrine has never been considered price fixing in any antitrust sense. Legally speaking, price fixing, of whatever category, has always been limited to arrangements based on agreement either expressed or implied.

Under *Colgate*, a seller (manufacturer) can suggest a resale price, saying to the buyer, "If you don't maintain the resale price, you will lose the privilege of buying or selling my products." Similarly, under the quality stabilization bill, the seller (manufacturer) says, to all who resell his products, "If you don't protect my good name by maintaining my price, you will lose the privilege of making any further use of my trademark."

The effect of the quality stabilization bill, as to stabilization of prices, is, and clearly should be, no more undesirable than a manufacturer's refusal to deal, under the *Colgate* doctrine, with a primary reseller. Fair trade rests upon a contractual system of price maintenance. The *Colgate* doctrine, as honored in the quality stabilization bill, rests solely upon the independent action of the trademark owner. That means no contract, no agreement, as to prices.

Therefore, since *Colgate* is not "price fixing," neither is quality stabilization price fixing. And since quality stabilization neither condones nor requires any agreement, written or oral, between a manufacturer and any reseller, relating in any way to prices, quality stabilization cannot in good conscience be called fair trade.

Quality stabilization is, instead, a clean and lawful defense for the quality manufacturer who is unwilling to have his trademark—his good name—used as store-traffic bait—and who is unwilling to break faith with his resellers, and with the public, by squeezing quality and value out of his product to meet the demands of cannibalistic retail monopolists for lower and lower prices with which to destroy the traditional American system of distribution through ethical resellers.

The quality stabilization bill is, in effect, an effort by Congress to assert its primary jurisdiction in respect to purely economic issues, thus affording the necessary guidance to the executive and judicial arms of our Government.

It is therefore our conclusion that the quality stabilization bill creates no conflict with State law, but rather redefines the role of, and sets economic policy for, the executive and judicial branches of our Federal Government.

THE QUALITY STABILIZATION BILL DOES NOT CONFLICT WITH STATES RIGHTS

To allege that the quality stabilization bill is an invasion of States rights is superficial and misleading for the reason that the *intrastate* application of the Sherman Act and other antitrust statutes over the last half century have created the compelling need for this legislation at the Federal level.

Since the 1911 decision by the U.S. Supreme Court in the *Dr. Miles* case (200 U.S. 373), the Sherman Act has been held to ban resale-price maintenance contracts.

Thus State policy as to this subject matter has been subordinate to Federal policy for at least half a century.

Among those making this illogical argument that the quality stabilization bill is an invasion of States rights is the Department of Justice.

If the Department of Justice followed through on its line of thinking, it would call also for the repeal of the Sherman Act as it affects retail transactions, and by the repeal of the Sherman Act thus restore the entire area to State control.

The weight of the common law until the *Dr. Miles* decision was that resale price maintenance in the distribution of trademarked products was valid. In 1900, 10 years after the Sherman Act was passed, Mr. Justice Holmes, then the chief justice of the Supreme Court of Massachusetts, recognized the common law doctrine that resale price agreements were not a rstraint of trade. He called this the "inherited doctrine."

The common law background of the validity of resale price maintenance led Mr. Justice Holmes in his dissenting opinion in the *Dr. Miles* case to point out that "there is no body of precedent that by any logic requires the conclusion to which the court has come (that resale price maintenance contracts violate the Sherman Act). The conclusion is reached by extending a certain conception of public policy to a new sphere * * *. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior motive or 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."

Viewed in the proper light, the quality stabilization bill represents an attempt to restore in a limited area the status of the common law before the Sherman Act preempted the field.

Such restoration can only be done by an act of Congress.

The central concept of the quality stabilization bill is that the 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.

The U.S. Supreme Court in *Old Dearborn* in 1936 (299 U.S. 183) 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 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."

Congress by its enactment of the Lanham Trademark Act in 1945 recognized upon practical considerations the essential interstate characteristics of a registered trademark.

The quality stabilization bill in essence is a statutory confirmation and implementation of the *Old Dearborn* decision and is consistent in jurisdictional scope and in underlying philosophy with the Lanham Act.

This is confirmed in detail in an opinion of Herbert A. Bergson, of the firm of Bergson & Borkland, of Washington, D.C. Mr. Bergson was for years the Assistant Attorney General of the United States, in charge of the Antitrust Division of the Department of Justice. Mr. Bergson's opinion is attached as an appendix to my statement.

The quality stabilization bill enables the trademark owner to protect his property, his trademark, by denying its use to those who abuse it.

The quality stabilization bill is consistent with State constitutional concepts and State laws that property rights are entitled to protection.

No State has ever enacted legislation dealing with this property control approach as applying specifically to trademarked goods; therefore there is no overruling or overriding of State policy as to the concept of law provided in the quality stabilization bill.

The quality stabilization bill is applicable only to trademarked goods in or affecting interstate commerce.

Under a quality stabilization law there should be no areas from which predatory pricing practices could spill across State lines and defeat the carefully structured public policy of the invaded State—as happened under both the Miller-Tydings and McGuire Fair Trade Enabling Acts.

ANY STATE-BY-STATE "EXCLUSION" AMENDMENT TO THE QUALITY STABILIZATION BILL WOULD BE DESTRUCTIVE

Any so-called "States' rights" amendment permitting a State to exclude itself from the operation of the Quality Stabilization Act would subject quality stabilization in effect to the same disintegrating pressures as have at last destroyed the State-by-State contract system of fair trade.

Texas and Missouri are two of the States that have never had fair trade acts, and thus have operated as areas of immunity from which every State in the Union—and, most effectively, States contiguous to Texas and Missouri—have been bombarded mercilessly, by mail with catalogs, circulars, newspapers, etc.—by radio and television—and by traveling peddlers—with offers of quality-brand products required in fair trade States to be sold fairly at uniform prices offering sufficiently attractive competitive values to have made those trademarked products the most popular of their kind.

This disaster was made possible inevitably by an arbitrary "spoiler" amendment quietly injected into the McGuire bill in committee. Had the McGuire bill not been so amended, the act would have prevented such destructive invasions of Fair Trade States.

Any State-by-State "exclusion" amendment to the quality stabilization bill has clearly the same ultimate purpose as the "spoiler" amendment of the McGuire bill and would have the same effect.

The perversive effect of this "amendment" would accelerate the elimination of quality stabilization from one State after another—until the intent of Congress, in its attempt to exclude deceptive and destructive practices throughout the entire Nation, would have been defeated.

Thus, by the contemptuous device of a "spoiler" amendment the conscientious manufacturer, ethical reseller, and the public would be found again exposed to the cannibalistic practices of so-called mass merchandisers who have mastered the trick of diverting store traffic from ethical resellers—thereby starving ethical manufacturers of trademarked quality products, thus forcing them to dilute the quality of their once-honored products to meet the demands of retail monopolists for lower and lower prices with which to destroy each other—as they build higher and higher the ramparts of monopoly.

Upon comparative examination the obvious purpose of any "State-by-State exclusion" amendment to the quality stabilization bill is unfairly destructive of the trademark property of the manufacturer, and is hostile to the rights and interests of ethical resellers and of the public.

SHOULD STATES BE PERMITTED TO "SECEDE" FROM THE UNION IN THE MATTER OF PATENT RIGHTS?

Property rights in patents—in trademarkes—and in copyrights—are identical in their constitutional significance. They provide the incentivism to creative service to meet public needs.

To emphasize the absurdity of an amendment for exclusion of State by State from the provisions of the Quality Stabilization Act, it is only necessary to ask what would be the result of a similar amendment to our patent laws.

Would it not be equally destructive of incentive to create new and useful products to provide by law that any industrial State, whose legislators wanted to free its manufacturers from the necessity of respecting patents owned by others, could do so simply by an act of its legislature excluding that State from any need to honor the patent laws?

How long would the U.S. patent system—recognized as the prime catalyst of our entire economy—have any significance, or be of any value in promoting science and the useful arts, if such exclusions, State by State, could be made effective?

Any Federal legislation that imposes arbitrary economic imbalance between States is essentially destructive legislation. In fact one of the great economic

advantages of the proposed Quality Stabilization Act is that it provides for uniformity of application throughout all the States.

If any State-by-State "exclusion" amendment were included in the Quality Stabilization Act, Congress will have done little more than perpetuate, by Federal law, the present checkerboard system of random States in which orderly marketing of trademarked products is permitted.

Checkerboard marketing is impractical and costly. Most manufacturers have found it an impossible system of distribution. That is why they have abandoned fair trade and, as a practical matter, would not be able to use a Quality Stabilization Act similarly disabled.

Is a repetition of that disastrous fair trade collapse what the proponents of such a "spoiler" amendment really desire?

RETAIL MONOPOLISTS SHOULD NOT BE GRANTED LICENSE TO HIDE BEHIND A MISTAKEN CONCEPT OF WHAT CONSTITUTES "STATES' RIGHTS"

The adoption of any State-by-State "exclusion" amendment in the quality stabilization bill would, in effect, subvert the right and duty of our Nation to stand firm and in orderly economic unity to meet new and serious threats confronting its people.

Problems have arisen from intensified foreign economic competition strengthened by an unprecedented economic alliance of industrial nations of Europe. Those allied nations now move, under uniformly prescribed conditions, to create among them what is, in economic effect, a United States of Europe, free from import duties and other restrictions that have impeded heretofore the interstate movement of merchandise across their borders.

They call this their "Common Market." It is much more than that. It is also a common organized source of competition with our United States for the markets of the world.

In that competition we of America find ourselves at a serious disadvantage as to competitive costs of production. In the European Common Market, labor rates, both skilled and unskilled, are far below labor rates in the United States. Our regulations governing imports into our country permit nations of the Common Market, as well as Asiatic nations with even lower labor rates, to penetrate our market in such volume as to help us not at all in our present shaky unemployment conditions. Those conditions—understandably—are aggravated also by the rate at which retail monopolies in America are driving out of business each day, and often into profitless inactivity, literally thousands of citizens experienced in distributive and relative services.

America's security can endure only through a continuation of America's economic strength. Yet we have found good Americans misguidely advocating a disabling so-called States' rights amendment to the Quality Stabilization Act, which amendment would make impossible the maintenance in America of anything like the economic unity, in method and purpose, wisely embraced by the increasingly industrious and prosperous nations of the European Common Market.

Such an amendment clearly would introduce, in and among the States, an unrelenting ideological fight for and against State-by-State legislative action to withdraw the State from the united economic front proposed under quality stabilization. Thus would be concentrated on individual State legislatures, in predetermined sequence, the full power of organized retail monopolists—striving to persuade its legislature to make each State a "Casbah" in which they may practice all the evil arts intended to be restrained by the quality stabilization bill.

The quality stabilization bill is intended to, and in unamended form would, permit, under Federal law, throughout all of the United States, at the will of any manufacturer of a competitive product bearing his brand, name, or trademark, the establishment of certain uniform conditions governing production and distribution of that product.

Under the proposed act to establish such uniform conditions each State is recognized as having, as a State, a right to be protected against unfairly disruptive competition originating outside its borders.

Enacted without crippling amendment, the quality stabilization bill will enable manufacturers to compete, throughout all of the United States, on uniform terms and conditions, and without exposure to (*a*) bait-merchandising practices, (*b*) deceptive pricing policies, or (*c*) published misrepresentation concerning the manufacturers' trademarked goods.

Is it believable that our United States could long maintain its economic supremacy, against competing nations united solidly under uniform conditions affecting production and distribution, with our country operating from a confusing and disrupting crazy quilt of competitive conditions?

Dare we ignore the right of each and every State to be protected from unfair encroachment from other States that promote the growth of retail monopolies, against which the public would otherwise have no defense?

LOOK WHO WANTS "QUALITY STABILIZATION" DEAD

Quality stabilization has been an issue of growing importance to the public since 1959, when it was first revealed by QBA as perhaps the only soundly based approach to the establishment of a constitutional Federal policy capable of resisting, and perhaps reversing, the age-old and merciless drive of consciousless men seeking monopolistic control of retail sales. These men strive constantly to attract gullible customers by parading, in their windows, and in their advertisements, at uneconomic prices, honored branded products.

QBA proposes no new restraints upon a manufacturer of a brand of merchandise he intends resellers shall price, up or down, as they may please.

However, QBA is joined, by much more than 70 national trade associations whose members resell trademarked products, in an urgent request that Congress, by enactment of the quality stabilization bill, encourage manufacturers of good intent to invest their trademarked products with that additional 10 percent or so of prime cost by which the product carries to the public often a bonus of 50 percent or more in "miles" of service and satisfaction.

We all, or no doubt most of us, have read of the cry of desperation emanating from the recent national conference in California, of representatives of the National Association of Consumer Organizations (NACO), the questionable name chosen for itself by the only national discount organization. The president of the association was quoted in the trade press as saying the quality stabilization bill "threatens our very existence and is the largest danger facing the industry today."

These words of the president of the National Association of Consumer Organizations seem rather incongruous since the quality stabilization bill is not directed at any class of reseller—whether discount house, a cooperative, a chainstore or whatnot—but is aimed instead toward the cannibalistic abuse and misuse of the goodwill of an honored trademark regardless of who commits such degrading practices.

The obvious conclusion is that among those who wish quality stabilization dead are the retail monopolists themselves, possibly some financial institutions that have overloaned to the retail monopolists, certainly including the susceptible newspaper that relies on local advertising of retail monopolists for an important part of its income, and the manufacturer who relies upon the retail monopolist's discrediting of competitive quality products to create store traffic that is diverted to the purchase of his inferior product.

NOW LOOK WHO WANTS QUALITY STABILIZATION

That the homemakers of America overwhelmingly want the quality stabilization bill enacted soon is authoritatively established by the certification by Ernst & Ernst, nationally known and respected certified public accountants, of results of a massive survey of national opinion showing that 81.1 percent of homemakers are asking for this proposed legislation. A photocopy of the economically and politically significant Ernst & Ernst report is included as an appendix to this statement.

A total of 15,295 homemakers selected at random (and in equal numbers) from every congressional district in the United States were interviewed. This work was done for American Issues Press, Inc., by experienced pollsters working out of more than 200 offices of Manpower, Inc., throughout the United States.

The total included is more than 10 times the 1,500 citizens customarily questioned by opinion survey organizations as adequate to provide, within 1 or 2 percentage points, a dependable cross-sectional result.

Question No. 6 of the American Issues Press survey presents the true essence of the quality stabilization bill, H.R. 3669, in text and in purpose. Of the opinions expressed on that question, a total of 81.1 percent of housewives voted, in clear effect, for the quality stabilization bill.

That question No. 6 read 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 products, 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?"

Federal legislation permitting (but not requiring) price and quality stabilization of a trademarked product by its manufacturer is supported by the American housewife as sorely needed for the protection of her family. She needs that help and she knows it. She appreciates those who support her interests as a homemaker. She finds it difficult to understand people who are unable or unwilling to support quality stabilization as a firm solution of her greatest economic problem.

HOUSEWIVES ASKED FOR THE SAME PROTECTION IN 1952—THEY KNOW NOW WHY THEY DIDN'T GET IT

In a similar national survey 11 years ago covering more than 10,000 housewives—with results also tabulated and certified by Ernst & Ernst—78.6 percent of the American housewives polled said they preferred that the manufacturers of their favorite trademarked products "set and lawfully enforce" the prices of those products.

In that 1952 survey a total of 10,279 housewives answered the following question:

"Would you rather have the storekeeper fix at any time to suit himself all the prices you pay for all the products he sells you or would you rather have the manufacturers of your favorite trademarked products set and lawfully enforce the prices of those products?"

A total of 8,080 housewives, 78.6 percent, said they wanted the manufacturer (not the retailer) to set and lawfully enforce the prices of their favorite trademarked products.

The American housewife knows what helps her and what hurts her. She is learning, surely, who helps her and who hurts her. The proof is overwhelming that she wants the quality stabilization bill enacted by this Congress.

These survey reports may convince you that only about 20 percent of the homemakers of the Nation remain so uninformed as to still be blind to the destructive objectives and consequences of retail monopoly, now being so rapidly forced on the public.

So it would seem that the retail monopolists, and others who want quality stazilization dead, are very much in the minority.

Any Member of either House who desires further information bearing upon the grassroots significance of the QBA housewives' survey, the Ernst & Ernst survey report of which is herewith exhibited, will have the full cooperation of QBA whenever desired.

The housewife is believed to be entitled to the full support of both Houses of Congress—on the basis of her overwhelming expression of serious need for protection from the cannibalistic proclivities of retail monopolists.

There is no more crushing form of monopoly than is retail monopoly. Retail monopoly extorts at will from the consumer, while it dictates to the manufacturer downgrading product specifications, then fixes the price it will pay.

Some influential leaders in one State or another, have expressed bewilderment that citizens claiming for long to be opposed to all harmful monopolies, and to be strong supporters of our antimonopoly laws, now stand out so amazingly and shout against quality stabilization.

WHEN ETHICAL RESELLERS ARE FORCED TO QUIT A PRODUCT

How does retail monopoly destroy? It's like this:

Manufacturers of popular trademarked proudcts normally at first have received nearly all their business from ethical resellers, who compete for the consumer's purchases by delivering product quality and dependable service at fair prices.

When retail monopolists destroy, with their store-traffic "bait" prices on it, the well-earned popularity of a trademarked product, they at once create unfairly the idea that the ethical service-type seller has been deliberately overcharging for that product. The result is understandable.

The ethical reseller, rather than submit to the retail monopolist's unfair effort to make him look like a robber, stops selling that product. So the manufacturer almost at once loses these smaller resellers as outlets that have helped build his market and who normally sell most or all of his production.

Thereafter the helpless manufacturer, to stay in business, must sell most of his seriously shrunken output through a comparatively few retail monopolists. Those retail monopolists demand constantly lower prices from the manufacturer, so that their bait of sensationally lower and lower prices on a once-favored product can be offered the public.

RETAIL MONOPOLISTS "LOVE 'EM AND LEAVE 'EM"

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 retail monopolist, when he has destroyed public confidence in a once-honored product—as a store-traffic lure—has only to sell out his inventory of that product and then shift to plunder likewise another, and another product, with no concern for the manufacturer's unfair losses or for the deception the retail monopolist has worked upon the public.

The housewife soon learns that she gets only the lessened quality—the lower value according to price—forced by the retail monopolists' demands for uneconomic price cuts. Too many times she bit at the retail monopolists' bait, and got what hunters of "something for nothing" always get. She got hurt. Is that why retail monopolists, according to the AIP surveys seemingly have less than 2 out of 10 American housewifes as their gullible customers? Is that why so many retail monopolists, after their initial "brass band" period in their area has passed, can't pay their bills?

The consuming public is being taught slowly but surely by their experience with retail monopolists that reduction of a product's quality to make possible even a 10-percent reduction in factory price—to meet pressures of piratical price cutters—usually reduces the product's value to the consumer by much more than 10 percent.

It's the top 10 percent of a product's prime production cost that carries to the consumer a far greater proportion of that product's values than does any other 10 percent. Sometimes cheapening by 10 percent, or less, a product's prime cost to manufacture reduces its value to the consumer by 50 percent or more.

CONSUMERS ARE CAUGHT IN THE MIDDLE

The consumer gets hurt as the cannibalistic degrading of an honored trademarked product continues. Forced to cut his prices, the manufacturer at once tries desperately to "make 15 workers do the work of 20." Do you doubt that 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 and cheaper labor until the product at last has become, at any price, a fraud on the public.

Retail monopoly and communism have a common goal. Each gives constantly less and less to its victims for the substance each takes from them.

It can be understood how, forced out of business by retail monopolists, ethical retailers begin "to wonder whether it could be worse under communism."

A disheartened Pennsylvania jewler, for example, with two children to feed, clothe, and educate, wrote Quality Brands Associates: "To me this danger (retail monopoly) is more serious than the threat of communism itself."

THERE IS ONLY ONE READY ANSWER

The quality and stabilization bill, when enacted, will give each manufacturer the power to protect his trademarks, protect his resellers, and protect the public against predatory price cutting for bait purposes, and against misrepresentation of the merchandise.

The enactment of the quality stabilization bill can mean a great deal to almost any man's family through its protection against depreciation of the quality of well-known trademarked products—protection through stabilization of retail prices—by any manufacturer who so elects.

It is high time we gave back to the ethical independent reseller the opportunity to offer to the public only products protected against the degradation forced by retail monopolists.

HANDY "DIRTY WORDS" SUCH AS "FAIR TRADE" AND/OR "PRICE FIXING" CAN BE SERIOUSLY MISLEADING

All thoughful men are conscious of the deplorable practice of besmearing soundly based and conscientiously supported legislation by tagging it, deceptively, with some widely used malodorous term publicly associated with something seemingly related but discredited in practice as harmful to the public.

As an example, in discussions of the pending quality stabilization bill, a few highly influential and unqestionably sincere citizens have been insisting that the bill is a "Fair trade" bill, which it in no sense is. Some of the same, and other, citizens often refer to the quality stabilization bill scornfully as a "price-fixing" bill.

It is understandable how, under mounting pressures of other problems, men may thus be led to embrace deceptively attractive, and entirely erroneous, conclusions.

For example, most of us have been told how the term "price fixing" became an epithetical "dirty word" designating a collusive horizontal "mass murder" price control practice, now forbidden by our antitrust laws.

In that forbidden, but still persistent, "price fixing" practice, a group of manufacturers representing the principal or perhaps the sole, source of supply of a certain category of essential product, would secretly agree that each of them would "fix" that product at a certain unconscionably high price.

Such surreptitious horizontal price fixing was—and of course is—plain skulduggery and is viciously against public interest—primarily because it eliminates all inducement to the manufacturer to enhance product values through free and open competition for public favor between products of the same general class. Horizontal price fixing leaves the public helpless to protect itself under the free play of discrimination in its choice between freely competing brands of products best suited to its varying needs, as the public would be free to do under the Quality Stabilization Act.

Under horizontal price fixing all, or nearly all, products available for a particular purpose are held to a fixed price through one unholy conspiracy. In such conspiracy a few manufacturers or a few resellers could—but no longer lawfully can—function in collusion to establish a monopoly by which to extort unconscionably from purchasers within the area controlled by that monopoly.

THE SHERMAN ACT IS ANTIMONOPOLY; SO IS QUALITY STABILIZATION

The Sherman Act—with hearty approval of all understanding citizens except those whose crimes it would restrict—was established to correct the evils of horizontal price fixing which may forbid not only secret horizontal agreements to increase prices unconscionably, but may also forbid horizontal agreements by manufacturers or producers to reduce prices, in concert, to starve out and exterminate competitors or to destroy public confidence in an honored quality product.

Such conniving price-fixing agreements sometimes are intended to—and do—accomplish such purposes within a relatively small marketing area, whether the purpose is to raise prices horizontally on a particular product, or category of products, or is to temporarily reduce prices to a point that starves out competition.

Large retail monopolists—rapidly growing larger and more numerous—are doing just that, persistently, in the process of eliminating by increasing thousands their smaller retailing competitors.

A single retail monopolist can seriously restrict the sale of a popular product. For two or more retail monopolists to join in a colusive downward price-reducing raid to exterminate smaller competitors in any marketing area would violate the Sherman Act but might involve such shrewd retail monopolists as to make it extremely difficult for Federal agencies to conclude any timely corrective prosecution.

