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Wright Patman M.C.

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FOR H. R. 11 AND S. 11 TO STRENGTHEN THE ROBINSON-PATMAN ACT AND AMEND THE ANTITRUST LAW PROHIBITING PRICE DISCRIMINATION

WRIGHT PATMAN, M. C.*

INTRODUCTION

H. R. 11 and S. 11 are modest and simple legislative proposals.[1] They provide for no change in our antitrust laws prohibiting price discrimination except to limit somewhat the use of the "good faith" defense. The extent of this limitation goes no further than to assist the Act by providing that the "good faith" defense shall not operate as an absolute and complete bar to a proceeding by the Government against the practices of destructive price discrimination. In other words, those discriminations which would have the effect of substantially lessening competition and tending to create a monopoly may not be defended by showing that they were practiced in "good faith."

It appears that those opposing H. R. 11 and S. 11 want to insure legality of price discriminations, even at the cost of lessening competition and creation of monopoly. Actually, they are arguing for those ugly results, with the concession that the ugliness may be covered

* Member of Congress; member of Texas Bar. The author has represented the First Congressional District of Texas in the House of Representatives of the United States since March 4, 1929. He and Senator Joseph Robinson of Arkansas co-authored the Robinson-Patman Act. Many other legislative proposals have been introduced by the author in the House of Representatives to strengthen Federal anti-trust legislation.

1. At the opening of the 84th Congress in January 1955, H.R. 11 was introduced in the House by Representative Wright Patman (D., Texas). The text of that bill was as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sub-section (b) of section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (15 U.S.C. 13 (b)), is hereby amended to read as follows:

"SEC. 2. (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That unless the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce it shall be a complete defense for a seller to show that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

At the same time, an identical companion bill, S. 11, was introduced in the Senate by Senator Estes Kefauver (D., Tenn.). Approximately 30 Senators joined with Senator Kefauver in co-authoring S. 11. Approximately 50 members of the House of Representatives either introduced in the House

with the veil of "good faith" meeting of competition. Therefore, the naked issue over whether H. R. 11 and S. 11 should be enacted into law is, like the bill, quite simple. It is this: "Shall we tolerate practices which destroy competition and create monopoly, even when those practices are based upon good intentions?" It should not be difficult for us to resolve that issue, especially in the light of our national anti-monopoly public policy. Certainly, no practice destructive of competition and creative of monopoly can be said to be consonant with our

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companion bills to H.R. 11 (which according to House rules were required to bear different numbers) or announced that they were co-sponsoring H.R. 11. One of the separately numbered companion House bills was H.R. 1840, which was introduced by Representative Byron Rogers (D., Colorado). All of these bills were promptly referred to the Committees on the Judiciary in the House and the Senate, since those committees are the legislating committees respecting the Clayton Act. Throughout the first session of the 84th Congress, the Judiciary Committees made no move to hold hearings or to report upon H.R. 11 and S. 11. Therefore, shortly after the opening of the second session of the 84th Congress in January 1956, Mr. Patman requested the Chairman of the Committee on the Judiciary, House of Representatives, to promptly hold hearings and report H.R. 11. Hearings were then scheduled but not to be held before April 18-20, 1956. Thereupon, Mr. Patman on February 28, 1956, introduced House Resolution 414. That resolution provided for moving that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of bill, H.R. 11. The rules of the House provide that when such resolution has remained on file with the Committee on Rules for seven Legislative Days the author of the Resolution may file a petition to discharge committees from further consideration of the bill in question; in this instance H.R. 11. In filing that petition Mr. Patman stated:

"Since the Committee on the Judiciary has not to date granted a hearing on the bill (H.R. 11) and has set it down for April 18-20 for a hearing before a subcommittee, which I believe is too late for effective action at this Session of Congress, those of us who are authors of this proposal are filing a petition under the rules to force consideration. The petition will be available for signatures of the Members of the House, Monday, March 12, 1956." 102 CONG. REC. 3845 (daily ed. March 8, 1956).