QUALITY STABILIZATION PUTS NO BURDEN ON GOVERNMENT

The antimonopoly Quality Stabilization Act will permit manufacturers to correct such competition-stifling price cutting without burdening any of the Federal agencies.

As has been said, the dirty words price fixing was invented and has been publicized persistently, for many years, as a handy label with which to designate

the destructive practice of robbing the public—and crushing competition—through collusive horizontal pricing agreements.

It is unfortunate that many of our citizens have been persuaded, by such repetitious use of the words "pricing fixing," to forget that no sale of any kind can ever be concluded until and unless either the seller, or someone in his behalf, "fixes" a price for the product.

And let us recognize the fact that the manufacturer, by stabilizing the retail price of his product, is thus better able to stabilize and improve its quality—its value to the consumer according to the price paid.

Due to the collapse of fair trade, there are mushrooming in America instrumentalities by which the growth of monopoly in merchandising is accelerated. As a matter of basic strategy, the perpetrators conceal from the public the fact that price in itself does not determine value.

There is also obscured the fact that, whenever, as is its purpose, predatory price cutting of a quality product contributes to the forced elimination of ethical independent wholesalers and retailers in any area, monopoly of distribution increases its power.

QUALITY STABILIZATION IS NOT FAIR TRADE

The quality stabilization bill proceeds from a wholly different basis than did fair trade.

The sole purpose of the quality stabilization bill is to protect, against destructive practices, the property rights of a manufacturer in his trademark or brand name, which is the identifying symbol of his precious reputation—often his most valuable asset.

Although fair trade's basic objective was commendable, price control by contract or agreement was in effect the legal result.

The quality stabilization bill extends protection against abuses of the brand name not only with respect to pricing, but also as to "bait and switch" merchandising tactics and as to misrepresentation of the branded product.

The difference in approach between quality stabilization and fair trade is made apparent also by the difference in the "remedy" provided by each. Under fair trade the producer, or any reseller affected, could ask a court to compel the reseller to raise his prices to those established by the manufacturer under fair trade.

Under the Quality Stabilization Act the brand-name owner, after revoking, for cause, a reseller's right to make any use of the manufacturer's trademark, will ask a Federal court to prevent the reseller from misusing and damaging the manufacturer's most previous property—his brand name.

Not only is the quality stabilization remedy different from fair trade in its processes. Quality stabilization is based upon a well-established concept of protection of property rights of the manufacturer in his trade name and in the goodwill it represents. This is a clearly constitutional approach based upon unassailable considerations of property rights well established by the U.S. Constitution and by the Federal judiciary.

After all the same concept that makes unlawful a malicious personal attack upon your own good name, leading to a restraining court action and the recovery of damages, differs not at all in principle from the quality stabilization concept, which likewise protects the good name and good reputation (the going value) of a manufacturer from practices that would destroy him.

Under the Quality Stabilization Act the owner of a trademark may deny its use to those who would defame it. This is completely consistent with the law of property that has developed over the centuries to encourage citizens to increase their capacity for public service.

To own property as a means of better serving public interest would offer no incentive unless the property is recognized as investing the owner with the right to determine the conditions under which others may make use of, or may be excluded from the use of, such property.

FACTS ABOUT THE QUALITY STABILIZATION BILL BRING MILITANT SUPPORT

Public support for the quality stabilization bill is becoming more militant whenever 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 abuse the mark.

(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 nonstabilized products available for the same purpose.

(6) Thus the public has the full benefit of both price competition and quality competition.

(7) Fully authenticated reports of the vast national housewives' survey mentioned herein and exhibited herewith show 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 retail monopolists' 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 retail monopolists to sell, products to compete, at fully flexible prices, with every important stabilized product offered. The retail monopolists will be deprived only of the chance to force an honored quality product to destroy its own honestly earned popularity as the retail monopolist 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 goodwill 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 retail monopolist or to the public at any price. Any manufacturer, with complete impunity, can do just that by simply closing his plant and going out of business as retail monopoly otherwise might easily force him to do. Such action is clearly within what has been referred to as the citizen's inalienable right to drop dead.

ERNST & ERNST,
Chicago, Ill., May 26, 1961.

AMERICAN ISSUES PRESS, INC.,
Chicago, Ill.:

We have tabulated from questionnaire forms forwarded to us by pollsters of Manpower, Inc., during the period from February 1, 1961, to May 15, 1961, the totals of the replies to the questions shown by the questionnaire forms entitled "American Issues Press, Inc.—Telephone Survey of Homemakers." Previously, our assistance had been solicited by you in refining the questions used in this survey, in the interest of maximum clarity and accurate research results. Modifications in form suggested by us were adopted and the questions were revised by you accordingly before proceeding with the survey.

Each form was coded to identify the congressional district and State in which it was used and bore a certification by the pollster to the effect that the questions had been asked by telephone of a number of homemakers without deviation from text.

The replies tabulated by us covered a total of 15,295 interviews with homemakers, such homemakers having been 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 results of our tabulation of responses for the entire United States are as follows (no opinion responses are not included in determining percentages):

Question No. 1. When you go shopping * * * do you buy mostly those brands of products easiest for you to see and reach * * * or * * * do you look for certain well-known brands you may have tried and like?

Easiest to see and reach	1,000
Percent	6.8
Well known	13,729
Percent	93.2
No opinion	566

Question No. 2. Do you buy mostly the lowest-priced products * * * or do you consider both quality and price in deciding upon the value of a product to you?

Lowest price	1,221
Percent	8.2
Quality and price	13,727
Percent	91.8
No opinion	347

Question No. 3. 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?

Less	12,349
Percent	93.7
More	828
Percent	6.3
No opinion	2,118

Question No. 4. As to lower-quality trademarked products of manufacturers who try to reach consumers * * * who are attracted more by low prices * * * than high quality * * * do you believe that such manufacturers of lower-quality products should continue to rely upon storekeepers to fix * * * as they please * * * the retail prices to be paid by their customers for such products?

Yes	4,373
Percent	39.8
No	6,618
Percent	60.2
No opinion	4,304

Question No. 5. Do you believe * * * that a product * * * made of lower quality * * * to sell at as low a price as may suit the storekeeper * * * sometimes meets * * * reasonably * * * a limited need * * * or a limited budget * * * of the homemaker * * * and that * * * therefore * * * the homemaker should be able to continue to easily find such products to buy?

Yes 11,418
Percent 84.0
No 2,171
Percent 16.0
No Opinion 1,706

Question No. 6. 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?

Yes 10,760
Percent 81.1
No 2,509
Percent 18.9
No opinion 2,026

Question No. 7. Do you believe a manufacturer should * * * or should not * * * be permitted by law to establish the lowest price at which a retailer could sell that manufacturer's trademarked product * * * while leaving the retailer always free to charge you at any time for that same product some higher price the retailer himself might want you to pay?

Should 4,677
Percent 36.3
Should not 8,216
Percent 63.7
No opinion 2,402

ERNST & ERNST.

BERGSON & BORKLAND,
Washington, D.C., March 20, 1963.

Mr. JOHN W. ANDERSON,
President, Quality Brands Associates of America, Inc.,
Gary, Ind.

DEAR MR. ANDERSON: You have requested my opinion as to the constitutional reach of the quality stabilization bill which was introduced in the House of Representatives on February 11, 1963, as H.R. 3669 of the 88th Congress, 1st session, and which differs substantially from the Federal fair trade bills introduced in earlier Congresses.[1]

It is my opinion that the provisions of the quality stabilization bill are fully within Congress' constitutional power to regulate commerce and that they comply with constitutional requirements relating to due process. The courts have consistently recognized that legislation authorizing a person to regulate the resale of goods identified by his distinguishing brand, name, or trademark is a reasonable exercise of legislative power.

The stated purpose of the quality stabilization bill 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, and for other purposes." 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 (17), inclusive. In substance, the bill provides that the owner of a brand, name, or trademark retains the property rights therein, and in the trade and public goodwill symbolized thereby, after the sale or transfer of the goods to which such brand, name, or trademark relates (par. 7); that he may revoke the right of persons to utilize such brand, name, or trademark in reselling identified merchandise where the seller engages in "bait merchandising practices," sells or offers to sell at other than the currently established resale price or at a price not within a currently established resale price range or publishes misrepresentations concerning the identified goods (par. 8); that the owner may sue in any U.S. District Court, regardless of the amount in controversy, for damages and injunctive relief where his brand, name, or trademark is utilized after the right to use it has been revoked (par. 10); and that the rights and remedies of the legislation shall be available to any owner even though he competes at any level of distribution with any reseller offering goods identified by the owner's brand, name, or trademark (par. 15).[2]

The availability of the rights and remedies provided by the legislation is conditioned by the requirement that goods usable for the same general purpose be available to the public from sources other than the owner of such brand, name, or trademark and that such other goods be in free and open competition with the goods identified by the brand, name, or trademark (par. 8). The bill also provides a forum for suit by a bona fide purchaser of goods subject to the provisions of the act against any owner, not otherwise subject to process, who in utilizing the provisions of the act publishes any misrepresentation as to the size, capacity, quality, condition, model or age of the goods in question and upon which misrepresentation the purchaser has relied (par. 8).[3]

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[1] A companion bill, S. 774, was introduced in the Senate on Feb. 11, 1963, by Senator Humphrey. With the single exception that H.R. 3669 contains an exemption for the sale of prescription drugs, the two bills are the same.

[2] Other provisions preserve the owner's right to bring actions otherwise provided by law for wrongful use of a brand, name, or trademark (par. 12); provide that the bill shall reach all acts and transactions in or affecting commerce which Congress may lawfully regulate (par. 13); define certain terms as used in the act and provide that an established resale price and resale price range shall be uniform at each level of distribution within each market area determined by the owner of the brand, name, or trademark (par. 14); and provide that a trademark owner may establish a resale price or price range for the resale of a combination of two or more items of goods different from the sum of the currently established prices for which the items are sold individually, and may engage in other promotional activities not made unlawful by any other statute (par. 14).

[3] Other provisions protect resellers against any unfair or confiscatory consequences of revocation of their right to use a brand, name, or trademark (par. 9); and provide that (a) lack of due diligence by a trademark owner in revoking the right to use a trademark of offending resellers competing with a defendant or (*b*) sale by the trademark owner of the same kind of goods to another reseller under terms more favorable or at lower prices than those under which the owner has sold such goods to the reseller involved in the revocation proceeding, will constitute defenses (par. 11). The bill also contains exemption for certain types of sales (par. 16).

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. The Supreme Court in *Old Dearborn Disturbing Company* v. *Seagram-Distiller's Corp.* (299 U.S. 183, 194 (1936)), expressly 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 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."

Applying this concept, the Court held that the Illinois Fair Trade Act which proscribed "the sale of identified goods at less than the price fixed by the owner of the mark or brand * * *" was not "so arbitrary, unfair, or wanting in reason as to result in a denial of due process" (299 U.S. at 194–45). The principle was reiterated in the 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 protectible interset in the property of trademarked goods owned by another, he has a right, in the protection of his interest, to impose a condition upon the resale of that property. Since the nonsigning retailer acquired the commodity with notice of the condition, enforcement did not violate due process. 283 F. 2d at p. 92."

See also *Parke, Davis & Co.* v. *Green Willow, Inc.*, (205 F. Supp. 346, 350 (S.D.N.Y. 1962).

The importance of protecting the property interest represented by the brand, name, or trademark, as this bill seeks to do, was clearly set forth in a recent opinion of the Supreme Court of Pennsylvania, *Mead Johnson & Co.* v. *Martin Wholesale Distributors, Inc.* (1962 CCH Trade Cases par. 70, 374 (S. Ct. Penna., 1962)). The court stated:

"* * * when a meritorious product acquires a certain good standing with the public, it is necessary to uphold its standard by prohibiting its sale at prices which presumably would be below or close to the cost price. If one dealer cuts prices below or close to the cost price, another dealer may cut even lower. This, then, could be followed by still further lower cutting until the slashing would fall below the waterline, sinking completely the ship of good trade" (1962 Trade Cases at pp. 76, 544).

See also *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.* (205 F. 2d 788, 791 (5th Cir. 1953), cert. denied, 346 U.S. 856, reh. denied, 346 U.S. 905); *Youngs Rubber Corp.* v. *Dart Drug Corp. of Maryland* (175 F. Supp. 832 (D. Md. 1959)). There would appear to be no difference in principle between unauthorized price cutting in the resale of identified goods and the additional practices listed in paragraph 8.

Since paragraph 13 expressly limits the bill's application "to all acts and transactions * * * in or affecting commerce, which Congress may lawfully regulate," it clearly is not subject to attack on the ground that it exceeds Congress' power to regulate commerce. In its jurisdictional scope, the bill is patterned after the Lanham Trademark Act, which grants remedies against persons who, in commerce, make unauthorized use of registered trademarks. Section 45 of the Lanham Act, paralleling paragraph 13 of the quality stabilization bill, defines commerce to mean "all commerce which may lawfully be regulated by Congress." Thus, both the Lanham Act and the quality stabilization bill contemplate the full exercise of Congress' commerce power; and neither can be said to go beyond constitutional limitations upon the exercise of that power.

To illustrate the manner in which the quality stabilization bill would operate if enacted, it will be helpful to consider a hypothetical situation. Suppose the XYZ company manufactures and sells throughout the United States a product identified by the trademark "XYZ." This identified product is resold through numerous retail outlets. Assume also that there are products produced by other than the XYZ company which are usable for the same general purpose as is "XYZ" and are in free and open competition therewith. Under such conditions, it will be optional with the trademark owner whether to use the act in the marketing of his products. If the XYZ company elects to use the act, the reseller will receive notice of the conditions under which his right to use the "XYZ" trademark will be revoked. When a reseller engages in "bait merchandising,"

publishes a misrepresentation or misrepresentations concerning the "XYZ" product, or sells it at unauthorized prices, the company notifies the reseller that his right to use the "XYZ" trademark in the resale of the product in question has been revoked.[4] Should the reseller, after receiving proper notice of the revocation, continue to employ the "XYZ" mark in selling the product in question to the public, the XYZ company can bring suit without respect to the amount in controversy for damages and/or injunctive relief[5] in any district court of the United States in the district in which the defendant resides or is found or has an agent.

Where a defendant has used the "XYZ" mark in interstate commerce, the court obviously has jurisdiction to entertain the action. Moreover, since paragraph 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. *Wickard* v. *Filburn* (317 U.S. 111 (1942)); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.* (334 U.S. 219 (1948)).

The extent to which proprietors of brands, names, or trademarks can secure relief against intrastate resellers is made clear by cases arising under the Lanham Trademark Act, which, as indicated above, is parallel to the quality stabilization bill in its jurisdictional provisions. A case in point in *Pure Foods, Inc.* v. *Minute Maid Corp.* (214 F. 2d 792 (5th Cir. 1954), cert. denied, 348 U.S. 888). Plaintiff in that action owned the trademark "Minute Maid" which it used in interstate commerce to identify frozen fruit juice concentrate. Defendant sold frozen meats solely within the State of Florida under the designation "Minute Made." Referring to the all-embracing definition of "commerce" in the act, the court commented:

"It is too well settled to require citation of authority that an activity local in nature but which interferes with the free flow of interstate commerce or exercises a substantial economic effect on interstate commerce may be regulated by the Congress" (214 F. 2d 795).

Accordingly, the court held that the complaint, although it did "not charge that the defendant distributes its products in interstate commerce, * * * [did] allege damage to plaintiff's goodwill established in interstate commerce" (214 F. 2d at 796). To like effect is *Lyon* v. *Quality Courts United* (249 F. 2d 790 (6th Cir. 1957). In that case defendant used plaintiff's registered trade and service marks for a motel which it operated in Ohio. Objection was raised on jurisdictional grounds because the infringing use occurred solely within the confines of a single State. The court rejected this contention, stating:

"Facts showing the plaintiff's own use of its mark in interstate commerce were clearly set out, as were facts alleging a substantial economic effect upon that use resulting from the defendants' intrastate infringement" (249 F. 2d at 795).

In *National Tuberculosis Ass'n.* v. *Summit County T. & H. Ass'n.* (122 F. Supp. 654 (N.D. Ohio, 1954)), defendant was charged with infringing the plaintiff's trademark used in its campaign literature and on Christmas seals. Despite the fact that there was no proof that defendant ever transported or sold the infringing seals outside of the State of Ohio, the court held that there was jurisdiction to enjoin the local infringement. In so holding, the court asserted:

"* * * it scarcely can be doubted that defendants' Christmas seal sale in Summit County has adversely affected and will aversely affect the plaintiff's fund solicitation there. The activities of these defendants multiplied in other places would seriously threaten plaintiff's national organization and its nationwide tuberculosis program" (122 F. Supp. at 657).

Still another pertinent authority is *Admiral Corp.* v. *Penco, Inc.* (106 F. Supp. 1015 (W.D.N.Y. 1952) affirmed, 203 F. 2d 517 (2d Cir., 1953)), where defendant had utilized the trademark "Admiral" in selling vacuum cleaners and other appli-

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[4] The exercise of the right of revocation by the XYZ company must be within 90 days of the act of the reseller giving rise to such action. The revocation itself must be carried out by means of a "written and dated notice." Moreover, if revocation is caused by a sale at an unauthorized price, the reseller previous to the sale must have received written notice of the owner's currently established retail price or price range. It should additionally be noted that nothing in the bill can prevent the reseller from continuing to sell the "XYZ" product so long as he does not use the "XYZ" mark in so doing.

[5] Injunctive relief, when granted, shall remain in effect 1 year from the date it is granted unless it is the 2d or a subsequent such injunction issued against the same defendant in favor of the same plaintiff, in which case it shall be a permanent injunction. Any injunction upon petition of such plaintiff may be vacated unconditionally by the court granting it.

ances through retail stores which it operated in New York State. In upholding jurisdiction under the Lanham Act, the court observed:

"* * * if defendant's use of the mark Admiral is allowed to continue such use by defendant, even if wholly intrastate, would result in a falling off of plaintiff's sales in the area where defendant operates" (106 F. Supp. at 1018).

In *Time, Inc.* v. *Life Television Corp.* (123 F. Supp. 470 (D. Minn. 1954)), the publishers of Time magazine sued for infringement of the trademark "Life" by defendent, which advertised and sold television sets in Minnesota under a mark closely imitating the trademark "Life." In upholding jurisdiction under the Lanham Act, the court declared:

"It is clear that Congress may constitutionally regulate wholly intrastate activity if it has a substantial economic effect upon interstate commerce. Therefore, this court has jurisdiction of the claim for trademark infringement though the defendants' business is wholly intrastate—since the infringement, if substantiated, will undoubtedly affect the interstate business of plaintiff" (123 F. Supp. at 473–474).

And in *S. C. Johnson & Son, Inc.* v. *Drop Dead Co.* (201 F. Supp. 442, 443 (S.D. Cal. 1961)), the court stated that:

"* * * it is a misconception that actual sales by an infringer must be made in interstate commerce before the Lanham Act applies. It is not the actual sales made in interstate commerce, but the effect of them which is the norm to be applied."

See also *Iowa Farmers Union* v. *Farmer's Education and Cooperative Union of America* (247 F. 2d 809, 815–16 (8th Cir. 1957)); *Stauffer* v. *Exley* (184 F. 2d 962, 967 (9th Cir. 1950)); *Nielson* v. *American Oil Co.* (203 F. Supp 473, 476 (D. Utah 1962)); *Liberty Mutual Insurance Co.* v. *Liberty Insurance Co. of Texas* (185 F. Supp. 895, 902–3 (E.D. Ark. 1960)); Cf. *Peter Pan Restaurants* v. *Peter Pan Diner* (150 F. Supp. 534 (D. R.I. 1957)).

The Supreme Court has never had occasion to interpret and apply the Lanham Act to infringing use occurring within the borders of a single State. In *Steele* v. *Bulova Watch Co.* (344 U.S. 280, 283 (1952)), however, the Court observed that the Lanham Act "confers broad jurisdictional powers upon the courts of the United States." In the light of this broad jurisdictional grant, the Court held that an infringing use occurring in Mexico but adversely affecting the interstate and foreign commerce of plaintiff could be enjoined under the act.

Since an equally broad jurisdictional grant is contemplated by the quality stabilization bill, I conclude that decisions thereunder would conform to those under the Lanham Act. It follows, therefore, that the owner of a brand, name, or trademark used in interstate commerce could invoke the judicial remedies created by the quality stabilization bill against the use in intrastate commerce of any act or practice enumerated in paragraph 8 of the bill where such use adversely affects the interstate business of the owner by impairing the goodwill inhering in his brand, name, or trademark.

Sincerely yours,

HERBERT A. BERGSON.

Mr. DINGELL. The record will remain open for a period of 10 days for any additional information that any interested party desires to place therein.

And with that, unless there is another witness present who desires to be heard, the committee will stand adjourned at the call of the Chair.

(The following material was submitted for the record:)

STATEMENT OF RANDOLPH J. SEIFERT IN SUPPORT OF QUALITY STABILIZATION BILL, H.R. 3669

As an attorney engaged in the general practice of law in New York City, and as a member of the firm of Russell, Seifert & Norton, I represent several manufacturers and organizations interested in the protection of trademarks, and thus vitally interested in the quality stabilization bill, H.R. 3669.

However, the issue goes much deeper than the moderate trademark protection afforded the manufacturer, the reseller, and the consumer by the quality stabilization bill.

The more fundamental issue is, Shall Congress reassert its constitutional power to make economic policy—particularly antitrust policy—or shall Congress continue to permit the usurpation of its power of policymaking by the Government's enforcement agencies and by the courts?

Viewed broadly, the quality stabilization bill, if enacted, will be an assertion by Congress of its basic constitutional power to fashion and define national economic policy. This measure relates to the legality or otherwise of certain intrabrand restrictions. This bill says it will be lawful for a trademark owner to announce conditions governing the use of his property, his trademark; that it will be lawful for a brand name owner to prevent his own brand from being forced to compete with itself.

This bill will establish the type of distribution system a producer may lawfully employ in presenting his own trademarked product to consumers. This is not a simple area, either in business or in the law, especially as we have moved from an agrarian to a largely industrial society, and brand names, trademarks and Government-imposed limitations on distribution practices seem now to be an essential and inevitable part of the business process.

Representatives of the Department of Justice and the Federal Trade Commission have appeared and condemned this proposed legislation as being a restraint of trade, and an interference with the free play of economic forces. It is my earnest conviction that just the opposite is true—that the enactment of this measure will liberate businessmen as well as channels of distribution from arbitrary, capricious, inconsistent, and illogical restrictions, imposed unilaterally, by the two coordinate branches of Government. Enactment of this legislation will enable a brand name owner to create something of value—a quality product marketed through a soundly operated distribution system.

Let me point out that in today's confused morass of antitrust law, as it relates to marketing, the only thing certain is that a restraint of trade is a restraint of trade simply because the U.S. Supreme Court says so. The reading of the recent opinions of the divided court in the *White Motor* case should dispel the last doubt as to who is making economic policy for American business. The time-honored franchise system of White Motor's was under attack, and three Justices of the Supreme Court thought that the White Motor franchise arrangement should be declared illegal per se—meaning that the court would not consider any evidence in justification, explanation, or vindication of White Motor's franchise system.