Of course, the rules require that in order for such petition to be effective it would have to be signed by 218 members or a constitutional majority of all the members of the House. As is shown by 102 CONG. REC. 7734-35 (daily ed. May 21, 1956), Mr. Patman was successful in securing the 218th signature to the petition. Three days later, on May 24, 1956, the Committee on the Judiciary submitted to the House, Report No. 2202, accompanying H.R. 1840 (one of the companion bills of H.R. 11), recommending "that the bill do pass." That report contains the following statement:

"Price discriminations favoring preferred buyers present a danger to the competitive enterprise system which is inconsistent with the policy of the price discrimination statute. Firms can abuse their superior market position and engage in discriminatory practices that eliminate small suppliers and small retailers from the competitive scene. In practical effect the law as presently construed allows the private interests of a discriminator to outweigh the public interest in preserving competitive opportunity at all levels of business activity. H.R. 1840 would reassert that the public interest in protecting the economy against discriminations which may substantially lessen competition or tend to create a monopoly must prevail over private interests served by discrimination."

and concluded with the following statement:

"CHANGES IN EXISTING LAW

"In compliance with clause 3 of rule XIII of the House of Representatives, there is printed below, in roman, existing law in which no new change is proposed; the matter proposed to be stricken out is enclosed in black brackets, and new matter proposed to be added is shown in italics:

antimonopoly public policy, even though the architect of such practices had some good, though misguided, purposes in mind. For example, mergers of corporations which destroy competition violate the antimerger law,[2] even though based on good intentions and for good purposes. In criminal causes, to be sure, evidence of intent is relevant to the issue. Here, we are not discussing proposals for amending the Criminal Code. Instead, we are discussing legislative proposals out of which only civil actions may arise.

THE PRACTICE OF PRICE DISCRIMINATION REPEATEDLY HAS BEEN FOUND TO BE MONOPOLISTIC AND CONGRESS HAS DETERMINED IT SHOULD BE CURBED

The extent to which we have free competitive enterprise in the United States is due to deep-rooted hostility toward monopolies, business combinations and monopolistic practices which resulted in Congressional investigations of "trusts" in the period from 1875 to 1890 and thereafter.

SECTION 2 (B) OF AN ACT APPROVED OCTOBER 15, 1914, AS AMENDED (15 U.S.C. 13 (B))

"SEC. 2 (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* [That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing] *That unless the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce it shall be a complete defense for a seller to show* that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The bill then came up for debate and vote by the House on June 11, 1956, at which time it passed overwhelmingly by the vote of 394 yeas, 3 nays and 35 not voting (102 CONG. REC. 10,051 (daily ed. June 11, 1956)). The matter then was considered by the Senate Committee on the Judiciary and was reported favorably by that Committee in Senate Report No. 2814, on July 27, 1956. But since that was the date on which the Senate adjourned *sine die* for the 84th Congress, the bill failed to receive consideration on the Floor of the Senate. The rules provide that a report of that nature cannot be taken up on the same day it is made without unanimous consent. Since Senator Bricker of Ohio (R.) objected to the bill receiving consideration, he prevented it from being taken up.

On January 3, 1957, at the opening of the 85th Congress, Representative Patman (D., Texas) re-introduced the same bill in the House, and likewise Senator Kefauver introduced again a companion bill in the Senate at the same time. By coincidence, Mr. Patman's bill in the House in the 85th Congress also bears the number H.R. 11 and Senator Kefauver's bill in the Senate the number S. 11. During March, April and May 1957 the Antitrust Subcommittee of the Committee on the Judiciary, United States Senate, held hearings on S. 11 and reported the bill to the Full Committee. The Full Committee did not act on the bill before the 1st session of the 85th Congress ended. The House Judiciary Committee has not held hearings on H.R. 11 in the 85th Congress.

2. 38 STAT. 730 (1914), 15 U.S.C. §§ 18, 21 (1952).

The first monopolistic use of the trust device was by the Standard Oil Company. Prior to 1875 J. D. Rockefeller and his associates, who owned the Standard Oil Enterprises, had acquired a large number of concerns whose stocks were registered in the names of various individuals who held them for the benefit of Standard Oil. In order to effectuate the control of those companies, the Standard Oil trust was organized in 1879. It encompassed about forty companies which controlled from ninety to ninety-five percent of the oil refining capacity in the United States. Thus, what had started out as a small company, in the period 1860 to 1865, as only one of about 30 refining companies, had by 1879 grown to a position of powerful monopoly control over an industry.