Please note that not even homicide is a per se offense—it can be justified. There are many mitigating circumstances, such as self-defense or accident. It is submitted that only Congress has the facilities, and only Congress has the constitutional power to condemn business practices as undesirable restraints, and impose the sanction of illegality threon.

The next matter that should be highlighted is the so-called States rights amendment proposed by the opponents of the quality stabilization bill. The judicial-legislative contest over this delicate area of economic policy also exists on the State level. It is State courts, not State legislatures, who are defining their economic policy in the most restrictive manner by declaring illegal and invalid sound and creative business practices of long standing. The proposed amendment therefore should be called a State court rights amendment.

However, there is another reason that makes the so-called States rights amendment specious in this context. It is Federal legislation, the Sherman Act as well as the Federal Trade Commission Act, that is creating the problems in this area. It is Federal law that establishes national antitrust policy, one that is hostile to any kind of planning or controlling of distribution. It is restrictive interpretations of the Sherman Act and the FTC in its application to the distribution of a product that makes orderly marketing well nigh impossible today.

As an example of restrictive interpretations, the Chairman of the FTC recently told a group of appliance manufacturers in New York that a manufacturer's interest in the distribution of his products should terminate as a matter of law at the shipping platform. In other words, the manufacturer produces the product, gets paid for it, and at that point loses all legal or justifiable business interest therein—despite the fact his trademark, his own property, is on the product.

So the proposing of a so-called States rights amendment would only serve to frustrate and defeat the purpose of this legislation. The States right banner is always most attractive, and it certainly was most astute of the opposition

to raise this specter. The fact is, however, that Congress should enact effective legislation, or none at all. The States rights amendment would, in effect, leave the present deplorable legal situation unchanged.

Another matter that is of special interest concerns the relationship of this proposed quality stabilization law to price fixing. At this time, price fixing, as an antitrust epithet, has great potency—similar in impact to a charge of communism during an election campaign. It is also a term of many meanings. To a businessman price fixing may signify the bargaining about terms of sale, between a buyer and a seller. To an antitrust lawyer, price fixing is a term of art, with a much narrower and more technical significance.

Price fixing, as originally employed in an antitrust sense was limited to an interbrand or competitive product situation whereby ostensibly competitive producers were, by acting in concert, availing themselves of monopoly power over prices. By expanding the scope of this classic definition of price fixing to include intrabrand competition—competition among sellers of the same branded product—the opponents then employ their price-fixing epithet.

It was conceded by the Assistant Attorney General in charge of the Antitrust Division, during his oral testimony against the quality stabilization bill, that "*price fixing is essentially an epithet, and I suppose the witnesses who have been reluctant to admit the term have been correct in saying you simply should not use names of this sort.*"

It is not only the emotional and propagandistic nature of the charge of price fixing that causes the difficulty. More to the point is that the term is simply inadequate as an analytical tool.

Judge Loevinger then defends his price-fixing charge on the basis that vertical resale price maintenance practices help to maintain horizontal price-fixing conspiracies. One answer to this is "so does the telephone." Should we outlaw the use of the telephone?

A better answer perhaps is that despite years of experience in antitrust enforcement in fair trade States, Government antitrust investigations and litigated cases simply have not established such a pattern. When the Government attacks a manufacturer's fair trade policy, such a case seldom, if ever, ripens into one involving a horizontal conspiracy. Any fair-minded student of antitrust will acknowledge that such cases are distributive cases only, involving the distribution system of one producer. This was true in *Dr. Miles*, *Parke-Davis*, *McKesson-Robbins*, and *Snap-On-Tool*, to name but a few.

The Department of Justice treatment of the State court decisions passing on the constitutionality of State fair trade legislation also leaves much to be desired. There can be no doubt that the great commercial States such as New York, Massachusetts, Pennsylvania, New Jersey, Illinois, California—with but one or two exceptions—have approved the social policy embodied in fair trade legislative enactment, and despite Mr. Loevinger's contention, the Supreme Court's opinion in the *Old Dearborn* case unanimously approved fair trade on its merits. This is vital to this committee's study of the matter, for the reason that the present legislative proposal is, in essence, a codification of that unanimous Supreme Court decision.

It has been more than 70 years since our basic antitrust statute—the Sherman Act—was enacted. The policy of protecting free enterprise against its own excesses that underlies the Sherman Act has been supplemented by hundreds of additional statutes, administrative decisions, and judge-made case law. Today, because of the confused and conflicting state of the law, anything a businessman does in the conduct of his business affairs is capable of being challenged as an antitrust violation.

For example, under the label "reciprocity," antitrust specialists are today questioning the right of a businessman to purchase a product made by a customer. Tomorrow, it may be illegal per se for a seller to buy anything from a former customer. So if you're a butcher and you sell a steak to a barber, you had better get your hair cut elsewhere.

Extreme and absurd? Yes, but give it an ominous name—"reciprocity"—foreclosing a market to competitors—and designate it as an antitrust crime, and we're ready to go to court.

The unplanned growth of antitrust law and its enforcement has been accompanied by several phenomena:

1. Basic decisions relating to economic policy—whether or not a particular business practice should be outlawed—more often than not are made by judges and administrators, based on academic and often obsolete economic theories, and

with but slight recourse to the realities of the marketplace. A current example of this is the present controversy between the Department of Justice and the Federal Trade Commission over whether cooperative advertising by a group of retailers constitutes price fixing under the antitrust laws. Thus the process of lawmaking itself is in the hands of the enforcement agencies. It is still most unusual in other areas of social control to have the police force function as a major participant in the purely legislative process.

2. The development of an a priori school of economic value judgments. The economic "party line" of antitrust law was given its greatest stimulus during the great depression of the 1930's, to which the influential liberal minds of that era contributed heavily. This body of uncritically accepted economic dogma, fashionable in antitrust circles, is a mixture of express rules and unstated prejudices. In the former category are rules such as "price fixing is per se illegal," and "any discrmination between buyers is to be discouraged." As examples of the tacit or unstated content of antitrust economic dogma are: "Bigness itself is bad, or at least suspect, while smallness of size is good, desirable." Also: "Businessmen generally spend much of their time contriving new ways to violate the antirtrust laws with impunity."

It is not the purpose of this statement to attempt to appraise the validity or otherwise of these fixed beliefs in the beneficial workings of our economy. It is important to note, however, that when a Supreme Court opinion is consistent with this school of economic thought, it is enshrined. The 1911 *Dr. Miles* case is an outstanding example of this process. Although it was a 5 to 4 decision, and contains a brilliant dissent by Judge Oliver Wendell Holmes, the majority decision is now accepted by antitrusters as a fixed and unalterable point of reference in the economic firmament.

Contrast this to the treatment and respect afforded the 1936 *Old Dearborn* case, a unanimous decision by the Supreme Court that approved of resale price maintenance on its merits. There is no question that *Dr. Miles* and *Old Dearborn* are wholly irreconcilable in their treatment of the economics of resale price maintenance. In the 1911 *Dr. Miles* case, five justices thought that resale price maintenance was undesirable as a matter of basic antitrust policy. Four justices disagreed, led by Mr. Justice Holmes. A quarter of a century later in the *Old Dearborn* case, all eight justices participating in the case found price maintenance to be entirely consistent with the public good. Thus out of 17 justices participating in these two cases, 12 voted in favor, 5 voted against. Yet antitrusters today enshrine as settled law the decision of the 5, and ignore the advice of the 12. Yes, antitrust has its perplexities and surprises.

I do not believe that Congress is completely aware of the extent to which its power to make antitrust policy has been eroded. Economic policy in this delicate area is now more frequently made by the courts of the Nation and in the offices of the Department of Justice and the Federal Trade Commission. I would suggest that Congress not only has the power, but an affirmative obligation to declare as law that which it finds socially and economically desirable. Congress should not be blinded or confused by epithets, or by false concepts based on unstated and untested assumptions.

For many years our national policy in respect to the law of distribution—intraband distribution—has been changing. Both the Department of Justice and the Federal Trade Commission have been moving on a case-by-case basis, persuading courts—always on theoretical grounds—to outlaw business practices that have been held perfectly valid and above reproach by former generations.

One lurid example of the judicial-executive encroachment on the area of congressional power and responsibility is found in the *Parke-Davis* case. The Supreme Court is now split on the question as to whether a seller can select his own customers. At least one Federal court of appeals, after *Parke-Davis*, has issued an injunction against the seller compelling that seller to deal with a particular buyer.

It is self-evident that the freedom to deal with customers of your own choosing is basic to private capitalism and a free enterprise society. Yet the tempering with and limitation of the right of customer selection by executive-judicial action goes almost unnoticed by Congress.

It is respectfully submitted that the experiences of affected businessmen who are parties in interest to this legislation and who have made their views known to this committee are more persuasive as to the merits of the quality stabilization bill than the abstract theorizing of government spokesmen who are charged only with enforcing the law, and not making policy.

SUPPLEMENTAL STATEMENT OF DR. JAMES F. BENDER[1] AND DR. DAVID H. ARBEIT[1] OF ADELPHI COLLEGE, GARDEN CITY, LONG ISLAND ON BEHALF OF NATIONAL SMALL BUSINESS ASSOCIATION IN SUPPORT OF H.R. 3669

The following material aims to cover some areas that the hearings to some degree neglected. It will, however, be impossible to skirt around everything that has been stated at the hearings. It seems to us that most of the proponents of the measure shied away from defending it on the grounds that it is very beneficial to the consumer. This apparently is the prime interest of the legislators. Time and again Congressman Dingell seemed to be trying to pinpoint the quality stabilization proposal as a price-fixing device and hence anticonsumer. I think we can make a strong case for the fact that the consumer's position will be considerably improved by the legislation.

Those who feel that this is anticonsumer legislation make certain assumptions about the consumer that had much more validity in the 1930's than they do today. It is incorrect to view the consumer in 1963 as an uninformed low-incomed, helpless economic little man. The consumer is much more sophisticated and economically wise today. He has a much higher real income; he is much more concerned with quality than with price competition that is accompanied with quality deterioration. In the 1960's with an average family income of approximately $6,500 per year the consumer is most concerned with getting better quality merchandise at fair price. The consumer wants the security of knowing that when he is paying fair prices he will get standard quality merchandise. He does not want to be lured by bait advertising stressing unusually low prices for quality branded merchandise. He knows that after the handful of items of top branded but offbeat size, color and style, is exhausted, he is redirected toward nonbranded inferior quality goods. Certainly when the consumer pays the advertised price for substandard merchandise, he is overpaying to a far greater degree than anyone might conceivably have to overpay under the quality stabilization bill.

Authorities in the consumer economic field are convinced that the consumer is very much interested in nonprice competition that stresses quality, service, information, warranties, delivery and credit. They no longer stress price cutting as much as they did during the depression of the 1930's. Under the quality stabilization bill the consumer will be assured that in most lines of merchandise there will be ample supply that is fairly priced and of excellent quality. The middle-incomed consumer is willing to pay a little extra for quality goods. He does not want the cheap, shoddy, inferior, nonstandardized blind merchandise of cutthroating promoters. The consumer is moving toward quality standards and away from price cutting, which is more of a quantity standard. The consumer is facing the economic facts of life. He cannot get something for nothing, he cannot beat the giant merchandiser and some of his unfortunate marketing tactics, bait advertising, sales gimmicks etc.

The consumer has to be convinced that maintenance of a stabilized price is not at all synonymous with monopoly pricing. The monopolist or oligopolist tends to set his pricing at a point where he will receive the maximum net profits. Under this bill, manufacturers of quality stabilized merchandise will have to compete with other such manufacturers and with those who make nonbranded merchandise. Under these circumstances the manufacturer of quality stabilized goods cannot set his price too high or people will turn to another merchandise. At best, his markup wil include a fair profit, not a maximum one.

In summary it might be stated that most consumers favor the elimination of bait advertising and misrepresentation features of the quality stabilization

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[1] Dr. James F. Bender, professor of marketing and director of graduate business studies at Adelphi College (Garden City, N.Y.), received his B.S. and Ph. D. degrees from Columbia University. Prior to his affiliation with Adelphi College, he was dean of Kimberly-Clark Corp.'s institute of marketing. He is a member of the American Marketing Association, the American Association for the Advancement of Science and many other scholarly societies. Dr. Bender is retained as a marketing and sales consultant by small as well as large business. His biography is listed in Who's Who in America and similar reference works. He is the author of a number of books and has published more than 500 articles in scholarly and trade journals.

Dr. David H. Arbeit, B.S., City College of New York; M.A.: Columbia University; Ph. D.: New York University. Teaching: City College of New York, New York University, Hofstra, C. W. Post, and Adelphi College. Taught in the area of business management, with emphasis on small business management, finance, and economics. Writings and lectures: Economic analysis of the postwar national debt, and evaluation of guaranteed annual wages; lectured on business, banking, financial topics to various business organizations and educational groups.

bill. The vertical price maintenance aspect of the measure will also be supported by the consumer when he recognizes that the prices he pays will only be fair ones and that in return he will receive guaranteed quality, superior service, extra convenience, and that he buttresses the economic power of the small local retailer and manufacturer who are nearby and conveniently at his service.

The quality stabilization bill can be defended by considering its very favorable impact on the businessmen of our economy. The overriding consideration is that the smaller businessman retailer as well as manufacturer is enabled to survive and effectively compete with the many large economic institutions that are characteristic and necessary within the framework of our economy. The manufacturer under the quality stabilization bill is primarily concerned with getting the best possible products at the lowest profitable price to the consumer. In this way maximum quantity may be sold and total profits enlarged. The manufacturer cannot set his price too high because he does not wish to price his article out of the market in order to subsidize wholesalers and retailers unduly. The manufacturer under the quality stabilization bill competes against nonbranded articles, against other manufacturers' brands, against private brands of chainstores and the like. He knows that overpricing or quality deterioration on his part will lead to his own economic demise.

This self-conscious appraisal by the manufacturer under the quality stabilization bill contrasts with the unscrupulous practices of certain ruthless, giant merchandisers whose tactics drive about 150,000 retailers and small manufacturers out of business every year. This prevails during a period that economists characterize as prosperity. Under the onslaught of the price-cutting tactics of discounters, ethical wholesalers and retailers frequently give up the line and occasionally go out of business. Now the discounters dominate the manufacturers and they dictate lowering of quality because they want lower prices. Under these circumstances, quality deterioration is highly elastic in relationship to price decline. A small percentage decline in prices induced by the discounter cause the manufacturer to reduce quality by even a larger percentage.

An assured market at stabilized prices enables the manufacturer to regularize his production and achieve a relatively low cost of production per unit. The manufacturer can, under these circumstances pass on in part the savings of his efficiency to the retailer and the consumer. Is he likely to do so?

Under this measure there will be sufficient competition engendered from off brands and other areas to indicate an affirmative answer to this question. This bill specifically encourages competition between products by prohibiting a monopolist or oligopolist from putting his article under fair stabilization. Competitive products must be available before a manufacturer may avail himself of quality stabilization. The businessman who attempts to practice cutthroating under this law is not necessarily destroyed. He may change his tactics. He may return the merchandise to the manufacturer at invoice prices. He may sell them as he wishes with due notation that his continued right to sell these goods has been revoked.

This bill will not drive businessmen out of business but will encourage them to continue under more orderly marketing procedures. The quality stabilization bill will help the small retailer survive. At present the small retailer's share of the volume of business is declining in the face of the aggressive merchandising and marketing policies of discount houses, department stores, and chainstores. The small businessman is caught in a price squeeze today that is on the one hand induced by rigidities, e.g., wages, rent, interest; and on the other hand, but cutthroating prices. As the noose tightens, hundreds of thousands of small independent retailers and manufacturers are eliminated annually. The decline of the independent retailer would be a serious loss to our economy. The bill fosters fair competition between the small unit retailer and the giants in branded merchandise only. The chainstores cannot undersell the unit store. The consumer will be assured of the same quality and price anywhere he buys. The consumer may then fully appreciate the convenience and service of the independent retailer and proceed to patronize him. The importance of the survival of the local businessman may also be buttressed by sociological considerations when one stops to think that today he is the leader in community chests, Red Cross drives, scouting, etc.

This bill has much to recommend it from a quasi-legal economic point of view. It should be stressed that every aspect of coverage under this bill is on a voluntary basis. The manufacturer, wholesaler, retailer may—not must—come under the quality stabilization proposal. It is true, however, that once these institu-

tions accept coverage under the bill certain definite responsibilities become theirs. For example, the manufacturer owes a responsibility to the reseller to ferret out those who are misleading, misrepresenting, and are using bait and switch merchandise tactics. The manufacturer must stop these resellers, otherwise a cooperative reseller may break the agreement without any consequences. The wholesaler and retailer have an obligation to the manufacturer in that they must not abuse the manufacturer's property right and his trademark by misrepresenting, by bait advertising, and by price cutting.

This bill compels the cooperative distributor to recognize the manufacturer's existing property rights in his trademark. Behind that trademark is the understanding that the manufacturer has put in a tremendous investment in maintaining quality. Intense bait advertising, loss leaders, and misrepresentation can irreparably damage a quality product's reputation in short order. The good will that a manufacturer may have built up over a generation may be destroyed in a season by such activity. This bill puts a premium on the recognition of the mutuality of interest between the manufacturer, wholesaler, retailer, and consumer. This approach we feel is a very profitable line along which total support for the bill should be found. We might even add the interest of the worker into this harmonious companionship. Manufacturers of quality stabilization items can pay decent wages, accept the responsibility and the cost of collective bargaining without the feeling that they will be destroyed by labor's demands.

There are those who argue that the Federal Trade Commission already has the power to curb misrepresentation, bait advertising, etc. It is apparent, however, to those who explore the morass of marketing misadventures in practice today that the Federal Trade Commission's ability to curb such practices has apparently been subverted. The giant quasi-monopolistic outlets seem to continue their predatory sales promotions with impunity. The new legislation will therefore strengthen the Federal Trade Commission in its attempt to enforce prohibition of unfair methods of competition. It will not add to existing governmentalism; it will not involve another Government agency, it will merely involve a time-honored private judicial remedy.

In addition to cease and desist orders of the Federal Trade Commission which have not been notably successful in curbing misleading advertising and deceptive practices in the resale of goods, manufacturers under the quality stabilization proposal will have the right to institute civil suits against dishonest sellers of branded merchandise. This would be a form of effective industrial self-policing which many believe to be more desirable than increasing governmental regulation.

Private remedial action by manufacturers of branded articles need not be antithetical to Federal Trade Commission action. Too frequently the FTC and the Antitrust Division of the Department of Justice have complained that they have not had enough men and money allocated by Congress to do an effective job. Manufacturers' remedial action can complement Federal Trade action. This bill can be another deterrent to the unscrupulous reseller to beware of bait advertising and deceptive selling practices, because the total dollar liability of his predatory actions may far exceed the illicit profit he hopes to garner. This type of risk calculation is readily understood by the cutthroater and the bait advertiser.

At the present time, in addition to antitrust and Federal Trade Commission action, misrepresentation is being handled by private agencies called better business bureaus. They have been fairly successful in handling fraud in specific instances. They are ineffectual, however, in handling widespread national bait advertising, loss leaders, and misrepresentations that are intended to deceive the general public. Under this law when these are committed by a reseller of a quality brand article, the manufacturer may revoke the reseller's right to continue to market this product, and to use the brand trademark. In addition, he may sue the reseller for damages or injuctive relief. Under this law, the relief will come much sooner than under the quasi-judicial, procedure of the Federal Trade Commission which involves investigation, complaint, cease and desist order, and judicial review. It may take as many as 5 years before the total procedures of the Federal Trade Commission are completed, and in the meantime the predatory tactics go on relentlessly. This bill would enforce the aim and intent of Congress more efficiently than is done at the present time.

STATEMENT OF MR. G. G. BLAISDELL, PRESIDENT, ZIPPO MANUFACTURING CO., RELATIVE TO H.R. 3670

The story of Zippo is a simple one. I founded our company in the dark depression days of 1932 and began manufacturing a cigarette lighter which I called Zippo. We built a quality product and for 31 years, every one of the millions of lighters which we have manufactured has borne the brand name "Zippo." I hope it's familiar to you and that you own one.

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 31 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.

A company's brand name and the goodwill it symbolizes is a great asset in a competitive market, but how can a brand compete against itself and grow? It can't—because when a product cannot be handled at a profit, it ceases to be handled. Yet, unethical and unprincipled retailers feature name brand merchandise in "bait" or "loss leader" advertising, building traffic on these brands, and making profit on unknown and unbranded merchandise displayed nearby.

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. 3670) 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 LEONARD C. TRUESDELL, PRESIDENT, ZENITH SALES CORP., CHICAGO, ILL., APRIL 22, 1963

Once again I am writing regarding the quality stabilization bill and to point out that since my last statement the situation has become much more serious. Many, many thousands of small retailers throughout the United States are suffering terribly.

With the slightest decline in business, literally thousands of these retailers will go bankrupt quickly.

The reason for the retailers being on the ragged edge of going bankrupt is that prices have degenerated to the point where a retailer can barely pay his overhead and earn a meager loving. He is unable to pay his people satisfactory living wages. All of this has been forced upon them because a few large companies have been successful in building a business in which they take well-known brands of products and price them as price leaders or bait to get traffic into the store.

While a few of these companies have been successful, it has been at the expense of thousands of small businessmen, and the time has come when the general retailing of all types of products in the United States is going to be dangerously hurt unless Congress provides the proper regulations to enable all businessmen, especially the small retailer, to make a fair and honest margin of profit.

Unless these retailers can immediately start to earn a margin of profit which experience indicates is required to exist in business, we are going to

be confronted with a serious number of bankruptcies or these dealers will be simply forced out of business completely.

It is my sincere hope that the Congress will take immediate action to improve this situation.

STATEMENT OF BROWN-FORMAN DISTILLERS CORP.

Brown-Forman Distillers Corp. began business in 1870. The guiding philosophy of its founder, George Garvin Brown, was to produce the highest quality whiskies that could be made. This has been, and is today, the keystone policy of Brown-Forman. Over the years we have expended millions of dollars in establishing and maintaining the highest standards of excellence of the various brands of this company through research, development, and quality control.

Mere excellence of products is not enough for commercial success in a highly competitive market. Quite large annual expenditures through advertising, merchandising, and promotion to acquaint the trade and the consumer with the merits of our products are necessary. In the end, the product must be sold at a price reflecting its quality and which returns a reasonable profit.

The American consumer expects quality of product that is commensurate with its price. "You get what you pay for" is the axiom of the marketplace. A product sold at a reasonable and stable price maintains its reputation for quality. One which is sold at cutrate prices is soon presumed to be of cutrate quality. A debased price structure can destroy overnight the efforts and expenditures of years to establish a reputation of premium quality.

H.R. 3669, the quality stabilization bill, will protect the manufacturer of high quality goods from loss of product goodwill and reputation through uncontrolled and destructive price wars, enabling him to more confidently invest in product development and improvement.

For these reasons, Brown-Forman Distillers Corp. supports and urges the passage of the quality stabilization bill, H.R. 3669.

STATEMENT BY ROBERT C. FERNLY, EXECUTIVE SECRETARY, NATIONAL INDUSTRIAL DISTRIBUTORS' ASSOCIATION

Our association, composed of more than 500 leading distributors of industrial supplies and equipment throughout the United States except 13 Southern States, strongly favors the passage of the quality stabilization bill known as H.R. 3669 and others. This position was established by almost unanimous vote of members attending our annual meetings in May 1961 and June 1962.

This act will enable our suppliers to protect their inherent property rights in their trademarks, brands, names, and thereby insure that the ultimate user of industrial supplies and equipment will be able to receive the value of distributors' services such as engineering advice, prompt delivery from local stocks, etc. As independent businessmen, we favor manufacturers utilizing industrial distributors as the most efficient marketing channel for industrial supplies and equipment. Without this legislation, manufacturers may tend to undertake their own wholesale distribution, as, under present law, they then have complete control over merchandising practices utilized in conjunction with thier brands and trademarks.

The bill promotes this highly worthwhile objective through purely voluntary means and no additional Government personnel or funds are required to enforce it.

STATEMENT OF DWIGHT D. TOWNSEND, DIRECTOR OF THE WASHINGTON OFFICE OF THE COOPERATIVE LEAGUE OF THE USA, APRIL 16, 1963

Mr. Chairman and gentlemen of the committee, we appreciate this opportunity to present the views of the Cooperative League of the USA on the proposed bill, H.R. 3669, otherwise titled the quality stabilization bill.

The Cooperative League is a national federation of all types of cooperatives. Nearly all of the 14 million families who own and control cooperatives in the United States are represented in the Cooperative League.

This bill proposes exactly the same brand of minimum price fixing under the guise of "quality stabilization" that has been proposed previously under a similar euphemism, "fair trade." The new facade is no less infamous than the former, and the Cooperative League is as vigorously opposed to this bill as to its predecessors. We resent efforts to camouflage a legislative proposal which from the day of its enactment would suppress competition by permitting manufacturers to fix minimum retail prices and thus pick consumers' pockets of hundreds of millions of dollars every year.

The most heinous offense under the antitrust statutes of the United States is conspiracy to fix prices. This legislation not only winks at price fixing. Under it, the Government would endorse price fixing and use its full authority to enforce price fixing. We are unalterably opposed to any such efforts to legitimize monopolistic price fixing. If this bill is enacted, the Clayton Act and the Sherman Act are effectively repealed.

To bring such legislation to Congress under the cloak of quality stabilization not only insults the intelligence of Congressmen but makes a mockery of our laws and our private enterprise system.

We remember the Office of Price Administration. During wartime emergency, this agency fixed maximum prices. OPA was—like all Federal agencies—responsible to the people through their elected representatives in Congress. Though its purpose was to protect consumers by fixing maximum prices, OPA was barely tolerable, even in wartime.

Yet now you have before you a proposal to allow private interests who are entirely beyond the reach of popular control to fix minimum prices—not maximum prices, mind you, but minimum prices in peacetime. This, gentlemen, is absolutely intolerable.

The first victim of this legislation would be the consumer. The second would be the small businessman who has been hoodwinked into supporting it. If it is true—as these misguided merchants insist—that their large-scale competitors enjoy lower operating costs per sales dollar, this legislation cannot save the small retailer. The large chain will simply offer more services with each purchase, offer more inducements to enter the store, or find ways to circumvent the fixed prices of, shall we say, quality stabilized merchandise.

Just as right-to-work proposals aggravate employer-employee relations, just as tax equality proposals would impose tax penalties on not-for-profit business, and just as fair trade begets trade that is remarkably unfair to consumers, so quality stabilization would stabilize neither quality nor service but only price. Quality stabilization is a semantic trick, and the Nation's 180 million consumers have a right to expect that this subcommittee will expose it.

This legislation should be disposed of with finality and dispatch so as to conserve the energies of Congress for more constructive purposes.

The Cooperative League is uncompromisingly opposed to H.R. 3669, and we welcome the opportunity to make our views known.

STATEMENT ON BEHALF OF THE PAINT & WALLPAPER ASSOCIATION OF AMERICA, INC., SUBMITTED BY ROBERT E. PETIT, EXECUTIVE VICE PRESIDENT

The officers and board of directors of the Paint & Wallpaper Association of America, Inc., on behalf of members throughout the United States, enthusiastically support the quality stabilization bill.

We feel that this legislation is imperative to the future well-being of the thousands of paint and wallpaper retailers who attempt to market quality merchandise at fair prices. We believe that the manufacturers and distributors of quality merchandise stand shoulder to shoulder in their attempt to market such products in an ethical, profitable manner.

Those who destroy precious reputations painstakingly built through years of fairness in dealing with the consuming public can and are destroying all incentive to make and market products of other than superficial quality. We believe this bill can restore some semblance of order in the marketplace, and will provide those who desire to make and market products through ethical channels the support they need to continue their efforts.

STATEMENT OF H. B SPEYER, VICE PRESIDENT AND TREASURER, CHAMPION SPARK PLUG CO.

We, as manufacturers of a trademarked quality product, namely, Champion spark plugs, are very much interested in seeing that subject legislation is pased. 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.

It will be optional with the manufacturers whether to use the Quality Stabilization Act in the marketing of his products. If the manufacturer elects to use the act, the reseller will receive notice of the conditions under which his right to use the trademark will be revoked.

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 the product according to the price.

STATEMENT BY JAMES A. HUESER, MANAGER, OF INDEPENDENT GARAGE OWNERS OF AMERICA, INC., TULSA, OKLA., APRIL 17, 1963

Comes now the Independent Garage Owners of America, Inc., a national federation of 6,000 owners of independent automotive repair shops in 40 States in the United States of America.

Independent automotive repair shop owners all over America are in favor of the enactment of the quality stabilization bill, because it will enable the independent automotive repair shops to stay in business by being able to compete on an equal basis for the sale of automotive repair parts and repair of automobiles.

For example, mass merchandisers (discount stores, supermarkets, drugstores, etc.) are able to sell brand name automobile parts such as spark plugs, headlamps, mufflers, tailpipes, oil filters, air cleaners, brake linings, brake shoes, and other parts at retail prices far below the wholesale cost the independent automotive parts wholesaler. The retail prices vary. But on brand name spark plugs for example, the retail price at the mass merchandisers is 10 to 20 cents less than the wholesale price which the independent automotive repair shop must pay. The manufacturers are unable to do anything about this because they do not have control over the retail distribution of their product.

As a result much of the motoring public buys automotive parts from the mass merchandisers, thereby making it more difficult for the independent automotive repair shops to compete for the parts and repair business. This in itself is bad enough. But the motoring public, because it can purchase parts at prices below wholesale, have turned themselves into amateur repairmen.

This not only makes it difficult for the independent repair shop to compete for the repair business, but the amateur mechanics are endangering the lives of other people through faulty repairs.

Therefore, it is vital for the quality stabilization bill to be enacted without delay to protect the lives of the motoring public and the future of the independent automotive repair shops in America.

STATEMENT ON BEHALF OF THE PHILLIPS-VAN HEUSEN CORP., SUBMITTED BY LAWRENCE S. PHILLIPS, EXECUTIVE VICE PRESIDENT

The interests of our company are a direct reflection of the interests of our more than 6,000 independent retailers throughout the country. Innumerable conversations with many of our customers lead us to believe that they almost unanimously feel that the passage of a quality stabilization bill is vital to their future and to their existence.

The typical small retailer in the men's furnishings field cannot possibly compete with the sprawling, predatory, unscrupulous giants whose avowed publicly stated business procedures are in direct conflict with the tens of thousands of small independent retailers in this country.

The independent retailer's only competitive tool against the unprincipled and ruthless retail operator, are service and brands. To cripple the meaning of a brand for these people would be like taking away their right leg.

On behalf of our retail accounts and our more than 3,000 employees, we urge favorable consideration of the quality stabilization bill.

STATEMENT OF OSCAR KOLIN, VICE PRESIDENT OF HELENA RUBINSTEIN, INC., IN SUPPORT OF H.R. 3669

This statement is presented to the Subcommittee of the House Committee on Interstate and Foreign Commerce in support of the quality stabilization bill. I respectfully request 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 this bill to the cosmetic manufacturer and distributor, as well as to all manufacturers of branded products. I am strongly in favor of legislation to protect brand names and trademarks. I am firmly opposed to predatory marketing practices which destroy the value of such brand names and marks. It is my belief that the continual rise of discount houses will eventually result in the destruction 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 products. To date fair trade laws have been our only means of combating these practices. I am convinced that the best answer to the problem lies in the quality stabilization bill and I sincerely hope that it will soon become law.

Here are my reasons. To explain, I will discuss the impact of the discount house on the manufacturer, the retailer and, most important of all, the consumer, the three categories of persons directly affected.

We are confronted today with two types of discount stores. The first feeds upon the hard-earned contributions of established businesses and makes no contribution of its own. Most often it is a small store located in the middle of the busiest commercial center of a large town or city among many long-established retailers. This small cutrater frequently sells only very well-known branded merchandise and it sells this merchandise at reduced prices. In recent years, however, another type of cutrate operation has appeared on the scene. Very often this establishment is a large chain or department store which handles two types of merchandise: (a) Quality branded goods which are sold as bait at reduced prices to induce customers to enter the store, and (b) several kinds of obscure, 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. Such deceptive and misleading merchandising practices will, 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 a recognized right to protect the goodwill of his product by establishing a minimum retail resale price for the product either through unilateral policy or under fair trade statutes. This right is recognized as a legitimate means of safeguarding the manufacturer's proprietary interest in the goodwill of his product, and of protecting that valuable property from destruction and impairment through predatory pricecutting, loss-leader selling, and other destructive marketing tactics.

A manufacturer of a branded product must create a product of quality. This involves extended research, product testing, and considerable financial investment. After years of hard work and continuing substantial expenditures, a goodwill is finally built up for the brand he has created, as well as a nucleus of loyal customers. As a result of careful cost calculations—the cost of the product itself, of its packaging, and of distribution (advertising, demonstration, sales promotion, sales representatives, etc.), the manufacturer establishes a price for these quality products. The price must be realistic and competitive with the prices of other manufacturers of branded cosmetic products—and the cosmetic industry is an extremely competitive one. Let me assure you that today the profit margin of a manufacturer of a quality cosmetic product is extremely narrow—with not one penny remaining for additional expenses.

Our traditional American system of distribution has been—and must continue to be—based upon free, open and fair competition. Different manufac-

turers produce the same or similar products for resale at various retail prices in accordance with their respective established patterns of doing business. These prices will vary on the basis of each manufacturer's basic investment in product research and promotional development. For example, there are 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 eyemakeup market. The product was copied by competitors and today similar items are being sold in the U.S. market at prices ranging from $0.79 all the way up to $5. These areas of research and risk investment resulting in new quality products could not be maintained without a minimum retail resale price structure. As long as there is 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 cosmetic retailer, whether a department store, chain or drugstore, must obtain its regular markup. When a discount house begins to cut resale prices, the retailers have 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 very real possibility that hundreds of thousands of these small retailers will go out of business. It should be remembered that it was the depression of the 1930's which caused numerous States to pass legislation legalizing fair trade agreements. It is important to 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 little choice. He either had to acquiesce in the demands of the retailers, lose money and subsequently face bankruptcy or, even if he would not meet the demands of the retailer, he was out of business anyway.

And this pattern, reminiscent of the depression years, will repeat itself. If 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. As a consequence, every retailer, without exception, will lose money by selling branded merchandise. This is obviously a literal point of no return.

3. And now let's consider the final victim—the consumer. It is well recognized that nationally advertised and branded consumer commodities most easily lend themselves to loss leader and cut-rate merchandising. The cutrate price offered to bait a customer appears, at first, to look like a big bargain to the consumer, but if a manufacturer is forced to give additional 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 of paying higher prices as a result of this price pyramiding.

The manufacturer, confronted with a 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 he must find a means of allowing the additional discount. His costs have been calculated with great care and he must, therefore, substantially reduce or eliminate entirely 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.

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 OF THE NATIONAL SPORTING GOODS ASSOCIATION IN SUPPORT OF THE QUALITY STABILIZATION BILL (H.R. 3669)

The board of directors of the National Sporting Goods Association at its annual meeting voted unanimously to support the principles of the quality stabilization bill (H.R. 3669). The National Sporting Goods Association is an association of independent sporting goods retailers located throughout the country. The headquarters of the association is at 23 East Jackson Boulevard, Chicago 4, Ill.

Sporting goods retailers are primarily small business. The Census of Business in 1958 showed annual sales of only $58,328 per store. The need for this legislation is now. The NSGA board of directors considers this bill the most important single bill for sporting goods retailers of all bills being considered by the Congress in this session.

Distribution is the final important link between the manufacturer and the consumer. Price cutting and dishonest practices are destroying the distributive economy as we know it.

The bill is permissive and only those manufacturers who wish to have their trademarked goods covered will make use of it. Retailers and consumers will have a free choice as to whether or not they will purchase these products or competitive ones offered by other manufacturers.

The bill is of greatest value to the small businessman. If we are to make it possible for him to compete he needs this protection, and he needs it now—before it is too late.

STATEMENT OF AMERICAN PHARMACEUTICAL ASSOCIATION ON H.R. 3369

The American Pharmaceutical Association, organized in 1852, is the national society of individual pharmacists in the United States. It is completely representative of the pharmacists of this country, both by professional specialty and geographical distribution.

Although the American Pharmaceutical Association is not a trade association, we have an interest in legislative proposals which affect the distribution of products available to the people of our country. We believe the public deserves quality products and honest services at reasonable prices.

The purpose of H.R. 3669, the quality stabilization bill, is to stabilize the quality of "goods, wares, and merchandise" by allowing manufacturers to control retail practices which may encourage quality deterioration of their "goods, wares, and merchandise" which bear a nationally recognized brand, name, or trademark. The bill would permit the manufacturer-owner of a brand, name, or trademark to retain property rights in the name regardless of sale or transfer of the "goods, wares, and merchandise." The bill gives the manufacturer-owner the right to revoke the privilege of sale of such "goods, wares, and merchandise" for any of the following reasons:

A. Because the reseller has employed "goods, wares and merchandise" bearing the brand, name, or trademark, in furtherance of bait-merchandising practices.

B. Because the reseller, with knowledge of the manufacturer-owners' currently established resale price, has advertised, offered for sale, or sold such "goods, wares, and merchandise" at prices other than those currently established by the manufacturer-owner.

C. Because the reseller, with attempt to deceive purchasers, has published a misrepresentation concerning such "goods, wares, and merchandise."

The bill is completely permissive in that the question of whether or not its provisions are employed is entirely left to the discretion of a manufacturer.

The American Pharmaceutical Association supports H.R. 3669, the quality stabilization bill, and we hasten to point out that our support is without self-interest; the bill specifically exempts from its coverage: "Sale of drugs, medicines, and devices for which either Federal or State law or regulations require a prescription from a physician, dentist, or such other persons as the various States may authorize to prescribe such items."

When a pharmacist dispenses pursuant to a prescription order he performs professional services and has both the professional and legal responsibility to determine the charge for rendering such professional services. Prescription charges do not represent the price of "goods, wares, and merchandise" that are merely sold in commerce. Up to the point when a pharmacist takes an article

in hand preparatory to dispensing a prescription order, the physical article is essentially a commodity. But the very act of dispensing the prescription medication, with all the attendant professional services of the pharmacist, introduces a marked change. This is the point at which a physical article passes from the world of commerce into the world of professional service.

The American Pharmaceutical Association joins the numerous other national trade and professional associations supporting H.R. 3669, the quality stabilization bill. We believe the bill is a constructive attempt to eliminate certain predatory practices involving quality products.

STATEMENT BY JOHN D. KELLY, EXECUTIVE COORDINATOR, NATIONAL ASSOCIATION OF TOBACCO DISTRIBUTORS, APRIL 24, 1963

The members of the National Association of Tobacco Distributors have long taken an active role in endorsing and supporting any and all endeavors which in their opinion would bulwark the freedom of initiative and preserve, in the public interest, the small business segment of our national economy.

In our opinion, the quality stabilization bill as contained in H.R. 3669 is critically necessary to the preservation of a marketplace economy wherein small retail and wholesale businesses can survive and hopefully even prosper.

Since the beginning of the century the "loss-leader" has been a favorite device utilized by certain retailers to bleed the vitality of competition from their less favorably circumstanced competitors. Nationally known products, or products of universal appeal, having widely established values, are disposed of by loss-leader practitioners at cost or less than the actual cost of acquisition. This offer and sale at such ruinous prices is intended as an enticement calculated to increase customer traffic to the place of business of the "loss-leader" seller and to induce the purchase of other merchandise for which no standard price is generally known. The customer is thereby entrapped, without suspicion, into purchasing other goods, often at an exorbitant markup, more than sufficient to make up the loss on the "leaders."

In spite of all protestations to the contrary the consumer, and I use the term collectively to include all consumers and all the purchases made in the "loss-leader" seller's store or stores, never saves anything when the loss-leader is employed.

The mercantile history of the United Statets is dotted with cases where single products and even whole companies have foundered not because of any inherent defect or lack of quality of the products themselves, but simply because the consuming public has, for some reason, lost confidence in the brand.

It has long been recognized that one of the surest ways to destroy acceptance and confidence in a product is to imply that the product is not worth what consumers are accustomed to pay for it. Use of a particular product as a loss-leader or in bait-advertising almost inevitably leaves the public with the feeling that the manufacturer or distributor of the product are taking an unwarranted or inordinate profit, in effect "gouging" the public. Anyone with the slightest knowledge of retailing and wholesaling is aware of this phenomenon.

The evil of the loss leader does not stop with the bilking of the public or the destruction of the loss leadered brand's integrity and acceptance by the consuming public.

An independent business, such as a small local wholesaler or retailer, must, of necessity, base his own image and community reputation on the quality of the brands of merchandise he carries. The public comes quickly to recognize that so and so company has such and such brand of a particular product. When one of these brands is debased and the public loses confidence in it the unfavorable public reaction almost invariably extends itself to include the innocent dealers in the community, along with the suspicion that they have been taking unfair advantage of their customers on every product they carry.

Most ethical retail and wholesale dealers live constantly with the fear that a brand in which they have invested considerable time, effort, and money in cultivating its acceptance by their customers and the general public, will find its way into the hands of a cut-price merchant. The loss leader practitioner rarely has an investment in the brand and less frequently has he an interest in its future potential. He seeks only to satisfy his own current need for a good traffic puller. He will use it for the sole purpose of getting customers into his

store in the hope that he will be able to sell them other more profitable merchandise once they are there. In such situations the item is quickly discarded by the price cutter once the public has lost faith in its value and perforce will also be discontinued by ethical dealers because the market for it has been destroyed. Thus the loss leader injures every level; from the manufacturer, through wholesaler and retailer right down to the ultimate consumer.

The foregoing establishes one of the principal reasons why small business continues in its present state of decline, as testified by numerous economists and market analysts. Caught in the vise of mounting costs and cut-price competition the small businessman lacks the financial resources to fight back. Unless some method is found to proscribe this vicious method of competition, and we sincerely believe that the quality stabilization bill offers a great hope for solution, then small businessmen regardless of the efficiency with which they operate their businesses will continue to decline in numbers and vitality. Our economic system and our antitrust laws were never intended to reward business merely because it is large or penalize efficient operations merely because they are small. It is obvious that a remedy is imperative.

For all of the foregoing reasons our association must unqualifiedly endorse the purposes expressed and inherent in H.R. 3669. However, we would be derelict in our responsibilities to this honorable body if we did not point out certain infelicities in draftsmanship within the current bill which may lead to radical misinterpretations of its purposes and effects. This committee is well aware of occasions in the past when laws beneficial and salutary in intent have been subverted by awkward language to nullify their main purposes and sometimes even to create an effect diametrically opposite to that intended by the sponsors of the law.

Section 14 of the present bill before you for consideration, at page 8 lines 3 through 13 inclusive, contains language which may be construed as having deleterious effects far from the intention of the bill's proponents. As presently drafted, that portion of the bill may be deemed to imply that the owner of the brand or mark may set higher prices for wholesalers than that charged direct buying retailers and that such owners, in combination sales, may sell below cost another's branded product provided that the same is tied in with the sale of his own merchandise. We are convinced that this is neither the intention nor the desire of those public spirited citizens sponsoring this legislation. Experience, however, has shown that, given the opportunity, ill-disposed individuals can seize upon apparently innocent loopholes to frustrate the most honorable of intentions and the most high minded of desires.

To obviate such untoward and unwanted likelihood, I beg leave to submit to this committee the following revisions of lines 3 through 13 inclusive of page 8 of the present bill, which revisions demonstrate conclusively that it is not the intention of the present legislation to, in any way, modify the provisions of the Robinson-Patman Act with respect to nondiscriminatory prices or the provisions of any antitrust law with respect to tie-in sales at below cost prices:

"Each currently established resale price and resale price range shall be uniform at each and nondiscriminatory to any level of distribution within each marketing area. Such owner of the brand, name, or trademark may so establish, for resale of a combination of two or more items of goods, subject to his currently established resale price or resale price range, a resale price or price range different from the sum of the current established resale price or price range for the items when sold individually. Such owner of the brand, name or trademark may also engage in other promotional activities not made unlawful by any other statute."

STATEMENT OF DR. HOWARD A. PRENTICE, EXECUTIVE VICE PRESIDENT, THE PROPRIETARY ASSOCIATION, WASHINGTON, D.C.

The Proprietary Association, an 82-year-old national association of the manufacturers of proprietary medicines, supports the principles embodied in H.R. 3669 and urges favorable consideration and passage of this bill.

The Proprietary Association's membership includes the manufacturers of drug products—packaged medicines—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, enforceable laws to protect those trademarks.

Therefore, the Proprietary Association endorses the aims of H.R. 3669.

STATEMENT OF MRS. DEXTER OTIS ARNOLD, PRESIDENT, GENERAL FEDERATION OF WOMEN'S CLUBS, WASHINGTON, D.C.

The General Federation of Women's Clubs, on behalf of its 11 million members, wishes to go on record as being opposed to the fair trade principles as set forth in H.R. 3669, the Quality Stabilization Act, which would amend the Federal Trade Commission Act.

We strongly oppose any legislation which denies free competition among retailers and which would permit price fixing by manufacturers. Such action undoubtedly would result in higher prices to the consumer and would be very detrimental to our free enterprise system.

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 hand presses 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 purchased 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 product 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 tradename, 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 farther 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. 3669 and others 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.

STATEMENT OF THE INDEPENDENT GARAGE OWNERS OF OHIO, INC., AT THE REQUEST OF THE ASSOCIATION MEMBERSHIP ON THE QUALITY STABILIZATION BILL, S. 774

I would like to express to the House Commerce Subcommittee hearing this bill the opinion of the independent auto repair service people who are members of our association. Through our 25 local units here in Ohio we conducted a vote of this bill. These units then instructed their delegates to the State board of directors to vote at our State board meeting to urge support of this legislation for the following reasons:

1. Because some types of business operations make it a habit to use name brand merchandise as a "football" to secure traffic to the point where an independent retailer can no longer profitably handle the item, thereby putting the

manufacturer in the position of either cutting quality to produce a lower price product or go out of business.