During the course of its investigations of "trusts," Congress found that Standard, after having merged with its competitors to gain a big size advantage over its remaining competitors, then acted to abuse its great economic power. Standard's favorite means of expressing its abuse of overpowering economic position was the use of the practice of price discrimination. It would go into the territory of one of its small competitors and cut the price in that territory to "meet the competition" of that small competitor. At the same time, Standard would hold its prices higher in another area. When the small competitor in the area where the price had been lowered had been driven out of business, Standard then would raise the price in that territory and move on to the territory of another competitor to "meet competition" and in doing so would again discriminate in price. The more monopoly control Standard acquired through the practice of price discrimination, the easier it became for it to drive out of business other small competitors through cutting the price to "meet competition," and in some instances "beating competition," in the individual local territories of such competitors.

In its investigation of "trusts," Congress found that the trail blazed by Standard in the petroleum industry had shown the way to monopolists and would-be-monopolists in other industries who quickly proceeded to imitate Standard's practice of price discrimination.

In that setting, Congress, in 1890, enacted the Sherman Act forbidding "trusts." And thereafter, in 1911, the Supreme Court of the United States approved an action brought by the Government under the Sherman Act to subdivide the Standard Oil Company.[3]

The order of the Court in breaking up the Standard Oil trust did not provide for ending Standard Oil's practice of price discrimination. In fact the Sherman Act contains no provision prohibiting that practice. Therefore, it is not strange that Standard's attorneys argued in 1911 that the Court should not order a breakup of Standard's monopoly

3. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

which had been acquired in "good faith" and through the lawful means of price discrimination.[4]

Those in and out of Government who feared the consequences of monopoly and its restriction upon economic freedom and political liberties cried out for additional legislation to curb monopolistic practices. They regarded as senseless any policy which simply provided for building up and then breaking up monopolies.

The leaders of political parties promptly responded to the expression of public opinion that laws should be enacted against specific acts and practices which produced monopolies rather than waiting for monopolies to grow into full flower, with an understanding that an attempt would then be made to dissolve the monopolies. Strong promises were made to "small business." "Antimonopoly" planks appeared in the platform of all three major parties participating in the 1912 presidential campaign. The Democrats won over the regular Republican Party and the "Bull Moose" Republican Party on that occasion. In the Democratic platform there was a promise launched against the monopolistic practices in the following words: "The prevention of holding companies, of interlocking directorates, of stock-watering, of discriminations in price, and the control by any one corporation of so large a proportion of any industry as to make it a menace to competitive conditions."[5]

At the opening of the Sixty-Third Congress in 1913, President Wilson, in one of his first messages, called for legislation to prohibit price discrimination and other unfair trade practices. In that connection he said:

> We are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limit of which experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain.

The public became aroused and public opinion called for legislation that would outlaw price discrimination and other specific acts and practices that had led to monopoly and monopolistic conditions.

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4. The attorneys argued that: "[Defendant's] control was but the result of lawful competitive methods, guided by economic genius of the higher order, sustained by courage, by a keen insight into commercial situations, resulting in the acquisition of great wealth, but at the same time serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals." *Id.* at 84.

5. Democratic Party Platform, 1912.

Mr. Brandeis, later Justice Brandeis, testified in 1914 that price discrimination was the most powerful weapon that the Standard Oil Company had utilized in its march to monopoly.[6]

Congress responded by enacting the Federal Trade Commission Act,[7] which declared unfair methods of competition to be unlawful, and the Clayton Antitrust Act,[8] which prohibited price discrimination, exclusive dealing, acquisition of stock by one corporation of another and interlocking directorates, where the effect would be substantially to lessen competition or tend to create a monopoly in a line of commerce. President Wilson was highly elated over the prospects for effective action against monopolistic conditions.[9]

However, the public and particularly small business enterprises had an unpleasant surprise ahead. It was found that somehow, someone had slipped into the anti-discrimination provision of section 2 of the Clayton Antitrust Act the proviso which made that section of the law unoperative against price discriminations when made "in good faith to meet competition." When that proviso was being debated in Congress, concern was expressed about the possibility of it