2. This results in an inferior grade of product to the public. As an example, a name brand copper tubing used to repair brake lines on motor vehicles was used in this manner by a store in Cleveland last year. They sold this copper tubing at a price below the wholesale cost to the retailer, to the public. Because of this difference in price, the retailers in this area could no longer sell this product to the public. Because they could not sell this product, they could not buy it from their supplier, the automotive parts wholesaler. When copper tubing began to pile up on the wholesaler's shelf, he inquired why. He was told by the retailers that because this "bargain barn" was selling it to the public at a price below what the retailer could buy it for, he no longer had a market for it. The wholesaler in turn, still wanting to sell copper tubing, turned to other sources of supply. He found that he could purchase copper tubing made in Japan at a price that would allow him to sell the retailer at a price the retailer could compete with the "bargain barn" on.

The results, however, did great harm to the public. How much, we have no way of knowing. The reason was that the Japanese copper tubing was not only lower in price but lower in quality. It had their spots in the wall of the tubing that could cause great harm if a brake line was made of this thin-walled tubing. Under stress it could well give way and cause a serious accident.

The quality stabilization bill is an ideal solution to this problem in that it protects the entire market, including the public, from those who would prostitute a name brand qaulity product and cause such a condition as described above and yet permit the public to still have an opportunity to have available to them products built to a "price" if they so desire.

There is so much of this prostituting of quality products going on at this time in our industry that unless something is done now about this, we are going to find ourselves in the position of either closing our doors, not only in the automotive service business but other small businesses as well, or joining the trend of handling inferior products in order to compete.

The United States cannot afford to lose the small business people in our economy. The public cannot afford to be subjected to a deterioration of quality in their purchases that is developing in this country as a result of the chaos now prevailing in retailing. The quality stabilization bill will bring order out of chaos because while it will provide protection to name brand quality products, it still leaves the door open to "price" built merchandise.

We earnestly hope this committee will recommend passage of the quality stabilization bill.

STATEMENT OF MICHAEL DAROFF, PRESIDENT, BOTANY INDUSTRIES, INC., PHILADELPHIA, PA.

Mr. Chairman, I support the quality stabilization bill, H.R. 3669. I am president of Botany Industries and also of H. Daroff & Sons, makes of "Botany" 500 clothing for men, and the House of Worsted-tex, makes 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–$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 quandry 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 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 or 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, 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 talked about. We manufacturers might weather the storm, but believe me, many of these small businessmen will go under.

As a manufacturer of two national brands of quality clothing, nationally advertised, I do not want those 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.

A Statement From Clyde Bedell, Los Altos Hills, Calif., on H.R. 3669

For 45 years I have intimately worked in the field of selling and merchandising, always with close identification to retail stores. Before that time, as a schoolboy, I worked in retail stores before and after school for some years. My first full-time work, in connection with retailing, was doing traveling editorial work for trade magazines, writing up progressive and aggressive activities of retailers in some 36 States and 4 Provinces of Canada for retail trade magazines.

In the course of my career, I have been director of sales and advertising, and of the corporation, for Butler Bros., then world's largest wholesaler. While with Butler Bros., I authored "The Seven Keys to Retail Profits," the most successful book on retailing ever published (McGraw-Hill, 1930).

I have also been advertising manager of Marshall Field & Co., and sales promotion manager of the Fair Store, on State Street in Chicago.

For many years more recently, I have—as a consultant—taught retailers of all types, all over the English-speaking world, how to advertise and sell more successfully and effectively. The basis of all my teaching is this simple, fundamental, vital truth: All good selling is serving.

I believe any effort to maintain prices artifically, whether under a forthright price maintenance or fair trade bill, or an act dishonestly promoted across the United States as "an act to promote quality stabilization" is a snare and a delusion. Such an act is always promoted in the interests of a modest minority of merchandisers, and to the disadvantage of the general public.

It is folly, on the one hand, for any administration to fight against the high cost of living and to admonish industry to keep prices down, while, at the same time it promotes or encourages the passing of acts to artifically maintain large groups of retail prices.

When prices are artifically maintained—as in the drug business, for instance—it seems to hold an encouraging umbrella over efforts to hoist prices in other activities, such as the filling of prescriptions. Does anyone believe that prescription pharmacists would be making the demands they make, working the schedules they work, and pharmacies charging the prices they charge for prescriptions (counting out capsules and tablets and relabeling bottles largely), were it not for the outrageous margins on numerous price-maintained drugs?

Cooperatives in the food field have had no chance to get a foothold and develop into any importance in the United States because the competitive free enterprise food chains, free to name their own prices, have kept gross profit margins so low that there was no umbrella under which food cooperatives could develop. Had the food industry in the United States been handicapped by a quality and price stabilization bill, we would not have the fabulous food industry in this country (despite certain persisting abuses), we presently have. Competition has developed fabulous ingenuity in food preparation, producing, and packaging. A quality and price stabilization situation would have permitted important operators to sit back and make fabulous profits without wiggling and ingeniously working to improve their competitive situation by progressive developments.

A price stabilization bill permits a good many little marginal liquor store operators and others to sit on their fannies in relative inactivity and make livings from people who are compelled to pay them for doing nothing but maintaining a stock on their shelves. It is doubtful if the American economy, or if the American public, is any better off for the supporting of these parasitical stores in the liquor field, or in any other field. It is certain we would not have been as well off if the countless small grocers of America had been preserved at the expense of holding back the large operators. Precisely the same arguments could have been made for price stabilization, even after the automobile industry got started, which could have kept the Ford automobile (and its low cost for repairing automobiles) from blanketing the country.

If we are to have a free enterprise system, we should have a free enterprise system.

If price stabilization is to be provided as a shelter for liquor stores, camera stores, drugstores, bookstores, etc., today, then price stabilization must be provided for appliance stores, furniture stores, men's clothing stores, department stores, tomorrow—and we can successfully throttle our economy into stagnation. We can preserve the status quo and stop all progress. We can see to it that every lazy merchant, who wishes to avoid effort, can sit and hand items off his shelves and still make a good living, if nobody is permitted to find more economical ways to operate and sell through efficiency and improved service.

I am aware of the good arguments that can be advanced for the so-called quality and price stabilization bill, but these arguments are all in behalf of the individual, and they are all against our American society and the free enterprise system.

Our society is in a desperate state today, because we have been making too many exceptions for too many individuals. It is time the Congress, and every thinking American, started paying the attention our forefathers did to our responsibilities as individuals for the making of a good society.

STATEMENT FROM MIKE CAROSELLA, CHAIRMAN, INDEPENDENT SHOEMEN, QUALITY STABILIZATION BILL COMMITTEE, JENKINTOWN, PA.

For years many legitimate independents throughout the country have been plagued with wave after wave of unfair competition from many large discount houses through misleading advertisements directed to the consumer.

This situation, if allowed to go unchecked, will result in thousands of independents throughout the country going out of business. Members of Independent Shoemen, are not afraid of good clean competition; we welcome it—it makes for a healthy business climate in all communities, and the country prospers by it.

We are afraid that our good name and integrity, which we have worked hard to build through the years, is being badly damaged through so-called bait advertising, which is nothing more than a cheap gimmick to lure customers into their stores (with our brands) and then as a result sell them something else in place of what they originally advertised.

I have personally shopped these stores and can testify that many advertisements are causing independents, as well as the American public a great injustice.

As chairman of the quality stabilization bill committee I do not intend to let this situation increase as the days roll into months and the months into years. I do not want to see many thousands of my fellow independents become victims of this unbusinesslike way of doing business.

America is a wonderful country, the best in the world. We have all helped make it the envy of the world by good, clean competition and free enterprise. Many of us independents wore Uncle Sam's uniform and helped preserve this wonderful system.

I urge all members of Congress to give their full support to this bill, the need is vital, the time is now. I ask each and every one of you to act now and legislate in favor of this bill on behalf of the countless thousands of independents from not only our organization, but all Americans who are earnestly trying to make an honest living in their own small communities throughout the country.

This is part of the American way of life, let's help keep it that way, and most of all let's preserve it, and with the help of God I know we will succeed.

STATEMENT BY EDWARD EWELL, PRESIDENT OF THE LAUNDRY AND CLEANERS ALLIED TRADES ASSOCIATION, NEWARK 2, N.J., APRIL 15, 1963

The quality stabilization bill has been carefully reviewed by a number of our leading members, and we wish to respectfully transmit the recommendation of our board of directors that it be favorably acted upon by the House Interstate and Foreign Commerce Committee. We do sincerely hope that the committee will favorably report it out of the committee as soon as possible for the early consideration of the House of Representatives.

Members of this national trade association composed of over 500 manufacturers and distributors represent the majority in the field of commercial laundry and drycleaning machinery, supplies, and affiliated lines in the United States.

It is the considered judgment of many that this fair-trade bill would help correct a number of unsound business practices which have sprung up around the country due to lack of legislative guidance in this direction.

We wish to thank the members of the committee in advance for careful consideration of this legislation which would be constructive in the long run in maintaining a healthy economy in the best interests of the public, business, and government.

STATEMENT OF MR. JOHN D. GRAY, PRESIDENT OF HART SCHAFFNER & MARX, CHICAGO, ILL.

The quality stabilization bill is urgently needed to protect consumers against the alarming spread of sharp and deceptive practices by unscrupulous retailers, and to strengthen the position of reputable retailers.

Manufacturers and most resellers of high-quality and respected brands of merchandise want the public to choose such brands for their dependable quality and value. As one of such manufacturers, we favor the objectives of the proposed quality stabilization bill and we hope your committee and the Congress will take prompt action on this bill to help protect quality brands and quality stores in which the public has confidence.

STATEMENT BY JOHN W. HUBBELL, SIMMONS CO., IN SUPPORT OF QUALITY STABILIZATION BILL

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, and Kansas.

By way of qualification may I say that I am a former chairman of the board of the Brand Names Foundation, and a lifetime director. I am a past president of the Sales Executives Club of New York and a current director, 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 am 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 involves our greatest research efforts, our most extensive advertising compaigns, 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 unethical 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. Some stores offer to sell an article below the going price to create an impression 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 of 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 product 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 normally resuls in 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 to 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 swiching" 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 desoil, 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 years, 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 is 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 loyality to establish."

Enactment of the quality stabilization bill and its broadened protection against deceptive pricing practices, against "baiting and switching" and against misrepresenation will be a pronounced positive effect upon our economy.

STATEMENT OF PHILIP CORTNEY, JAMES LLOYD FRI, AND RICHARD N. SEARS IN SUPPORT OF H.R. 3669

The volume and nature of testimony presented on the quality stabilization bill by both opponents and proponents gives convincing evidence that there is deep and widespread concern regarding the seriousness of problems in important areas of the distribution system. This testimony also clearly indicated substantial disagreement on the type of legislation needed to improve the competitive business environment and, at the same time, protest the fundamental rights of the consumer.

Our opinion, based on marketing experience and objective study of relevant data, is that, under the quality stabilization bill, competition would not be lessened and prices to the consumer would not rise.

These are the two basic issues raised by this bill and the ones most intensively debated. They relate primarily to the competitive environment of the market.

In addition to the voluminous testimony on both issues, members of the committee now have available in the marketplace concrete examples of two widely divergent forms of marketing that give not theoretical but tangible and realistic aid in answering these two important questions.

One is the orderly form of controlled brand name marketing which has been used for many years by large distributors. The other is discount merchandising, in which price comparisons with well-known trademarked products are used primarily for promotional and traffic building purposes.

Since this bill is intended to give manufacturers of trademarked products essentially the same rights and protection that have been enjoyed and effectively utilized by large distributors, we will discuss first what actually happens under this orderly form of merchandising.

Large distributors such as chainstores, mail order houses, and cooperative buying organizations are now selling under their own house names more than one-third of all trademarked goods sold in America. Under this system, commonly referred to as controlled house brands, the distributor fully controls the price and the merchandising policy from the manufacturer to the retail customer.

Under this bill, the consumer would receive essentially the same benefit and protection on nationally trademarked goods. There is intensive competition with house brands and with other nationally branded products, and this competition would most certainly control the consumer price as it does today.

Admittedly, one of the major purposes of this act is to decrease intrabrand competition at the retail level—the strictly "price war" form of selling between dealers in which products bearing the same identity are offered on a price basis only, as in the "discount" form of merchandising.

In our opinion, the discount form of merchandising, in total, has not contributed to improved quality of product, to the convenience of customers in shopping, or to lowering the cost of the retailing in relation to services rendered. Conversely, because of its predatory nature, it has increased the ratio of low-quality products and, more importantly, it has caused manufacturers to decrease their investments in long-range programs of research and informational advertising.

In brief, it can be demonsitrated not only by logic, but by examples drawn from innumerable experiences in actual merchandising that for the long range the consumer gets more real value for her money when the manufacturer and retailer are encouraged to compete in building up to a quality, rather than down to a price. In the controlled brand form of merchandising, the incentive is to build value into the product.

This is the basic concept which motivates and governs policy in all effective brand name production and distrbiution. Under such a system of creative merchandising, there is effective competition at all levels of trade. The consumer thus receives the full benefits of unhampered competition to build real value into the product.

There is no mystery in regard to the technique of discount selling. In order to stay in business, this type of store must realize a minimum gross margin on its total sales just the same as any other retailer. Thus, for every dollar he sells below his required percentage markup, he must sell an equal volume above this markup. In brief, the formula for operating under a discounting policy is simply to surround every deeply discounted item (loss leader) with three or four profit boosters.

Most estimates of huge savings to the consumer in discount stores are based on the faulty premise that the differences between suggested price of branded products and the discounters' loss-leading price can be totaled and projected on a nationwide basis as the increased price the consumers would have to pay if the quality stabilization bill were passed. One witness estimated that this increase might be as much as $14 billion. In the opinion of responsible and widely experienced marketing men, this type of contention and estimate of saving to the consumer is either based on a faulty premise or is a deliberate hoax.

CONCLUSIONS

One of the most persistent contentions of those opposing this bill is that there would be no free and open competition if prices were stabilized at the retail level. Certainly this contention is clearly disproved by what actually happens under the controlled brand form of selling. Here, there is competition between retailers of the most rugged type, and the same competitive forces would be in action on national brands under the provision of this bill.

The controlled brand form of marketing has satisfactorily demonstrated that competition has not decreased; that there has been no increase in prices to the consumer, and that this type of market stabilization is not violative of law.

It is strongly urged that what is actually happening in the markets be carefully weighed against theoretical arguments and contentions so that what might be outmoded concepts will not prevent the rapidly changing distributive system from freely adjusting itself to present-day consumer needs.

Philip Cortney, president of the Coty Co. and a student of economics, studied engineering and economics at the University of Nancy, France, where he graduated in 1916. He also studied political sciences and international law for 2 years at Columbia University, preparing for a Ph. D. Mr. Cortney has an hon-

orary degree of doctor of laws from Hamilton University. He is 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. He is vice chairman of the monetary committee of the International Chamber of Commerce.

Mr. Cortney has 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 he wrote a weekly column on economic and monetary problems for the French newspaper Le Figaro. He is the author of the book "The Economic Munich," and of an essay on "The Political and Economic Consequences of Lord Keynes' Theories."

James Lloyd Fri, A.B., Ohio University, M.B.A., Harvard Graduate School of Business Administration.

After majoring in marketing at the Harvard Graduate School of Business Administration, Mr. Fri was professor of merchandising for 5 years at the Graduate School of Retailing, New York University. He was manager of the Merchandise Division of the National Retail Dry Goods Association (now the National Retail Merchants Association) for 5 years, and for 30 years he was managing director or president of trade associations of manufacturers of consumer goods.

He was lecturer of retailing at Columbia University for 20 years and is author of the textbook, "Retail Merchandising," and has written or edited a number of books on merchandising and numerous articles and monographs on marketing.

Richard N. Sears, president of the Bates Shoe Co., of Webster, Mass., is a graduate of Harvard College (A.B., 1927). He received his master's degree from Columbia University in 1930. Mr. Sears has a Ph. D. from Harvard University (1934).

Mr. Sears has been a director of the National Shoe Manufacturer's Association and of the New England Shoe and Leather Association. He is a trustee of the National Shoe Institute.

STATEMENT OF JAMES LLOYD FRI IN SUPPORT OF H.R. 3669

My name is James Lloyd Fri of Bronxville, N.Y. My statement here and the conclusions and recommendations made are based on more than 40 years of close study and research in marketing of consumer goods beginning with the Harvard Graduate School where I majored in marketing with a degree of master of business administration.

For 5 years thereafter I was professor of merchandising at the Graduate School of Retailing, New York University; for 5 years, manager of the merchandise division of the National Retail Dry Goods Association (now the National Retail Merchants Association) and for 30 years managing director or president of trade associations of manufacturers of consumer goods.

For more than 20 years I was lecturer on retailing at Columbia University. I am the author of the textbook "Retail Merchandising," and have written or edited a number of books on merchandising and numerous articles and monographs on marketing. Since the early 1920's, I have followed closely the many hearings before congressional committees on proposed legislation aimed at the control of the marketing of consumer goods. It is from this long-time interest and experience as student, teacher, trade association executive, and consumer that the following conclusions and recommendations are drawn.

From a careful reading of testimony at hearings on the quality stabilization bill, a reasonable conclusion is that the conflict is not so much between opponents and proponents, as it is between actual knowledge of the realities of present day marketing and outmoded theories and concepts.

If there were a more even spread of factual information on actual merchandising processes—with particular reference to the competitive environment—debate on basic issues would most certainly be more productive.

The primary purpose of the following statement is to identify some of these more basic issues, and evaluate the relative significance of the facts and the theories as expressed by opponents of the quality stabilization bill.

It will be shown, based on fully valid evidence, that price stabilization of trademarked products at the retail level under the quality stabilization bill and the concept of free and open competition are completely compatible.

It will be shown that an economy requiring unrestricted price competition at the retail level is destructive of the consumer's best interests; that price of prod-

uct is meaningless unless related to quality of product; and that the discount form of merchandising puts into reverse practically all of the creative and constructive quality-building forces inherent in the brand name system of distribution.

Further it will be shown herein that opponents of the quality stabilization bill, whether representatives of the Department of Justice, or professors of marketing, or economists, have themselves been deceived or otherwise are a party to the deception of Congress and the consumer, when they cite "estimates" and "projections" allegedly showing that enactment of this bill would result in increased prices to consumers.

Unfortunately an aura of authority and responsibility is attributed to the assertions of the Department of Justice. Never was it more wrong than in its economic pontifications about the quality stabilization bill. Its statement was not based on facts. Instead it was largely based on theoretical notions and half-truths, and unsupportable assertions, claims, allegations, contentions, and estimates that do not square with the realities of the marketplace.

For that reason the assertions of the Department of Justice will be dealt with first in the following statement.

A FALSE PREMISE LEADS THE DEPARTMENT OF JUSTICE INTO AN ERROR OF BILLIONS OF DOLLARS

The Department of Justice asserts it "has found by economic surveys that consumers in States with price maintenance, or so-called fair trade, laws pay from 19 to 27 percent higher prices than consumers in States without such laws. Projecting an average price increase of 20 percent for all sales that may be covered by the operation of a national price maintenance law shows that it would cost the American consumer billions of dollars and have a powerfully inflationary effect."

This statement, which has appeared repeatedly in the record of hearings in one form or another, is typical of the many misconceptions due to lack of knowledge of the realities of present day merchandising, and particularly due to lack of knowledge of promotional techniques.

The nature of the above cited survey was not explained in the testimony, but a similar study by the Department of Justice, made in 1954, received wide distribution in the trade press. In that study it was reported that if customers had purchased 736 advertised drug products in a group of District of Columbia stores, they would have "saved" 28 percent as compared with list prices. A similar study of applicances showed that a "saving" of 27.7 percent could have been realized.

These figures were presented at a hearing in 1954 on a Fair Trade Act for the District of Columbia. They were used again by a witness last year as part of his "evidence" that passage of the quality stabilization bill might cost the American consumers as much as $14 billion annually.

Estimates of huge price increases to consumers, if this bill is passed, are based almost entirely on the unwarranted assumption that consumers are enjoying billions of dollars of net "savings" under the present form of merchandising in which there is little price stabilization of national brands at the retail level.

That such estimates of "savings" are in large part mythical can convincingly be demonstrated by simply examining the procedures used to obtain the results of such surveys.

Anyone acquainted with the discount form of merchandising should know that if this study of the Department of Justice had included all of the items sold by these same stores, customers would have contributed an average of about 30 cents out of every dollar of the stores' volume. The reason is simple: This type of store operates on a margin of about 30 percent. True, consumers would have made "savings" on some branded items, but they would have lost most of these "savings" on nonbranded products.

It is a serious disservice to the uninformed consumer for teachers of marketing and representatives of the Government to lend their prestige to studies which, by their very nature, are misleading. It is a disservice to assert that huge "savings" accrue if purchases are made in discount stores, without at the same time informing the customer that unless she limits her purchases solely to the identifiable loss-leader items, she will pay about the same price in the discount store as in the regular limited-service stores.

LOSS-LEADER SELLING IS EXTENSIVE

Some opponents of this bill have stated that "studies have indicated there is very little real loss-leader selling being done." There is no mutually acceptable definition of loss leader within limits that would permit accurate statistical study. However, those who contend there is little of such selling being done have themselves presented the most convincing evidence that loss-leader selling is, in fact, extensive.

There are two general types of discounts or markdowns which stores take in the ordinary course of business. The one is the customary markdown or "sale" to close out seasonal goods or stocks that are imbalanced for any merchandising reason. The other is the type of discounting that is done to create an "image" of low-cost operation and low prices throughout the entire store.

The former is a necessary and desirable part of efficient merchandising. The latter is intended to mislead the consumer.

A retailer using this deceptive form of promotional appeal would explain his methods this way: "Deeply discounted products (loss leaders) are nothing more than tools * * * to build traffic and create an illusion about our store. By featuring brand name goods at a value people recognize, I'm telling my customers that all my prices on all my products are cheap. I will make back my losses on the deeply discounted products by also selling those items of furniture, luggage, sporting goods, jewelry, and other merchandise which are not nationally advertised. On these 'blind' products I can make a reasonable profit, while giving the customer the impression he is always getting a bargain when he comes to my store."

The dividing line between customary markdowns and predatory discounting is obviously not exact, but when it is the policy of a store to systematically make markdowns on well-known brands substantially below the margin needed for the whole operation, that practice is clearly loss-leader selling. It is intended to be deceptive to the consumer and it is. It is also predatory to the manufacturer who owns the brand.

The facts are that all deeply discounted items are sold well below the store's required markup. Consequently, there is a loss on these goods which, of necessity, must be balanced by a higher markup on other goods.

The statement that "there is very little loss-leader selling being done," was made during the hearings by a professor of economics and a contributor of publications on consumer information. He appended to his testimony against the quality stabilization bill a long list of items in which the fair trade price and the price paid were shown.