6. At the hearing on H.R. 11380, 63d Cong., 2d Sess. (1914) before the Committee on the Judiciary of the House of Representatives, Mr. Louis D. Brandeis, who later became a Justice of the Supreme Court, testified as follows:

"MR. BRANDEIS. . . . to get a monopoly by getting a competitor out of the way. That is not competition; that is destruction. It is not the purpose of competition at all; it is destruction. Now, it seems to me perfectly clear, as a general proposition, that what we must do in dealing with business, with the liberty of a business, is precisely the same as what we must do in liberty of the individual. Any one of us might be knocked down when we go through the streets by somebody who is a good deal stronger than we are. I am certain I might be so knocked down. The law undertakes to restrain the liberty of that physically strong individual by not allowing him to exercise his right to do as he pleases and prevent his knocking me down, unless it should be in self-defense or in some other justification or infringement of his rights. What is done there? That is the regulation, the restriction, of the liberty of one which is absolutely essential to the preservation of the liberty of the other. Now, that same principle applies, of course, in business. If a man who is strong, who has the endurance which comes with size and with wealth, is allowed to use that against an individual, that is not competition. Competition consists in being able to do the thing better—either cheaper or in quality better, in service better—than the other person; that is competition. The Standard Oil Co., did not compete with those individuals when it went in and destroyed them. They committed industrial murder just as much as the man who physically used his strength to put an end to the persons about him."

7. 38 STAT. 717 (1914), 15 U.S.C. § 41 (1952).

8. 38 STAT. 730 (1914), 15 U.S.C. §§ 12-27 (1952).

9. Shortly after President Wilson signed the Clayton Antitrust Act and the Federal Trade Commission Act, he wrote in a private letter:

"With similar purpose and in a like temper the Congress has sought, in the Trade Commission bill and in the Clayton bill, to make men in a small way of business as free to succeed as men in a big way, and to kill monopoly in the seed. . . . It is our purpose to destroy monopoly and maintain competition as an only effectual instrument of business liberty. . . . Letter of Woodrow Wilson, October 17, 1914, in 3 THE PUBLIC PAPERS OF WOODROW WILSON 189-90 (1925-27).

"pulling the teeth" from the law.[10] However, it was denied that it would have that effect.

The fears which had been expressed about the possible effect of the "good faith" proviso in the Clayton Antitrust Act of 1914 proved to be well founded. In the twenty-year period following the passage of the Clayton Antitrust Act of 1914 it proved to be an ineffective tool

10. The Clayton Act of 1914 originated with the bill H.R. 15657, introduced by Mr. Clayton on April 14, 1914, 51 CONG. REC. 6714 (1914). Section 2 of this bill prohibited discrimination in price between different purchasers, with the purpose or intent to destroy or wrongfully injure the business of a competitor of either the purchaser or the seller. Section 2 did not contain any proviso excepting discriminations made in good faith to meet competition.

H.R. 15657 was reported out on May 6, 1914, and the report, H.R. No. 627, 63d Cong., 2d Sess., 8-9, showed that the § 2 prohibition of price discrimination was confined to a well-known, common, particular form of discrimination. Thus, the report stated, in part:

"Section 2 of the bill is intended to prevent unfair discrimination. The necessity for legislation needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of prices of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of the same class of commodities above their fair market value in other sections or communities. Such a system or practice is so manifestly unfair and unjust, not only to competitors who are directly injured thereby but to the general public, that your committee is strongly of the opinion that the present antitrust laws ought to be supplemented by making this particular form of discrimination a specific offense under the law when practiced by those engaged in commerce."

S. Doc. No. 583, 63 Cong., 2d Sess. (1914). Made the same statement for the Senate Judiciary Committee in its report on H.R. 15657.

In its report upon the bill to enact the Clayton Act—S. REP. No. 695, 63d Cong., 2d Sess., 1 (1914), to accompany H.R. 15657, the Senate Committee on the Judiciary said:

"Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves are not covered by the act of July 2, 1890 (the Sherman Act) or other existing antitrust acts and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."