There should be no reasonable doubt that most of the professor's data was factual in respect to the savings that were available on specific items. However, when consumers or Members of Congress conducting hearings on the quality stabilization bill are led to believe that the same percentage of savings can be enjoyed on all purchases, then economists who do not give the whole side of the story become themselves a party to deception.

Opponents of the quality stabilization bill contends that it would prevent low-margin retailers from passing on to consumers the savings resulting from a more efficient form of distribution. This at most is only a theory, an allegation. For no creditable evidence to support such a claim has been submitted in testimony. Nor does such evidence appear to be available from any source to indicate that the total gross margin of stores operating under the discount appeal are any lower than other nonservice stores carrying similar types of merchandise.

What has been shown convincingly is that there are savings on specific products. Yet according to the comparative lists submitted by opponents of this bill as their evidence, it is very illuminating—but really not surprising—to note that more than three-fourths of such products are offered for sale or are sold with a markup of less than 15 percent.

Responsible merchants, whose buyers have shopped discount stores extensively, can give this committee convincing evidence that the wide majority of discount houses have to get gross margins of at least 25 percent on their total sales. If a store thus needs 25 percent gross margin, then for every dollar he sells below this required markup, he must sell an equal volume above this markup.

It can safely be concluded therefore that the visible savings on the individual discounted items cannot be added together and projected on a nationwide basis as net savings to the consumer.

Those who make such estimates are either uninformed in regard to the mechanics of discount selling or are attempting deception.

This committee has repeatedly heard such estimates of huge savings. The erroneous assertions came from the Department of Justice and from economists and teachers of marketing, and were echoed by witnesses claiming to be speaking for consumers. There can be no basis in logic or in relevant marketing experience to use such an unsupportable premise as a reason to justify opposition to the quality stabilization bill. Rationalization of such opposition is impossible.

OBJECTIVE STUDY BY ENGLISH ECONOMISTS SHOWS RESALE PRICE MAINTENANCE DOES NOT RAISE CONSUMER PRICE LEVELS

Evidence that (*a*) resale price maintenance does not raise consumer price levels, and that (*b*) it operates to benefit the consuming public, may be found in a book entitled "Fair Trade, Resale Price Maintenance Reexamined," published in 1960 by two English economists.

The authors are P. W. S. Andrews, a lecturer on economics at the University of Oxford, and Frank A. Friday of the University of London.

Their evidence and findings are based primarily on what actually happened in other countries when resale price maintenance was abandoned. They are thus comparing, in a postmortem way, certain theories and concepts with the realities of the marketplace.

As a result of their comparative analysis, the authors found that "there is no evidence at all of a general downward pressure on gross margins after resale price maintenance was prohibited in Canada. In fact, margins have risen (in Canada) to a similar extent as in the United Kingdom. It is clear that the basic assumption of the opponents of resale price maintenance that the practice raises gross margins is quite wrong. The general claims that the abolition of resale price maintenance will benefit consumers by reducing the price level and will improve distribution by lowering gross margins is a great illusion."

Economists Andrews and Friday conclude that the abolition of resale price maintenance would mean (*a*) a decline in the number of independent merchants; (*b*) a reduction in competition between private brands and manufacturers' brands; (*c*) an increase in the size of large retailers; (*d*) a trend toward forward integration with the large manufacturer going into the retail business as well; and (*e*) the squeezing out of the small manufacturer.

ERROR AS TO CAUSE AND SIGNIFICANCE OF BUSINESS FAILURES MISLEADS DEPARTMENT OF JUSTICE TO OPPOSE QUALITY STABILIZATION BILL

The Department of Justice asserts that the rate of business failures is higher in States which have fair trade laws than in those States without fair trade laws. Therefore, the Department of Justice concludes that small business will be hurt by the enactment of the quality stabilization bill.

Although statistics were submitted showing the rate of business failures in States having resale price maintenance laws compared with States without such laws, there was no accredited information or convincing argument presented by the Department to show any causal relationship between the failure rates and the status of resale price maintenance laws in the various States. This, of course, is a very important consideration if such data, per se, are to be used to substantiate such a broad conclusion that the small businessman will be hurt by the enactment of the quality stabilization bill.

It is obvious that many reasons might well influence the failure rate much more than the presence or absence of resale price maintenance laws. The following considerations are sufficient to indicate that the conclusion of the Department of Justice was not based on sound reasoning or dependable statistics.

A high rate of business failures resulting from the crippling of State fair trade laws is broadly obvious, but cannot be accurately proved (or disproved) statistically. The impact on small business of lawful "loophole" transshipments, mail-order-house shipments, etc., into fair trade States, thus crippling the effectiveness of the fair trade statute, cannot be accurately weighed.

The Dun & Bradstreet report is too general—too broad—for the specific use given it by the Department of Justice.

First. This Dun & Bradstreet report represents only approximately one-half of the total number of businesses in the United States. Whereas practically

all large businesses are included by Dun & Bradstreet, a staggering number of small businesses are not.

These businesses "omitted" from the Dun & Bradstreet report are, in all probability, those with the least economic power to survive price wars, and therefore the ones most affected because Congress as yet has not enacted the quality stabilization law.

Further, no weight is given by the Department of Justice to the undetermined number of small businesses exterminated without bankruptcy or other proceedings that would bring their failures to the attention of the courts or of Dun & Bradstreet.

Second, To determine the relationship, if any, between fair-trade laws or lack of fair trade laws and the rate of failure of small business, some minimum steps should have been taken by the Department of Justice before the Dun & Bradstreet's statistics could be used. For example, the amount and the type of commercial activity in the State, the nature of the State's economy, the population growth of the State, the number of new businesses being established in the State, the rate of failure of such new businesses, etc., are significant and influential factors given no weight by the Department of Justice.

PRICE STABILIZATION AT THE RETAIL LEVEL UNDER THE QUALITY STABILIZATION BILL AND EFFECTIVE COMPETITION AT THAT LEVEL ARE COMPLETELY COMPATIBLE

One basic concept that has hampered productive debate and realistic consideration of this bill is the persistent contention of some governmental representatives and economists that there cannot be free and open competition when there is price stabilization at the retail level. At the recent hearings an economist and teacher said with considerable finality that "price maintenance at the retail level and an effective competitive system are incompatible."

If the proponents of this theory would go into the marketplace and see the competitive forces in action they would find that the most rugged competition in today's market is to be found among large distributors, such as chainstores, mail-order houses, and cooperative buying organizations. For years these large distributors have been marketing under their own house brands, with price stabilization at the retail level, and with complete control of merchandising policies from the manufacturer to the consumer. Under such a policy, competition for consumer patronage is on "value for money" rather than on the lowest price for the same trademarked item.

As far as the marketing processes and competition are concerned, the brand names of these large distributors perform the identical function as the brand names of manufacturers.

For most distributor house brands, there is nationwide promotional effort and distribution, and consumer prices are determined by adding to the manufacturer's costs the averaged costs of the retailer, plus a reasonable profit, just as is done by the national brand producers.

These controlled distributor brands represent more than one-third of all trademarked goods sold in the United States. Certainly, this is tangible evidence of "effective" free and open competition at the retail level, as far as the consumer is concerned. Under the provisions of the quality stabilization bill, the same unrestricted forces of competition would be in effect on national brands.

A PRICE ON A PRODUCT IS MEANINGLESS UNLESS THE PRICE IS RELATED TO THE QUALITY OF THE PRODUCT

Opponents of the quality stabilization bill contend that "the only real and effective competition is that which is on a strictly price basis, at the retail level." The theory that price is the sole basis of competition is unsound and efforts to evaluate this bill by such an outmoded concept tend to throttle constructive consideration of it. Admittedly, when an uninformed consumer sees tangible savings on well-known products she is likely to assume that similar savings are storewide, particularly when she is encouraged in such belief by the statements of governmental representatives and teachers of marketing.

But those experienced in actual production and marketing know that for most consumer goods the retail price does not, per se, give dependable indication of its real quality. It is only when such price is related to a known

quality or grade that the consumer can use price as a guidepost. These guideposts are meaningful and useful to the consumer only when a manufacturer (or a distributor or retailer) clearly identifies the product by trademark or brand name and when he also establishes or suggests a realistic retail price, for each quality or grade. By such identity the seller voluntarily assumes responsibility for satisfactory performance in open competition with other products within the same price range. Thus, competition to maintain these values must of necessity be primarily in the laboratories and testing departments before the goods are offered for sale.

Under such a policy, there is aggressive competition to build up to a quality or value rather than down to a price, and consequently in both national trademarked products and distributor house brands, the consumer gets much more real value for her money.

This is the basic concept which motivates and governs all effective brand name merchandising and promotion down to the retail level.

The discount form of merchandising puts into reverse practically all of the creative and constructive forces inherent in the brand name system of distribution. By its very nature it is admittedly predatory in that its motivating force is sapped from the energy and goodwill developed by brand name manufacturers and retailers by heavy investments, research, and promotion.

From the marketing point of view, the primary purpose of this bill is not only to encourage manufacturers and retailers to compete openly on quality rather than just on price, but more importantly to give them specific protection on their investments in establishing quality and developing more helpful guideposts for the consumers in evaluating quality.

That price stabilization at the retail level and effective competition are compatible is convincingly demonstrated every day in the market. How then could anyone, except a person insulated from the actual competitive environment of today's market, continue to put forward such a theory?

CONCLUSION

From the record of hearings it may safely be concluded that a wide majority of all objections to this bill originate from a relatively few basic misconceptions regarding (*a*) the true significance of some current marketing policies and practices and (*b*) what would actually happen if there was more price stabilization at the retail level.

First. In evaluating the significance of objections to this bill, serious consideration must be given to the fact that it is evolutionary and not revolutionary as the testimony of many of the opponents would seem to indicate. It is evolutionary because its primary purpose is simply to extend to trademarked products the same rights that have been enjoyed for many years by large distributors of house brands. Those rights would entail permission to establish a retail price and maintain control of merchandising policies and operations through to the consumer. During the past few years the forces of free competition in the markets have clearly demonstrated that for the long range the consumer gets more real value for her money on her total purchases when manufacturers and distributors compete to build quality into a stabilized retail price.

Second. Those who theorize that "the only true competition is that which is on a price basis at the retail level," will find a positive and realistic answer to the contrary in the market itself. For under the controlled brand form of marketing, all of the forces of free and open competition are in full effect, and this same rugged competition would be in action on national brands under the provisions of this bill.

Third. Another stated objection to this bill, in the same area, is that "it would deny the consumer a right and an opportunity to share in any savings made possible by lower cost merchandising." This contention is based on the erroneous assumption that discount merchandising is a new type of distribution in which retailers operate on lower margins.

But no evidence whatsoever was offered in the hearings to indicate that the price cutting of branded products has resulted in lower total gross margins for such stores nor is such evidence available from any known source. On the

contrary, it is the opinion of widely experienced marketing men that stores using the discount appeal operate on about the same gross margin as other nonservice stores that carry the same type of merchandise.

Fourth. The contention that this bill would result in increased prices to consumers and in lessened competition between manufacturers and retailers is not only the basis of most of the unwarranted opposition, but more importantly it is the most difficult to rationalize.

For consumers and others not well informed regarding promotional techniques, these savings may seem like evidence of the benefits from free and open price competition at the retail level. Therefore, it is understandable that there is deep concern when the uninformed public is told by representatives of the Government, by economists and by representatives of farm bureaus and labor unions that if this bill is passed these visible—but phony—savings would be taken away and the price of the goods might increase by as much as $14 billion annually.

Deep discounting gives visible savings on well-known brands. This the consumer sees. But what she does not realize is that most of these savings are nullified by higher markup on other less known products, because every retail store has to realize a certain minimum gross margin on total sales.

Therefore, it is a gross misconception or intentional deception for anyone to add up the savings on specific items used as samples, and project them on a nationwide basis as the formula for estimates of the increased price consumers would have to pay if this bill went into effect.

In conclusion, the type of opposition above recited gives emphasis to the major difficulty of getting practical legislation in this area of marketing. This is very pointedly summed up by a former chairman of the Federal Trade Commission who says that "even if the heavy facts of life are on your (business) side, rest assured that in the scales, one feather of governmental inference is worth a ton of private citizen's facts."

RESOLUTION

Whereas the Massachusetts Consumer Association is concerned over the so-called quality stabilization bill (H.R. 3669) presently before the Congress of the United States; and

Whereas the provisions of this bill are not in the interests of consumers; and

Whereas this bill emphasizes the role of the manufacturer in price fixing and price rigging and practically eliminates the role of the retailer in the pricing process.

The Massachusetts Consumer Association in convention assembled at Framingham State College on April 6, 1963, resolve as follows:

To request all members of the congressional delegation of the Commonwealth in the Congress of the United States to vote and actively work against the passage of this bill, and

To notify all members of the congressional delegation of the Commonwealth in the Congress of the United States of our desire to learn of their respective activities concerning this bill.

ANDERSON, IND., *April 9, 1963.*

Representative JOHN D. DINGELL,
House Office Building, Washington, D.C.

DEAR REPRESENTATIVE: As a life member of the American Pharmaceutical Association, I would like to make it clear that they do not speak for me, when they support the quality stabilization bill.

This is nothing more than a fair trade bill under a different name and I am unalterably opposed to it.

Price control is people control—and this bill provides for price control.

Retailers do need some kind of protection from loss-leader type selling—but this bill goes far too far.

Sincerely,

J. D. SCHREINER.

STEPHEN F. WHITMAN & SON, INC.,
Philadelphia, Pa., April 22, 1963.

Mr. W. E. WILLIAMSON,
Clerk of the House Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: This is to advise you that we sincerely endorse the passage of the quality stabilization bill. We made this recommendation because we believe that if quality products are to be maintained their prestige must be preferred in the marketplace.

Also, if the economy of the Nation is to be maintained each and every retailer must do business at a fair profit in order to pay taxes as well as general expenses.

Will you please have this letter made a part of the record at the hearing. We also suggest that the committee report this bill favorably to the full Senate.

Sincerely yours,

J. HAROLD ROTH,
Vice President, Sales.

LINCOLN METAL PRODUCTS CORP.,
Brooklyn, N.Y., April 23, 1963.

Hon. HARLEY O. STAGGERS,
Chairman, Subcommittee, House Interstate Foreign Commerce Committee, Washington, D.C.

HONORABLE SIR: I wish to be on record as supporting the so-called quality stabilization bill now being considered by your committee.

As a manufacturer who has worked very closely with the small dealer, I can see of no stronger weapon to help keep him in business than the quality stabilization bill now being considered.

This bill is meant for the small businessman who can conduct his business profitably and competitively.

As a manufacturer, it will help us in planning further ahead with the knowledge of customer satisfaction, and his ability to sell profitably.

I strongly urge passage of the quality stabilization bill.

Yours very truly,

HARRY SCHWARTZ,
Vice President, Sales.

MIRRO ALUMINUM CO.,
Manitwoc, Wis., April 22, 1963.

Mr. W. E. WILLIAMSON,
Clerk of the House Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: Our company has long been an advocate of price protection particularly on quality brands. We have spent millions of advertising dollars to sell MIRRO to the American public at fair prices, but which mass merchandisers use as bait.

We believe that overproduction in most lines of branded housewares and electric table appliances does not permit any manufacturer to overprice his merchandise at the marketplace. We also believe that a great number of small retail establishments, who have been the backbone of our distribution to the consumer, should be protected against the mass merchandiser who uses well established lines to give the impression that all goods are similarly discounted.

We own a trademark, MIRRO, have spent millions to make it a popular household name and should be privileged to control the price and the profit to the department and harware stores who have helped us over the years to build a tremendous MIRRO consumer franchise.

Sincerely,

G. C. KUBITZ,
Senior Vice President, Marketing.

NATIONAL ASSOCIATION OF HOUSE TO HOUSE INSTALLMENT COS., INC.,
New York, N.Y., April 24, 1963.

To: House Interstate and Foreign Commerce Committee, U.S. Congress.
From: Edward L. Sard, executive director.
Subject: Quality stabilization bill.

The members of the National Association of House to House Installment Cos. (who have home offices in 37 States and serve some 5,500,000 American families) strongly endorse the quality stabilization bill now before your committee as a means of insuring the maintenance of quality of retail merchandise, thus protecting the consumer. Our members also endorse this legislation as a means of protecting the small businessman against the type of unfair competition that tends to eliminate the small retailer in favor of the giant chain retailer.

As an association composed of 333 retail firms (most of whom are small) and 198 manufacturers and suppliers (most of whom are interested in protecting their property rights in their merchandise), we feel most strongly that this quality stabilization legislation is essential to the economy of the country.

EDWARD L. SARD.

STATEMENT OF LEHN & FINK PRODUCTS CORP., BY WALTER N. PLAUT, PRESIDENT, NEW YORK, N.Y., MAY 15, 1963

The quality stabilization bill, S. 774, H.R. 3669, is, in my opinion, important legislation to Lehn & Fink Products Corp. and to most other national producers of quality consumer products. Since the fair trade laws of the various States have become largely ineffective because of judicial interpretations, we have found ourselves facing an increasingly difficult marketing situation.

Lehn & Fink Products Corp. has a long tradition of producing and marketing nationwide quality cosmetic, proprietary, and household products. We are convinced that where such products are made the subject of indiscriminate price cutting at the retail level, the consumer must in the long run be deprived of such quality products at reasonable prices because orderly and effective distribution channels must be disrupted.

The maintenance of the goodwill which is associated with our long marketing history requires that the consumer be able to purchase our products at uniform prices throughout the country and that wholesalers and retailers be enabled to earn a reasonable return for the services they perform in distributing our products.

I am convinced that the quality stabilization bill will effectively restore a marketing and distribution situation which will benefit not so much this company and its wholesale and retail customers as the consuming public.

NATIONAL RETAIL FURNITURE ASSOCIATION,
Washington, D.C., April 25, 1963.

Subject: H.R. 3669, Quality Stabilization Act.

Hon. HARLEY O. STAGGERS,
Chairman, Subcommittee on Commerce and Finance,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The purpose of this letter is to give your committee the position of the directors of the National Retail Furniture Association on H.R. 3669 on which you are currently holding public hearings.

We would appreciate it 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 2-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 H.R. 3669 be amended to read as follows (new material is italicized):

"(11) In any proceeding under paragraph (1) it shall be a *complete* defense *to the charge of unfair competition* for the defendant (A) to establish that the plaintiff has not used due diligence *in policing and in enforcing the provisions of this Act* to effectuate observance or enforcement of plaintiff's

rights under paragraphs (7) to (17), inclusive, of this subsection against *all* other persons who are in substantial competition with the defendant and who are known to plaintiff to be violating the same subparagraph of paragraph (8) of this subsection on which revocation of the defendant's right to employ the brand name, or trademark was based, *or has not used due diligence in taking civil action for damages and injunctive relief as provided in paragraph (10) to prevent and restrain further violations of paragraphs (7) to (17), inclusive, of this subsection* or (B) to establish that the plaintiff has sold the same kind of goods of like grade and quality as the goods involved in such proceeding to another person similarly situated under terms more favorable or at lower prices than those under which the plaintiff sold such goods to the defendant."

We believe that this supplementary wording will sufficiently protect cooperating 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 follow up complaints vigorously.

"(4) Enforce fair trade prices by repeated legal action if necessary.

"(5) The enforcement program must be a continuing and sustained one."

We thank your committee for the opportunity to present these views and urge enactment of H.R. 3669 with the amendments we have proposed.

Yours sincerely,

DEREK BROOKS,
Vice President and Director of Government Relations.

TRADE-MARK SERVICE CORP., *April 19, 1963.*

Re quality stabilization bill—Opposed

Hon. VANCE HARTKE,
U.S. Senator from Indiana, Senate Office Building, Washington, D.C.

DEAR SENATOR: I am opposed to your bill because you are assuming that fair sales and prices can be controlled by the indirect control of the owner's registered trademark.

There is no provision in the U.S. Constitution for Congress and the Federal Government to provide for the regulation of the "use and ownership" of trade-

marks in the same manner as is provided for patents and copyrights. The present trademark law is based on the commerce clause of the Constitution, article 1, section 8.

There is no Federal common law of trademarks (*Wheaten* v. *Peters*, 38 U.S. 591) and according to the U.S. Supreme Court, the rights of use and ownership of trademarks arise under the common law and statutes of the individual States (248 U.S. 90).

What is needed is an amendment to the U.S. Constitution providing that Congress shall have power to regulate the "use and ownership" of trademarks and this is set forth in my remarks in the hearing H.R. 9041 in 1938 and H.R. 4744 in 1939. I respectfully refer you to Congressman Eugene Keogh, who has introduced such a constitutional amendment "Congress shall have the power to regulate the use and ownership of trademarks." (The word trademark shall include brands, labels, designs, and all symbols of identity as applied to products, commodities, and services.)

Under the present statutes, "registration" has been regulated and the use of the trademark is limited to the power of Congress to regulate "commerce." The trademark is not an article of commerce and the U.S. Supreme Court has never ruled that trademark per se is an article of commerce, to be bought, sold, consumed, or title regulated directly or indirectly. In other words, the present law regulates the "trade" but not the "mark."

If you will delete the word "trademark" from your bill, or else defer further action on your bill until such constitutional amendment can be enacted, I will be glad to give my wholehearted approval to the measure. If it is enacted the way it is, it will suffer the same fate as the Fair Trade Acts, and will not accomplish the purpose you seek; namely, the indirect control of prices and other factors of unfair competition through trademark control.

Respectfully submitted.

PAUL STRUVEN, *President.*

TESKEY'S TV CENTER,
Indianapolis, Ind., April 22, 1963.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: I understand that the House Interstate and Foreign Commerce Committee is holding hearings this week on the quality stabilization bill.

The State of Indiana Electronic Service Association, Inc., which represents over 350 individual TV men in Indiana, has taken a stand favoring this type of legislation. Our statement is enclosed.

We respectively request this statement be included in the record of the hearings.

All officers of this association serve without any form of pay. We feel this is our duty to the industry from which we make our living.

The IESA chairman employs two men and an office girl. The vice chairman runs a one-man shop. In my business, it is my wife, myself, and one man. The other officers and directors are comparable, with the largest employing six men.

We are not a professional pressure group, nor do we go in for lobbying and that sort of thing. We sincerely believe that quality stabilization is the answer to the trend of making things cheaper and poorer in quality, and selling them "by the ton" by the mass merchandisers that will spell the ruin of this Nation, if it goes unchecked.

Thank you.

Yours truly,

FRANK J. TESKEY, *Secretary.*

STATEMENT OF THE STATE OF INDIANA ELECTRONIC SERVICE ASSOCIATION, INC., ON POSITION ON QUALITY STABILIZATION LEGISLATION, APRIL 20, 1963

Small business today is represented by various government agencies, but what about the very small, or "tiny businessman"? Here the spirit of independence is strong, exercise of the freedom to start one's own business.

The State of Indiana Electronic Service Association, Inc., represents over 350 of these tiny businessmen. For the most part, they are one-, two-, and three-

man shops. IESA members engage in the sale and service of radio, stereo, hi-fi, and television sets in the State of Indiana.