During the debate on the bill in the Senate, the following identification was made of the particular form of discrimination to be prohibited by §2:

"MR. WALSH. . . . Section 2 refers to that form of unfair competition generally denominated as local price cutting . . . .

Perhaps the most conspicuous offender in the matter of unfair competition by local price cutting has been the great Standard Oil Co." 51 CONG. REC. 14099 (1914).

With this evidence before us showing that the section 2 prohibition was confined to a "particular form of discrimination," the debates in the House and the Senate make it clear that the "good faith meeting of competition" proviso, when it was later inserted in the bill by the Senate Judiciary Committee, was not understood or intended by Congress to legalize discriminations that were prohibited. Thus, the following colloquy occurred during the debate in the House:

"MR. STAFFORD. As I understand it, the purpose here is to provide a uniform price for all persons and customers for the same quality of goods?

for use against destructive price discriminations. As pointed out herein, the Federal Trade Commission made many investigations and reported that the practice of price discrimination was widespread, that it was leading to the creation of monopolistic conditions and that "The Commission has no evidence which would establish that price discrimination by chain stores has not been in good faith to meet com-

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"MR. WEBB. And under like conditions.

"MR. STAFFORD. About which there cannot be any competition at all, so far as the seller is concerned, in meeting the competition of some other corporation?

"MR. WEBB. Oh, yes; if he meets the competition of some other person, he is not meeting that competition for the purpose of destroying or wrongfully injuring his competition." 51 CONG. REC. 9096 (1914).

"MR. GRAHAM (of Pennsylvania), Mr. Chairman, I desire to offer an amendment . . . [The clerk read] after the word 'shall', insert the words 'except in lawfully meeting competition' . . ." *Id.* at 9389.

"It has been held in some of the cases that have been tried that wherever prices are cut below cost that is unfair trade practice; but where a man meets another's price in protecting his business in a district with a price, it is his lawful right and privilege, and it is the object of competition that he should meet his price . . . ." *Ibid.*

"MR. WEBB. Mr. Chairman, we hope this amendment will not be adopted, because in our opinion it adds nothing to the section. We think under the provisions of the section any man who honestly meets competition is not thereby intending to destroy or wrongfully injure any other person. If that is his object, meeting honest competition, this section will not hurt him. . . ." *Ibid.*

"MR. GARDNER. Would the adoption of the amendment offered by the gentleman from Pennsylvania [Mr. Graham] open the door to the practices which you seek to prevent by section 2?"

"MR. WEBB. It might be a suggestion to the parties that that could be done. . . . I oppose the amendment because, as I have said, I think the amendment of the gentleman from Pennsylvania is useless and unnecessary."

The question was taken, and the amendment was rejected *Id.* at 9390.

The Senate Committee on the Judiciary added a good faith meeting of competition provision to § 2 of the House bill so that the § 2 prohibition would not prevent "discrimination in price in the same or different communities made in good faith to meet competition and not intended to create monopoly."

The Senate committee report, S. REP. No. 698, 63d Cong., 2d Sess. 43-44 (1914), explained this addition as follows:

"After full consideration it is deemed advisable to enlarge the exception in the first proviso to the section by adding . . . 'discrimination in price made in good faith to meet competition and not intended to create monopoly' upon the ground that the enlargement will tend to foster wholesome competition."

The debate in the Senate on H.R. 15667 as amended by the Senate Committee on the Judiciary, included the following regarding section 2:

"MR. CUMMINS. . . .

Made in good faith to meet competition. . . .

Imagine the Government endeavoring to prove that a particular instance of price cutting was not made in good faith to meet competition. . . ." 51 CONG. REC. 14228 (1914).

"MR. REED. . . . Manifestly, if two men are in competition at a given place—let us say the Standard Oil Co. and an independent company—and the independent company should drop the price of gasoline to 11 cents, and the Standard Oil Co. should meet it, that would be an act done in good faith to meet competition. If, however, the Standard Oil Co. were to drop the price of gasoline to 5 cents, a price less than the article could be produced for, and kept it up to 11 or 12 cents somewhere else, and carried it out and kept it up so that it drove the independent concern out of business, there would not be any difficulty at all in a jury finding that they did not do it in good faith. I will undertake, in any reasonably plain case, any outrageous case, to get a verdict every time under that section." *Ibid.*

petition and there is good ground to conclude that in many cases it has been for that purpose."[11]

It was easy to see why the big chains were driving the independents out. They were getting price concessions and secret rebates far beyond anything that was justified by the suppliers' cost differences. The investigations revealed, for example, that prior to 1935 the Atlantic & Pacific Tea Company had been receiving on an annual basis $6 million in off-the-invoice discounts and another $2 million a year in brokerage fees on its purchases.

In many instances the big chains were demanding special price concessions and coercing small suppliers into granting special concessions, with threats of putting up their own manufacturing plants. In other instances they were playing the suppliers off against one another, forcing suppliers of nationally advertised products to meet the prices of small, exclusive suppliers who could not, in practice, market to the independent trade. It was overwhelmingly obvious that something had to be done to check this abuse of power and return the competitive contest more to a contest of efficiency.

The Federal Trade Commission, in its *Final Report on the Chain Store Investigation*,[12] stated that the Clayton Antitrust Act, as then written, permitted destructive price discriminations "when made in good faith to meet competition." The Commission reported that such

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"MR. CUMMINS. . . . [B]ut we are not making this law to arrest the progress of monopoly in outrageous cases only. We are making it to preserve competition." *Ibid.*

"We might just as well have said . . . that the seller can do anything that he desires or pleases to meet competition that is not in violation of the anti-trust laws; if it is in violation of the anti-trust law, we need no further condemnation or penalty. We have wound up this section practically by saying that the seller can do whatsoever he pleases with regard to his business, provided he does not violate the antitrust law; and yet this is one of the sections that have been proposed to strengthen the antitrust law, to add to the antitrust law, to accomplish the purpose of the antitrust law by forbidding something that is not now forbidden by the States." *Id.* at 14250.

The conference report, S. Doc. No. 585, 63d Cong., 2d Sess. (1914), eliminated from the good faith proviso the language "and not intended to create monopoly." 51 CONG. REC. 15637 (1914). During the debate on the conference report in the Senate, the following criticisms of the good faith proviso were made:

"MR. STERLING. . . . Passing the paragraph or proviso which permits discrimination in price because of differences in grade, quality, or quantity, or differences in cost of selling or transportation, I come to this significant provision injected by the committee, namely, the provision which permits 'discrimination in price in the same or different communities made in good faith to meet competition.' It is easy to conceive of the multitude of sins that may be covered by that broad and generous cloak. . . ." *Id.* at 16115.

"Think of it. It can always be urged against the charge of unlawful discrimination that it was done for the purpose of meeting competition. 'We found our competition charging a certain price for these goods.' We cut the price of ours, below cost even, to meet his competition. What have you got to say about it under this law?"

11. FTC, *Final Report on the Chain Store Investigation,* S. Doc. No. 4, 74th Cong., 1st Sess. 51 (1934).

12. *Ibid.*

"good faith" provision of the law, as then interpreted, virtually nullified the law against price discriminations. The Commission, that connection, commented:

> A simple solution for the uncertainties and difficulties of enforcement would be to prohibit unfair and unjust discrimination in price and leave it to the enforcement agency, subject to review by the courts, to apply that principle to particular cases and situations. The soundness of and the extent to which the present provisos would constitute valid defenses would thus become a judicial and not a legislative matter.[13]

The Commission, in its report on the chain store investigation, rejected suggestions that the Sherman Antitrust Act be relied upon and used to halt these destructive price discriminations.[14] One thing was clear. Something had to be done, and done without too much delay. Therefore, resolutions were introduced in the House of Representatives providing for an investigation of the trade practices of big-scale retail and wholesale buying and selling organizations.[15] Those resolutions provided for the investigations to be made by a Special Committee of seven Members of the House; four Democrats and three Republicans, under the chairmanship of the author.[16]

When this practice was being investigated in 1935-1936, it was found that injurious price discriminations were being practiced in industry after industry. Big suppliers were discriminating in their prices, either to undercut the smaller companies or to meet the prices of the local companies. Sometimes the big companies would meet the price of local companies to put them out of business, and sometimes to make them raise their prices. Where a big company found that a local competitor was selling below its national price, it would meet the price in that area, and if the local company did not show signs of going out of business, then the game of raising prices would start. The big company would lower the boom for a while and then raise it again. If the local company failed to raise its price promptly, then the boom would be lowered again. Before long, after a few

13. *Id.* at 96. The Commission recommended the following language as a prohibition against price discrimination: "It shall be unlawful for any person engaged in commerce, in any transaction in or affecting such commerce, either directly or indirectly to discriminate unfairly or injustly in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States."