As a group, these tiny independents have learned to successfully compete with the mass-merchandising giants. They avoid the high overheads of the giants, and maintain a close personal contact with their customers.

However, when mass merchandisers offer our parts, tubes, accessories, and even the sets themselves as loss leaders, and then jack up their prices on something else to cover these losses, the tiny independent is doomed. He has neither the capital nor reserves to last out this unfair type of competition.

Many manufacturers recognize the vital role played by independent electronic servicers in upholding the quality of the original product, and maintaining excellent radio-TV reception for the American public, all at the lowest possible cost. This has been proved time and again by various manufacturer's surveys.

On behalf of the over 350 tiny independent TV businessmen who make up IESA, this association urges passage into law of the quality stabilization bill. This position was reached by unanimous vote in open meeting.

We feel that quality stabilization in no way interferes with anybody's freedom of choice. Manufacturers may elect to use it, or not. Dealers and servicers are free to handle products under the law, or outside of it. The ultimate consumer is free to choose quality products and services offered by the tiny independent, or other merchandise and questionable service offered by mass merchandisers.

The TV men of Indiana urge enactment of quality stabilization legislation as a means to guarantee the American consumer availability of top quality goods and services at fair prices. Thank you.

STATEMENT OF NATIONAL SHOE RETAILERS ASSOCIATION BY EDWARD J. MCDONALD, EXECUTIVE VICE PRESIDENT, APRIL 15, 1963

The National Shoe Retailers Association is the largest and most important retail trade group in the shoe industry. Its members number some 4,000 retail outlets.

While the membership consists of department, specialty stores, chainstores and independents, 80 percent of the retailers are small businessmen—the independent type of operator—who depend on brand name resources for merchandise and the sale of brand name products for their volume.

For some time, the independent retailers have been seriously concerned about their future. The lack of capital and the increasing competition of new forms of distribution have been threatening their security.

The Board of Directors of the National Shoe Retailers Association, speaking for the entire brand name segment of the Association, unanimously approved the provisions of the quality stabilization bill—eliminating bait advertising, unscrupulous price cutting and merchandising practices—as a powerful means to help guarantee the future security of brand name retailers and, therefore, the future security of the national economy.

The NSRA believes that quality stabilization is a must and should be enacted without delay. The directors and brand name retailers earnestly ask the House Commerce Committee for its all-out support for this much needed legislation.

Thank you.

THE GREEN SHOE MANUFACTURING CO.,
Boston, Mass., April 15, 1963.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
New House Office Building, Washington, D.C.

GENTLEMEN: This refers to the quality stabilization bill which is now before your committee for consideration.

We want to express our endorsement and strong support of the objectives of this bill. For over 40 years we have been investing in and have attained a brand name for children's shoes with prestige and great value, not only to ourselves but to our department store and retail customers throughout the United States.

Our 1,600 employees with a payroll of over $7 million annually depend on the value of the Stride Rite brand under which our shoes are sold. Yet, at the present time, we do not have any effective way of protecting ourselves against the harmful and damaging effects of price cutting and the use of our name for bait purposes, which are indulged in by stores around the country, and which are hurtful to the value of our brand in the eyes of the consumer, as well as our customers.

We believe that in fairness and simple justice we should be put in a position of being able to supply an article of top value to consumers, on which they can depend as to quality and steadiness of value and price. More important in children's shoes is that they should be fitted on children's feet with conscientious skill and integrity. This is not so in the case of the unethical store which cuts the price and uses our brand name as a bait only.

We therefore urge favorable consideration by your committee of this bill.

Sincerely,

S. L. SLOSBERG, *President.*

STATEMENT IN REFERENCE TO THE QUALITY STABILIZATION BILL

ANSON, INC.,
Providence, R.I., April 23, 1963.

To Whom It May Concern:

I wish to make it known that I feel the quality stabilization bill is most necessary for the distribution of quality merchandise. It is becoming more apparent and a necessity more urgent as the growth of all types of discount operations are established throughout the United States. Most all of these discount operators must have quality-known brand merchandise in order to draw the general public to their store counters.

This is unfair to legitimate retailers of all sizes throughout the United States. Some method such as the quality stabilization bill must be enacted into law to give the manufacturer putting his best efforts into quality merchandise some protection as to where and how this merchandise is to be sold. This is also necessary for the protection of the smaller retailer as we all know the backbone of good distribution throughout the country.

Sincerely yours,

OLOF V. ANDERSON, *President.*

CHESEBROUGH-PONDS, INC.,
New York, N.Y., April 19, 1963.

Re quality stabilization bill.

INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
House of Representatives, Washington, D.C.

DEAR SIRS: This has reference to your expected consideration of the quality stabilization bill.

Chesebrough-Pond's, Inc., is a company which has been engaged for over 75 years in the manufacture and sale of proprietary drug, cosmetic, and toiletry products to the people of this country through virtually every recognized means of distribution. Such experience as we have obtained in these years has led us to firmly support the principles in the quality stabilization bill.

We believe that in today's markets the manufacturer, especially the national advertiser, has a major responsibility for the good name and quality of his product. This duty on the part of manufacturers has been gradually recognized by many courts in this country in their consideration of the manufacturer's direct responsibility to consumers. Wholesale and retail distributors are recognized as vehicles, however important, to connect the consumer with the product manufacturer. The obligations and duties which are imposed upon the manufacturer of trademarked products imply, however, certain rights on his part. He has the right to determine the inherent and relative value of his products and should be permitted to set this value uniformly, if he chooses, on a country-wide basis. He should have the right to defend his products' name against attacks by other parties even where such parties have legally come into possession of his product. Such attacks today on the retail level can involve bait and switch tactics of retailers who feature nationally advertised brands in their advertising in order to draw traffic into their stores, and then switch customers to their own private labels; it includes deviation from the inherent value given he product by the manufacturer, a practice which implicitly creates a question in the consumer's mind as to the quality and value of the product.

To a company like ourselves, our trademarks are our most important property. Present trademark laws give protection against copying or other infringement of such trademarks, but what is needed is additional protection against the attack leveled on nationally advertised products centering on the

product's value. We wish to emphasize to the committee that this is truthfully every bit as important to a reputable manufacturer.

While the so-called fair trade laws provide a measure of protection in this area in some States, such laws are essentially price maintenance laws which do not attack the heart of the problem so far as the manufacturer is concerned, i.e., an all-inclusive law protecting his most important property, his trademark.

We urgently request your favorable consideration of this bill.

Very truly yours,

R. F. MITCHELL, Jr., *Counsel.*

PENNSYLVANIA ASSOCIATION OF INDEPENDENT BUSINESS,
Devon, Pa., April 24, 1963.

HON. HARLEY O. STAGGERS,
Chairman, House Subcommittee on Commerce and Finance,
House Interstate and Foreign Commerce Committee, Washington, D.C.

DEAR CONGRESSMAN STAGGERS: We are writing to you regard the quality stabilization bill now being considered by your committee.

Our membership is composed of some 3,000 small business firms throughout Pennsylvania. These members are engaged in all lines of business, including manufacturing, wholesaling, retailing, and service trades.

Some months ago, we submitted an outline of the proposed legislation contained in the quality stabilization bill. We asked our members to express their opinion regarding this bill as it applied to their particular field.

We are pleased to nform you that 90 percent of our members were in favor; 5 percent were against; and an additional 5 percent failed to vote.

In view of the above, the small businessmen of Pennsylvania urge your support of this measure.

Yours very truly,

E. LYNN CARTER, *Executive Secretary.*

RUBBERMAID, INC.,
Wooster, Ohio, April 22, 1963.

MR. W. E. WILLIAMSON,
Clerk of the House Interstate and Foreign Commerce Committee,
House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: It would be very much appreciated if you would include the following statement in the House Commerce Committee record hearings on the quality stabilization bill.

"We believe that a manufacturer spends a great deal of money to build a brand or trade name so that people gain confidence in the name and know that they can rely on quality and value when they look for and buy products carrying that name.

"When a retailer misuses that brand preference to draw people to his store and away from other stores by price cutting, he is stealing from the manufacturer and other retailers handling the product. He is cutting into a property right owned by the manufacturer and shared by all retailers who use it fairly. The merchant who cuts price is trying to get more than his fair share of brand-name value by drawing more people into his store to sell them greater volume of a product at a lower profit, hoping they will purchase a greater amount of other merchandise at normal profit. In doing so, he is misusing a property right loaned to him by the manufacturer, and he is misusing it to the detriment of the manufacturer and other retailers.

"We believe that the passage of the quality stabilization bill will help to prevent the misues of honored trademarked products by unethical retailers and thus protect the manufacturer who had built it up and protect the tens of thousands of legitimate retailers who want to use the trademark properly."

Thank you, Mr. Williamson, for including this statement in the record of the hearings.

Sincerely,

DONALD E. NOBLE, *President.*

KAYSER-ROTH HOSIERY CO., INC.,
New York, N.Y., April 17, 1963.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: The following statement concerning the quality stabilization bill is being sent to you for the purpose of inclusion in the record of the hearings to be held next week by the House Interstate and Foreign Commerce Committee:

"I feel that the passage of H.R. 3669 is important to the distribution economy of our country and is primarily essential in the protection of retailers and consumers against the reduction of quality, misrepresentation of products, and fraudulent advertising, which are inherent in a system that permits unethical exploitation of valued manufacturer's trademarks.

"The passage of this legislation is extremely important also in maintaining the existence and the growth of small retailers who today are beset with competition on all sides from giant retailers.

"The competition that they face from larger retailers who do not violate the proprietary rights of a manufacturer when selling his trademarked products, can be met with reasonable success by small retailers.

"However, when other retailers use manufacturer's trademarked products to bait the consumer, or misrepresent trademarked merchandise, or deviate from the established price of trademarked merchandise, then the small retailer is faced with competition which eventually will afford him little, if any, opportunity for growth and which must lead to his elimination as a factor in the American economy.

"It is for these reasons that I urgently request that the House committee vote for the passage of H.R. 3669—the quality stabilization bill."

Very truly yours,

ARNOLD M. RAPHAEL,
Vice President and General Manager.

TRADEMARK SERVICE CORP.,
New York, N.Y., May 2, 1963.

Re quality stabilization bill—opposed.

Hon. HARLEY O. STAGGERS,
U.S. Congressman From West Virginia,
House Office Building,
Washington, D.C.

DEAR CONGRESSMAN: Supplementing my letter of April 19 and thanking you and acknowledging your letter of April 22, as well as Mr. Williamson's telegram, I am herewith submitting my further objections to the above bill.

In my original comments to the Honorable Senator Vance Hartke, I expressed my objections to the use of the trademark in almost any form in these bills. Most labels are construed as trademarks, the same as brands and other symbols of identity. In your bill, if enacted as it, the word "label" could be construed as a trademark.

Since the will of the people is supposed to be expressed through Congress, I am afraid that the courts would misinterpret this bill unless it was clearly indicated that the intention of Congress was to indicate that the word "label" could in any way be considered for identification purposes.

If you would remove the words "packages and labels" from the entire bill, that would eliminate any possible conflict. But since this does not appear to be very practical and would take out most of the sense of the bill, may I suggest that you seriously consider one of the following suggestions:

(1) That the word "descriptive" be placed before the word "packages" and before the word "labels" in each case that it appears in the bill.

(2) Or, if the foregoing is not suitable, a new sentence can be added at the end of section 1, paragraph 3, page 11, on line 16, after the word "and". The term "label" is intended only for descriptive purposes and not in any manner to indicate identification or ownership.

With either of these changes, I would be very happy to support your bill in its entirety.

Respectfully submitted.

PAUL STRUVEN, *President.*

RUST-OLEUM,
Evanston, Ill., April 18, 1963.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
House Office Building, Washington, D.C.

GENTLEMEN: We believe the quality stabilization bill is vital to our own company's activities—to enable us to continue to provide, through our independent distributors and independent dealers, the full measure of values added by distribution and related services which we feel are essential at the point of sale. We are also most anxious to insure that the ultimate consumer will receive the full maximum benefit from his purchases of our product, and to this end we believe it is essential that our product be sold in properly qualified establishments where the management and store personnel will be willing and able to spend the time to find out about customer's rust problems and give him proper information, guidance, and help. In the purchase price we provide something extra in margin to compensate the dealers for giving that extra effort to properly sell our goods, and to protect our reputation for quality and performance, and therefore also provide proper protection of our brand name Rust-Oleum.

It is an especial deception on the public where a product like Rust-Oleum is offered in "bait merchandising," and so the bills, S. 774, and H.R. 3669 define and restrain certain unfair methods of distribution and promote quality and price stabilization on goods identified by distinguishing brand names and trademarks is in the vital public interest.

We strongly support this bill, and urge its early enactment and passage.

Very truly yours,

ROBERT A. FERGUSSON, *President.*

AUTOMOTIVE WHOLESALERS ASSOCIATION OF NEW ENGLAND, INC.,
Rutland, Vt., April 17, 1963.

MR. W. E. WILLIAMSON,
Clerk of the House Interstate and Foreign Commerce Committee, House Office Building, Washington D.C.

DEAR MR. WILLIAMSON: Speaking for our association, which consists of 371 independent automotive wholesalers and their branches throughout the 6 New England States, with a total employment of approximately 4,300 people servicing 45,000 retail accounts throughout New England, we ask that you include the enclosed statement in the records of the hearings on the quality stabilization bill, No. S. 774.

Thanking you in advance for your cooperation in this matter.

Very truly yours,

R. J. HARRISON, *Executive Secretary.*

The members of the Automotive Wholesalers Association of New England, Inc., consisting of 371 independent automotive wholesalers and their branches, feel very strongly toward the enactment of the quality stabilization bill, No. S. 774, for the following reasons:

We feel that the enactment of this bill is of the most vital importance to the economic survival of our members (independent businessmen). Without the enactment of this bill, our members feel their very survival is in jeopardy, as every day more and more leading quality manufacturers' lines are being used by the discount houses as leaders, consequently destroying the price structure of these lines.

PALM BEACH CO.,
Cincinnati Ohio, April 17, 1963.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
Care of Mr. W. E. Williamson, Clerk
House Office Building, Washington, D.C.

DEAR SIRS: Our board of directors again 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.

PRINCE GARDNER,
St. Louis, Mo., April 16, 1963.

MR. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
New House Office Building, Washing, D.C.

DEAR MR. WILLIAMSON: It is my understanding that the quality stabilization bill hearings are set for April 23, 24, and 25. You will recall the statement I made in my letter of June 18, 1962, which you put in the Congressional Record, which was 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."

I would certainly appreciate this statement being made a record again for the committee's consideration.

Yours very truly,

H. W. WHITEAKER, *President.*

G. & C. MERRIAM CO.,
Springfield, Mass., April 16, 1963.

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
House of Representatives, Washington, D.C.
(Attention: Mr. W. E. Williamson, Clerk).

GENTLEMEN: Again this year we are writing to ask your full cooperation in doing everything possible to promote passage of the quality stabilization bill in the current session of Congress.

We believe this bill to be in the public interest in respect to its giving manufacturers the opportunity to protect the quality of their products and thus assure consumers they are getting full value for what they pay.

Also, we are strong supporters of the quality stabilization bill as we believe it will help alleviate some of the problems of small independent merchants who are in a desperate struggle 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 consumers on many items after having lured them into buying as result of cut-price offers on well-known quality merchandise.

We urge, therefore, your active support of the quality stabilization bill and suggest that this letter be incorporated into the record of hearings on this bill.

Sincerely yours,

GORDON J. GALLAN, *President.*

MEIER'S WINE CELLARS, INC.,
Silverton (Cincinnati), Ohio, April 16, 1963.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
House Office Building, Washington, D.C.

GENTLEMEN: We are most happy to learn that your great and important committee is holding hearings on the quality stabilization bill before legislature this year.

As a small Midwest wine producer, operating our company as an independent family-owned unit, and working with some 1,500 farmers, mostly grape growers,

in the great State of Ohio, we find that it is mandatory that this quality stabilization bill be given favorable consideration by your commitee and passed by legislation to become a law as soon as possible.

With our own vineyards located on Isle St. George, which is an island in western Lake Erie, and operating two wineries, one at Sandusky and one here at Silverton, just outside of Cincinnati, I, as the managing director of our company, have the task of keeping economically alive. To do this, first, I must see that the grape grower and the apple grower and the blackberry grower make a profit on their operations. Then our own winery operation must be financially sound; then the wholesaler of our product and his salesmen must operate successfully, financially. Then the retailer, scattered throughout all of these 50 States, must have his profit, as otherwise the whole chain of making a fine bottle of wine is broken.

These are the strong elements in the American economy that have made it what it is today. Let us keep these channels of economy open on a normal basis.

Many thanks for your consideration for the passage of this bill.

Sincerely yours,

HENRY O. SONNEMAN, *Managing Director.*

WATCH MATERIAL DISTRIBUTORS ASSOCIATION OF AMERICA,
Washington, D.C., April 10, 1963.

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 1963 as a matter of economic survival for our customers, some 25,000 independent retail jewelers, and our member wholesalers.

At its annual convention in Chicago, members of WMDAA declared their approval and endorsement of the quality stabilization bill and its principal purpose, 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.*

SOUTH CAROLINA RETAIL COUNCIL,
Columbia, S.C., April 9, 1963.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee,
Room 1334, House Office Building, Washington D.C.

DEAR MR. WILLIAMSON: This organization, being interested in the passage of quality stabilization legislation during 1963, requests the following statement be included in the House Commerce Committee record of hearings on the present bill, S. 774:

"The enactment of the quality stabilization bill is vital to retailing's effort to regulate itself without Government mandate. A free enterprise approach to price maintenance is embodied in the bill, due to cooperation and strengthening within the channels of distribution. A minimum of price maintenance is preferable to price chaos."

Enactment of resale price maintenance on designated merchandise is urgent for the stability of distribution and as a protection of consumers against volatile pricing.

Very sincerely yours,

W. A. COLLINS, *President.*

CHEMICAL RESEARCH & MANUFACTURERS, INC.,
New York, N.Y., April 16, 1963.

MR. W. E. WILLIAMSON,
Clerk of the House Interstate and Foreign Commerce Committee,
House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: In connection with the current hearing on the quality stabilization bill now pending, I would appreciate your including our statement in your record of the hearings, as follows:

"The proposed quality stabilization bill is the only legislation so far that has offered any real protection to manufacturers in connection with their products, brand names and trademarks."

I hope your committee meets with continuing success in this important legislation.

Sincerely yours,

Dr. W. LANGER, *President.*

NEW YORK, *April 15, 1963.*

Mr. W. E. WILLIAMSON,
Clerk, Interstate and Foreign Commerce Committee,
House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: We respectfully request that this statement be incorporated in the record of the hearings on the quality stabilization bill being held before the Commerce and Finance Subcommittee of the House Interstate and Foreign Commerce Committee on April 23–25, inclusive.

The members of this association comprise a substantial segment of the watch importer-assembler industry in this country and include a number of companies whose trademarks and brand names are nationally known and advertised, such as Longines-Wittnauer, Benrus Watch, Omega Watch, Movado Watch, and many others. The watches sold by these companies are fine quality products and they are vitally interested not only in maintaining the quality of their watches but also in having the right to proceed against those who by means of unethical and predatory selling practices threaten the very existence of their brand names and trademarks.

The watch industry is one of the most competitive industries in this country. At the retail level, the consumer has the choice of selecting a watch either from among dozens of well known nationally advertised brand names or from literally hundreds of lesser known brands, and at prices ranging from a few dollars to hundreds of dollars per watch. Most of the manufacturers of trademarked watches pursue a policy of suggesting prices, with the result that the consumers have come to have confidence in the quality of trademarked watches and the prices established by their manufacturers.

This situation provides a fertile ground for the merchandiser at retail who, in "bait" or "loss leader" advertising, features respected brand name watches at prices 40 percent to 50 percent below their normal selling prices. He knows that this will induce customers to patronize his store where they will expect to find other quality goods at similar low prices. Much of the time, however, only a limited quantity of the featured watches are available and he usually proceeds to sell some other watch on which more often than not he realizes a handsome profit.

In the meantime, the maker of the trademarked watch has suffered serious injury. If other retail dealers in the same trade area also cut their prices of the trademarked watch, to meet the competition of the first discounter, it is not long before that particular brand loses the confidence and good will of the consumers. On the other hand, if the other dealers do not cut their prices, they encounter serious resistance in trying to sell the trademarked watch at its suggested price in the face of the much lower price of the discounter. In either case, the manufacturer is damaged because the orderly distribution of his product has been disrupted. Likewise, the business of the small retail dealer has been adversely affected by the price cutting discounter.

The quality stabilization bill provides a fair and equitable means of dealing with this grave problem. It gives the manufacturer of trademarked goods the privilege of taking certain action against the price cutter of his product, but only after certain conditions have been met by the manufacturer. More-

over, there is nothing in this bill that requires the manufacturer to take any action whatsoever if he does not wish to do so. The consumer will still enjoy his freedom of choice respecting the article he wants to buy, the price he wishes to pay for it, and the place where he wants to buy it. There is no restriction on the ethical retail dealer with respect to the nature of the business operations he wishes to engage in. Monopoly is not created because each of the trademarked products is still competing against all of the other trademarked products, as well as against the other products in the same category which are not so protected.

It is our view that legislation is sorely needed that will give the manufacturer the right to protect his trademarks and brand names from the widespread abuses being practiced by certain merchandisers at the retail level. The enactment of the quality stabilization bill will provide that right.

Accordingly, we respectfully urge that the adoption of the bill be recommended by the committee.

Respectfully submitted.

AMERICAN WATCH ASSOCIATION, INC.,
By WILLIAM H. FOX, *Executive Secretary.*

NATIONAL OFFICE MACHINE DEALERS ASSOCIATION,
Los Angeles, Calif., April 9, 1963.

Mr. W. E. WILLIAMSON,
Clerk of the House Interstate and Foreign Commerce Committee,
House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: It is our understanding that there will be hearings April 23, 24, 25 held by the House Interstate and Foreign Commerce Committee on the quality stabilization bill, and our association would appreciate having the following statement included in the record of the hearing:

"To prevent the complete extermination of the independent retail dealer who sells brand-name products of quality, it is absolutely essential that the quality stabilization bill be passed at this session of Congress. Sanity must be returned to the marketplace to assure that the proud owner of his own independent business will not be driven from the American scene by the long tentacles of discounterism, which at the moment is a highly disturbing and predatory condition existing in our Nation today. The backbone of American retail, the independent dealer, must be maintained and strengthened, hence the necessity for the immediate passage of this bill."

Thank you very much, Mr. Williamson, for your giving this statement your very good attention.

Cordially yours,

HAROLD MANN, *Executive Secretary.*

ELECTRIC APPLIANCE DEALERS ASSOCIATION,
Minneapolis, Minn., April 9, 1963.

Mr. W. E. WILLIAMSON,
Clerk of House Interstate and Foreign Commerce Committee,
House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: We urge an early enactment of the quality stabilization bill. Please include the following statement from the Minneapolis Electric Appliance Dealers Association in your record of the hearings in the House Commerce Committee, scheduled for April 23–25, 1963:

"We need the Quality Stabilization Act for business survival. Please work hard for its passage and resist all opposition, and help stop bait advertising now killing small business. We appreciate your vigorous support."