14. "While price discrimination was one of the methods used to build up the monopoly which the Supreme Court held unlawful in the Standard Oil dissolution suit, it has never been held to be a violation of the Sherman Act in and of itself." *Id.* at 65.

15. H.R. Res. 203 and 239, 74th Cong., 1st Sess. (1934).

16. Rep. Wright Patman (D., Texas), Chairman; Rep. Sol Bloom (D., N.Y.); Rep. Scott W. Lucas (D., Ill.); Rep. John F. Dockweiler (D., Calif.); Rep. Donald H. McLean (R., N.J.); Rep. W. Sterling Cole (R., N.Y.); Rep. Gerald J. Boileau (R., Wisc.).

ups and downs, the local company would catch on to the fact that it had better raise up to the big competitor's price. Since the big competitor would not permit local companies to have more than a certain share of the local market, the only profitable thing they could do was to raise their prices up to the big supplier's price.

Under the foregoing circumstances, no supplier had any real independence to reduce his price. Discrimination made it so easy for the big competitors to meet his price, and he knew they would meet his price, and hence he knew he could only lose money and not gain any volume of business by reducing his price.

Today, there are only three or four or perhaps one or two big suppliers in each industry which have any genuine independence to reduce prices. This is the centralized control over prices maintained by discrimination, which is aimed at the elimination of sellers who attempt to initiate independent price behavior. This is not competition in any realistic sense. This is soft competition.

In the light of the facts uncovered during the course of investigations of big-scale buying and selling in 1935-1936, it was not difficult for one to see why the law against price discrimination had broken down. One of the main reasons was the defect in the law pointed out by the Federal Trade Commission in its report on the chain store investigation. That defect was the provision which allowed the sellers who were discriminating in price to defend on the ground that they were meeting competition in good faith. We who were in the Congress at the time immediately moved to remedy this situation. Bills were introduced in both the House and the Senate to overcome the defects in the laws against price discrimination, including the loophole which permitted discriminations "made in good faith to meet competition."[17]

During the winter of 1935-1936 extensive hearings were held by the Judiciary Committee of the House of Representatives and the Judiciary Committee of the Senate on the proposals to strengthen the laws against destructive price discriminations. Representatives of the larger corporations which had been practicing price discrimination voiced strong opposition to the proposals to strengthen the laws against price discrimination.

It is not difficult to see why the big corporations do not like the anti-discrimination law. These corporations are at the top of the heap, and because of their greater size may find it possible to exercise an unfair advantage over their smaller competitors. Many of these giant corporations are fat and lazy, and they would not like to have to compete with smaller companies on the basis of efficiency. Many of

17. H.R. 8442 (Introduced by Rep. Wright Patman (D., Texas.)) and S. 2154 (Introduced by Senator Joseph Robinson (D., Ark.)), 74th Cong., 2d Sess. (1935).

them know that if they did have to compete on equal terms the smaller companies would run rings around them.

Many of the big corporations are inefficient. They have a large number of high-priced vice presidents; they have huge advertising and political expenses; and, worst of all, they are snarled up in more bureaucratic red tape than the worst Government bureau we ever had. Many of the managements do not know who their own people are, and most of the underlings have to spend their time making up elaborate reports and reading regulations to find out what authority they have to do what. All of this takes time and money that might be spent in productive work.

Despite all of the opposition that the opponents could muster to the proposals for strengthening our laws against price discriminations, the Judiciary Committee of the House and the Judiciary Committee of the Senate reported favorably on the Robinson and the Patman bills and recommended their enactment into law.