Sincerely,

O. A. GLASOW, *Managing Director.*

WISCONSIN AUTOMOTIVE WHOLESALERS ASSOCIATION, INC.,
Madison, Wis., April 9, 1963.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: I am informed that hearings on the quality stabilization bill are scheduled for April 23, 24, and 25. I wish that you would include in the record of the hearings the sentiment of the board of directors of the association I represent as executive secretary.

That statement is: "The need is now for all-out support to pass this much needed legislation and to have it enacted at the earliest date possible."

Very truly yours,

R. C. SALISBURY, *Executive Secretary.*

FLORIDA STATE RETAILERS ASSOCIATION,
Winter Park, Fla., April 8, 1963.

HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
House Office Building,
Washington, D.C.

GENTLEMEN: The innocent American consumer will continue to get less and less for his money until quality stabilization legislation is enacted to put an end to predatory retail practices which force manufacturers to squeeze quality out of their honored products.

Merchants throughout Florida, expressing their views through the Florida State Retailers Association, strongly and vigorously support the quality stabilization bill now pending before your committee and urge its early enactment.

Respectfully,

K. K. KENNEDY, *President.*
DALLAS L. HOSTETLER, *Executive Director.*

NATIONAL OUTERWEAR & SPORTSWEAR ASSOCIATION, INC.,
New York, N.Y., April 8, 1963.

Re quality stabilization bill.

The quality stabilization bill is the best step in the direction of preventing the public from being misled by the promotional type of store, including the discount operation, which takes well-known branded merchandise and uses it as a loss leader in order to draw the consumers into the store to sell them an inferior kind of merchandise.

Brand name merchandise is assurance to the consumer that the product is an honest one, and both the maunfacturer and the consumer should be protected from the practice of pawning off an inferior product upon the consumer once he is led into the store by the offering of a quality brand name as a loss leader.

We earnestly hope that this bill will be passed by the current session of Congress.

JULES GOLDSTEIN, *Secretary.*

MCMONAGLE & ROGERS, INC.,
Middletown, N.Y., March 27, 1963.

Re quality stabilization bill, Harris-Madden bill No. 3669.

Messrs. OREN HARRIS and RAY J. MADDEN,
Cochairmen, Commerce Committee,
House Office Building, Washington, D.C.

GENTLEMEN: It is our understanding that the quality stabilization bill has been introduced in both the House and Senate of the 88th Congress.

This important bill has to do with the future existence of the small retailers that go to make up such a large segment of our business enterprises in the United States.

We strongly urge you to favor this bill.

The giant outlets of distribution that have been gradually growing toward monopoly of general commodities are rapidly crushing out the existence of the small businessman. This has also brought about the destruction of established

trademark goods as well as price chaos in the marketplace of reputable commodities.

Before any more damage is created, the quality stabilization bill should become law.

We urge your full support of this measure during this session of the Congress.

Respectfully,

W. R. MOORE, *President.*

CHRISTIAN BOOKSELLERS ASSOCIATION, INC.,
Chicago, Ill., April 16, 1963.

DEAR SIRS: The Government of the United States has for many years been aware of the importance of the small businessman in the American economy.

Special legislation and many fine publications from the Small Business Administration have been a real help and encouragement to every small businessman.

The Christian Booksellers Association is not seeking legislation that will protect the inefficient merchant, but rather we seek legislation that will provide the necessary protection against the encroachment of unfair competition by unscrupulous merchants.

It is our considered opinion that the early enactment of the quality stabilization bill is needed. Please give this bill your all-out support, and I am sure that the small merchant in your community will be most grateful.

Your task is not an easy one, but it carries real responsibility to all of the American people. Legislation such as the quality stabilization bill enacted with your help will aid in strengthening our economy at a very critical time in the history of the United States.

Sincerely yours,

W. F. MOORE.

TACOMA RETAIL TRADE BUREAU,
Tacoma, Wash., April 12, 1963.

HOUSE COMMERCE COMMITTEE,
House Office Building,
Washington, D.C.

GENTLEMEN: This organization, comprised of approximately 150 retailers in downtown Tacoma, Wash., went on record last year in support of the quality stabilization bill which was Senate Joint Resolution 159 at the last session. Now that the bill has been reintroduced and is the subject of a hearing before your committee, this statement is written to reiterate our unqualified endorsement of the measure.

As you are aware, this bill would reaffirm a principle established in a unanimous decision of the U.S. Supreme Court to the effect that a manufacturer's property rights in this trademark continue in effect when his merchandise is purchased by wholesalers and retailers. The bill is specific in permitting manufacturers to revoke the right of a reseller to use his trademark if the latter misrepresents the merchandise, cuts the established retail price or utilizes the branded articles in so-called bait merchandising.

Members of our organization, in common with most established retailers, are adversely affected by price cuts and by unethical practices on the part of discount houses and so-called fly-by-night operators who conduct alleged distressed merchandise sales. This legislation will be a major step in checking practices which are definitely hurting the established methods and institutions of our distributive economy.

This is not an attempt to reenact fair-trade laws and this bill will be workable without any expense to the Federal Government since enforcement will rest with manufacturers who will be permitted injunctive relief through the courts. We join the 70-some national trade associations who have gone on record in support of this measure and respectfully urge your committee to report the measure to the floor of the House for favorable action.

Respectfully yours,

NED MCMAHON, *Acting President.*

TULSA EXECUTIVES' ASSOCIATION,
Tulsa, Okla., April 11, 1963.

CHAIRMAN, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
House of Representatives, Washington, D.C.

Whereas it is recognized that many retail outlets are engaging in unfair and deceptive practices by way of bait merchandising, misrepresentations as to quality, model, etc., particularly in the cases of brand names; and

Whereas many small businesses are being destroyed by such practices, due to lack of protective laws; and

Whereas small businesses are essential to the economy of our Nation and to our community and must therefore be afforded protection by law in order to survive; and

Whereas it is believed that H.R. 3669, which is presently before the House Interstate and Foreign Commerce Committee, will afford a measure of protection: Be it therefore

Resolved, That we go on record as favoring prompt enactment of this bill and that a copy of this resolution be forwarded to the House Interstate and Foreign Commerce Committee.

ROY ROLLER.

RESOLUTION

CHAIRMAN, INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
House of Representatives, Washington, D.C.

Whereas it is recognized that many small businesses are being destroyed by the unfair and deceptive practices of many retailers by way of bait merchandising, misrepresentations as to quality, size, model, year of manufacture, etc.; and

Whereas it is believed that adequate protection for said small businesses is not afforded by present laws; and

Whereas our Nation has been built by small business concerns and must have adequate protection by law in order to survive; and

Whereas it is believed that H.R. 3669, before the House Interstate and Foreign Commerce Committee at this time, will provide a measure of such protection: Be it therefore

Resolved, That we go on record as favoring its prompt enactment and that a copy of this resolution be forwarded to the House Interstate and Foreign Commerce Committee.

BELLAIRE MERCHANTS ASSOCIATION,
By L. G. ECKEE, President.

TULSA, OKLA.

WHITE STAG MFG. CO.,
Portland, Oreg., April 18, 1963.

Mr. W. E. WILLIAMSON,
Clerk of the House Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

DEAR MR. WILLIAMSON: Will you please include my following statement in the record of the House Commerce Committee hearings on the quality stabilization bill, which I understand are scheduled April 23, 24, and 25 of 1963:

As president of a company which has for 79 years produced high-quality textile products, and distributed among quality stores throughout the United States, at published wholesale prices, and at nationally advertised and suggested retail prices, I want to go on record as favoring the proposed Quality Stabilization Act.

Our main interest is to check disastrous price cutting and the deliberate misrepresentation of merchandise to the unsuspecting American public, who, of necessity, gets substitute merchandise foisted upon it, which is the "bait and switch" tool of the price cutter. If this can't be prevented in an orderly way, price wars result, and disorderly distribution, instead of orderly distribution, takes over with its downward spiral of prices, and the consequent cheapening of quality (in order for price cutters to exist), and finally, a bitterly disillusioned public.

We prefer to maintain the standards of quality that have upheld our name for almost eight decades, and made it almost a household byword, synonymous

with quality. If we were forced to fool the public by cheapening our merchandise, and hence depreciating our name, and if our dealers were forced to cut our suggested retail prices to meet the cheapened prices of deliberately misrepresented merchandise, our name would soon be worth nothing to the consuming public, nor to our dealers, and neither would our company be worth anything as a producer any longer.

In the past, there have been better business bureaus at the local level, trying to prevent misrepresentation to the public, but these too often are emasculated by local pressures. Only a national Quality Stabilization Act that is above attack, and above reproach, can be effective in preventing piracy by unscrupulous purveyors. We try to price our products legitimately, without inflation, we try to encourage our dealers to sell them in the same manner. Neither we nor the stores selling our products can command more than fair prices, because both competition and supply and demand factors, quality for quality, naturally hold us in line.

We must maintain the public confidence in our marketplace, instead of the ruthless disorder of the street bazaar which could take over if we don't protect ourselves from quality misrepresentation in an orderly way.

We therefore seek a national act which will make it unlawful to misrepresent or bootleg merchandise proclaimed to be the same or similar, but at lower prices. It's OK for a standard brand and standard quality with standard prices to become the target for vendors who can give the same quality for lower prices, but when prices are cut, and inferior merchandise is claimed to be the same, that must be stopped to prevent havoc in the marketplace. Elimination of standard brands and standard quality would remove the very guideposts on which the American consumer has long depended.

HAROLD S. HIRSCH, *President.*

P.S.—If you will remember in the old days of prohibition, the public was offered branded Scotch "or similar" at cut prices, but usually discovered that the brands had been faked, and that the word "similar" was a complete myth, that the only thing which had been cut was the quality of the ingredients, which had been cut with water.

No one could control this, because it was all undercover during prohibition, and no purchaser dared complain because the purchaser himself was breaking the law and had no legal protection. Today, he is not breaking the law by buying a substitute product at cut prices, and he should be protected legally if he discovers he has been duped.

NORTH CAROLINA GENERAL ASSEMBLY,
Raleigh, April 19, 1963.

Hon. HARLEY O. STAGGERS,
Chairman, Subcommittee on Commerce and Finance,
House Office Building, Washington, D.C.

DEAR CONGRESSMAN: I am no less convinced this year than I was last that some legal protection must be afforded the owner of a legitimate and respected brand name. Our experience during the past 12 months has convinced all of us at Hanes Hosiery that the quality stabilization bill is more needed than ever.

It is our hope that you will give this matter your most serious consideration.

Sincerely yours,

GORDON HANES,
President, Hanes Hosiery Mills.

WINSTON-SALEM, N.C.

RETAIL JEWELERS OF AMERICA, INC.,
Washington, D.C., May 24, 1963.

Mr. W. E. WILLIAMSON,
Clerk, House Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

DEAR Mr. WILLIAMSON: Rather than submit a formal statement in support of the quality stabilization bill, in which the House Interstate and Foreign Commerce Committee has been holding hearings, the Retail Jewelers of America, which have endorsed the quality stabilization bill are submitting the letters of

many of their members which indicate the urgent and vital need for Federal legislative assistance now.

We would appreciate it if you would incorporate this letter and its attachments in the record of the hearings on the quality stabilization bill.

Sincerely,

JAMES C. LUCAS, *Executive Vice President.*

CARROLL'S,
Coral Gables, Fla., May 13, 1963.

Mr. JAMES C. LUCAS,
Executive Vice President, Retail Jewelers of America,
Washington, D.C.

DEAR Mr. LUCAS: Gordon Smith, president of the Florida Jewelers Association has asked me to sum up the reaction of our membership with reference to price-cutting activities of many stores, etc., on brand name goods.

Among the average small retailer the result has worked a terrible hardship. While we are sure no merchant worth his salt wants a "crutch" nonetheless he neither wants the price war to erupt in his neighborhood—one that is so often the result of one chain fighting another. Each are "loaded" with various and sundry advantages he cannot have, such as extra discounts, allowances for quantity purchases advertising bonuses, etc., etc.

In our personal case we make it a policy not to feature—or even show very many advertised brands, because of this condition. Over 60 percent of our sales are unbranded or little-known names—as a matter of fact in some lines we sell 80 percent of that type of goods with our own name on same. This is a name we know no one else can offer at any price. Yet you may be sure our prices are very competitive and meet with practically no resistance. The name brand manufacturer who wants us to feature his product has to offer us some assurance that his merchandise will not be "footballed" to the extent that we are made to look foolish.

The survival of many small merchants—taxpayers—depends upon some such protection, and many manufacturers need it too.

Very truly yours,

CARROLL C. SEGHERS.

LITTLE RIVER JEWELRY,
MIAMI, FLA., *May 14, 1963.*

Mr. JAMES C. LUCAS,
Executive Vice President, Retail Jewelers of America,
Washington, D.C.

DEAR MR. LUCAS: We are in the retail jewelry business, and we are having a very hard time meeting our bills.

We believe that one of the reasons is that the customer has lost all confidence in the trademark on merchandise.

Many firms have used the reputable trademark to get customers in their stores. By using this trademark as bait (selling it a little under cost to leave the impression that all the merchandise is priced the same way).

We, the retailer, need the reputable manufacturer as well as he needs us for an outlet for his merchandise. But, when his trademark is destroyed so is the manufacturer.

The question that we hear most today is "What is wrong with this product? I see so many different prices on it."

We have had to drop many of our brands that we were handling because we felt that they were cheapening their product to fit the price that mass distributors demanded on the product.

We like to sell a product that the customer has confidence in, that it is the best made to give service that the customer expects from the trademark.

We can't say that this is the total answer to our staying in business, but it is a big question. We think that quality stabilization will be a step in the right direction. If we don't get help, we may be the next business to disappear off the American scene.

GORDON E. SMITH.

W. W. PUTNAM JEWELERS,
Tallahassee, Fla., May 14, 1963.

Mr. JIM LUCAS,
Executive Vice President, Retail Jewelers of America,
Washington, D.C.

DEAR MR. LUCAS: Will you do all you can to promote the adoption of the quality stabilization bill now being considered by Congress?

We desperately need this legislation to keep the United States strong under the free enterprise system. We need it to eliminate, as much as possible, the gross misrepresentation and bait advertising of recognized lines of reputable manufacturers. It certainly has been hurtful to our business to have fine lines of merchandise advertised as bait to lure the customer into the competitor's store and then have the salesperson switch the customer to an inferior product.

Thank you for doing all you can to eliminate unfair trade practices by seeking the passage of the quality stabilization bill.

Sincerely yours,

W. W. PUTNAM,
Director, Florida Jewelers Association.

CHARLES G. RHODES & SON,
Fort Pierce, Fla., May 15, 1963.

Mr. JIM LUCAS,
Washington, D.C.

DEAR MR. LUCAS: We would like to give you our considered opinion of the pending quality stabilization legislation and you are authorized to use this letter in any way you see fit to influence the passage of this legislation.

The proposed quality stabilization bill would, we believe, be a giant step forward in bringing a greater degree of honesty to all retailing which most certainly would react to the advantage of the buying public.

Retailing has not been able to clean its own house and rid itself of the unethical and downright dishonest persons who misrepresent and take advantage of the prestige of legitimate ethical retailers' hard-won reputations for integrity in merchandising.

Your efforts in behalf of this legislation are sincerely appreciated.

Very truly yours,

CHARLES G. RHODES.

OHIO RETAIL JEWELERS ASSOCIATION,
Cleveland, Ohio, May 17, 1963.

Mr. JAMES C. LUCAS,
Executive Vice President, Retail Jewelers of America, Inc.
Washington, D.C.

DEAR JIM: I know, Jim, that you are sensitive to the real need for quality stabilization in order to rescue small business.

Predatory pricing is murdering retail jewelers and as the respected Supreme Court Justice Brandeis pointed out in a decision many years ago, local prices resulting from predatory price cutting is only temporary because after the small ethical retailer is driven out of business, prices rebound to higher levels and the consumer has gained nothing.

To stimulate you to even greater efforts in support of quality stabilization, I asked our directors just last week to write me some of their experiences resulting from the lack of fairness and ethics in today's marketplace.

The enclosed letters speak for themselves and I hope you can use these letters to advantage in presenting some of our problems to our Congressmen who are considering quality stabilization legislation.

Kind personal regards.

Sincerely yours,

CLARENCE MOSES, *Executive Director.*

THE COWELL & HUBBARD CO.,
Cleveland, Ohio, May 14, 1963.

CLARENCE MOSES,
Care of Ohio Retail Jewelers Association, Cleveland, Ohio.

DEAR MR. MOSES: Reports indicate that the quality stabilization legislation is again up for consideration.

It is my sincere hope that this can be enacted into law and that unlike many similar attempts, that this can be made to stick.

More than 50 years of retailing have proven to me that quality stabilization is the only way to control many vicious and unfair trade practices.

Many unethical schemes are automatically eliminated by such a bill. We have been through several cycles of bad business years caused by illegimate advertising and merchandising practices which cannot be controlled without such a law, unfortunately previous bills have had loopholes of escape.

If I can be of any assistance in promoting the passage of this please let me know.

Yours truly,

H. B. MCCAGUE, *Vice President.*

HARRIS JEWELER, INC.,
Sidney, Ohio, May 14, 1963.

CLARENCE MOSES,
Executive Director, Ohio Retail Jewelers, Cleveland, Ohio.

DEAR MR. MOSES: I have been watching, with great interest, the action being taken in Washington regarding quality stabilization legislation. I have also talked to our Congressmen about this.

I feel that quality stabilization is a matter of life and death to the small retailer. We find ourselves in the position of having our bread and butter items used by the larger stores as loss leaders or come-ons to get people into their stores. Take Remington shavers for example. The larger department stores advertise this at a retail price which is below my cost. A personal check of their prices in the jewelery field showed me they were charging from 10 to 25 percent more than we do for items in a nonnationally advertised category. This deliberate footballing of highly advertised standard brands is certainly unethical and an attempt to deceive the public into thinking that all of their prices are lower.

The businessmen in Shelby County feel very strongly in favor of this legislation and have had several meetings to discuss our line of action.

I feel that you, Mr. Moses, as executive director of our State organization, should take a strong stand on this matter.

I will be more than happy to do anything within reason, to help in the passage of this bill.

Very truly yours,

HAROLD M. HARRIS.

NEWSTEDT'S,
Cincinnati, Ohio, May 16, 1963.

Mr. CLARENCE MOSES,
Ohio Retail Jewelers Association,
Cleveland, Ohio

DEAR MR. MOSES: We are pleased to tell you how we feel about quality stabilization legislation.

We feel that a manufacturer is entitled to protection against those who would use his product as a "leader" by selling such a product below the going price in a community.

When this situation has arisen in our trading area, we have promptly discontinued the brand that is being footballed. We switch our support to another line that is not being discounted. It is obvious that the manufacturer suffers a loss of sales revenue but in addition, he is losing local support and local advertising. Such losses cannot help but have a far-reaching effect on his future. It is most unfortunate that a manufacturer has no redress against the price cutter whose actions have set this chain reaction into motion. We sincerely hope that Congress will see fit to correct this inequity.

Very truly yours,

E. L. SPITZNAGEL.

WARD'S JEWELERS,
Cleveland, Ohio, May 14, 1963.

Mr. CLARENCE MOSES,
Executive Director, Ohio Retail Jewelers Association

DEAR CLARENCE: Time is of the essence in the matter of Congress coming to the aid of small business which is being threatened with extinction by predatory price cutters. We desperately need "quality stabilization" fast.

In my own case the squeeze is such that in attempting to stay in business I am cutting expenses to the point that vital services that my business offers the public must be curtailed. After keeping a watch repairman for 28 years I have had to give him notice. S O S.

Most sincerely,

PHILIP FRIEDMAN, *President.*

HALE'S,
Greenville, S.C., May 13, 1963.

Mr. JAMES C. LUCAS,
Retail Jewelers of America, Inc.,
Washington, D.C.

DEAR MR. LUCAS: I understand that there will be a hearing soon on the quality stabilization bill, and I would like to go on record as being in strong support of this bill.

We have for too long needed a measure like this. I feel that it is of a vital necessity to both the jewelry industry and the public. It can only result in a boost for ethical and legitimate businesses and as a psychological boost for the buying public.

We are very interested in the progress and passage of this bill.

Sincerely yours,

HEYWARD M. SULLIVAN.

ANDRAE JEWELER'S,
Orangeburg, S.C., May 14, 1963.

Mr. JAMES C. LUCAS,
Retail Jewelers of America,
Washington, D.C.

DEAR MR. LUCAS: I urge you to give your complete support to the quality stabilization bill now up for consideration.

The average jeweler who operates a single store in South Carolina has a very difficult time making his business produce a satisfactory profit. There are many reasons for this and I believe personally that the quality stabilization bill will assist the ethical jeweler in eliminating a few of these.

The South Carolina Retail Jewelers Association and its many members as well as myself, strongly urge you to give this bill your complete support.

Yours very truly,

TED ANDRAE,
Secretary, South Carolina Retail Jewelers Association.

H. L. LANG & CO., JEWELERS,
Staunton, Va., May 18, 1963.

Mr. JAMES C. LUCAS,
Executive Vice President, Retail Jewelers of America, Inc.,
Washington, D.C.

DEAR JIM: I certainly hope the quality stabilization bill will pass and allow those manufacturers, who desire to do so, to be able to protect their product from price cutting. We have discontinued stocking electric razors because there is not an established price on them. They can be bought from our cost up to the suggested price. Before the price war on razors, we sold about 60 razors a year. We advertised razors, and built a fair volume on them. We are having a similar problem with several watch manufacturers.

A reasonable markup on merchandise is necessary to stay in business. An established price on merchandise is the only protection a customer has to know he is paying the correct price.

Some restriction on not allowing merchandise to be sold below a certain price is about the only protection a small retailer has in this day of the giant depart-

ment stores. The large ones are getting bigger, and we small retailers are getting fewer.

Cordially yours,

WALTER M. DIXON.

HUDSON'S JEWELERS,
Marion, Va., May 23, 1963.

MR. JAMES LUCAS,
Retail Jewelers of America, Inc.,
Washington, D.C.

DEAR MR. LUCAS: As a small retailer here in southwest Virginia, I would like to go on record as being in favor of the quality stabilization bill.

Over the past 12 years being a merchant here in Marion, Va., I have seen some real changes in the business trend. Competition seems to be growing keener every year and I definitely feel these times our price tags are most important. Unless the small merchant has some type of protection from the volume buyer and user, who in turn sells at cutrate prices, we will continue to grow smaller.

In our area we are confronted with so-called discount houses who sell quality brand merchandise at prices slightly above manufacturers cost; also we have an influx of wholesale mail-order catalogs who also list quality brand merchandise at wholesale prices.

In years past we built up a fair business on electrical appliances; however, due to the highly competitive field of so-called wholesale prices of these items our volume has been greatly reduced. Therefore, I feel the small merchant should have some type of protection and I am most heartily in favor of the quality stabilization bill.

Cordially,

JACKSON C. HUDSON.

(Whereupon, at 11:25 a.m., the subcommittee was adjourned at the call of the Chair.)

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