The bill introduced in the Senate and reported by the Senate Committee on the Judiciary followed the FTC's recommendation literally in that it contained no reference whatever to "good faith" or to "meeting of competition." The House bill, on the other hand contained the language of the statute today. The Senate bill was amended on the floor of the House by insertion of the "good faith" clause of the old Clayton Act. The conference committee agreed upon the language of the House bill.

The Conference Report to the House on the resolution of the differences between the Senate and the House bills, is quite significant on the "good faith" proviso in the light of subsequent developments. That is particularly true in view of the fact that the Supreme Court, in the *Standard Oil* case,[18] held that the "good faith" defense provides an absolute bar to a proceeding against price discrimination.

Mr. Utterback was the Chairman of the Conferees for the House, and therefore not only presented the Conference Report to the House but also served as manager of the bill when it was reported to the House by the Conference Committee for consideration.

With reference to the "good faith" provision, the Conference Report contained the following statement:

> The Senate bill contained a further proviso—That nothing herein contained shall prevent discrimination in price in the same or different communities made in good faith to meet competition.
>
> This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating

18. Standard Oil Co. v. FTC, 340 U.S. 231 (1950).

> to the question of meeting competition, *intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commision,* is included in subsection (b) .... (Emphasis added.)[19]

That aspect of the Conference Report on the bill which became the Robinson-Patman Act was further explained by Mr. Utterback, the manager of the House Conferees in the following language:

> This does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities, and duties. They are fixed in the other provisions of the bill. It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations.[20]

Above all else, the Congress meant to correct the defect in the law which permitted destructive discriminations "in good faith to meet competition." Therefore, Mr. Utterback, the manager for the bill on the House floor, stressed the point that the "good faith" proviso as agreed upon by the Conference Committee was not to serve as an absolute bar to a charge of price discrimination. He pointed out that instead it was to be merely a rule of evidence.[21]

Therefore, it was made clear that the Congress never intended the "good faith" proviso to be construed as a carte blanche exemption to violate the bill so long as a competitor could be shown to have violated it first. Particular care was exercised to make clear that the law was not to be used in practices of oppressive discriminations in violation of the obvious intent of the bill.

With the need for remedial legislation so urgent,[22] the Congress

19. H.R. REP. No. 2951, 74th Cong., 2d Sess. 6, 7 (1935) (on H.R. 8442).
20. 80 CONG. REC. 9418 (daily ed. June 15, 1936).
21. *Ibid.* In that connection, Mr. Utterback explained the point as follows: "In connection with the above rule as the burden of proof, it is also provided that a seller may show that his lower price was made in good faith to meet an equally low price of the competitor, or that his furnishing of services or facilities was made in good faith to meet those furnished by a competitor. It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities, and duties. They are fixed in the other provisions of the bill. It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations."
22. The House Committee Report on the need for the legislation stated: "Your committee is of the opinion that the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary." H.R. REP. No. 2287, 74th Cong., 2d Sess. 3 (1935) (on H.R. 8442).

acted not only in a manner to make its intent clear, but also with a large emphatic vote. For example, the Robinson-Patman Act passed the House by a vote of 290 to 16 and when it was finally voted on in the Senate it was passed without objection.

A few of the facts relating to the passage of the Robinson-Patman Act have been cited to demonstrate that in effect the whole Seventy-fourth Congress accepted its responsibility and met one of the really serious problems of the day when it strengthened the laws against destructive price discrimination.

It was thought that with the enactment of the Robinson-Patman law Congress would not be called upon to deal with this problem again. If the clear intent of the Congress had been followed in the interpretation of the Robinson-Patman Act, it is not believed that Congress would now have before it for consideration additional legislative proposals to strengthen the Robinson-Patman Act. How then does it happen that in the Eighty Fourth Congress and again in the Eighty Fifth Congress bills have been introduced to strengthen the Robinson-Patman Act against destructive price discriminations?

ORIGIN OF THE NEED FOR H. R. 11 AND S. 11

In 1951 the Supreme Court of the United States in an opinion and decision held that a giant concern, such as Standard Oil Company of Indiana, is now privileged to discriminate in price with the effect of destroying its competitors, destroying its customers, substantially lessening competition and tending to create a monopoly so long as that giant concern shows that it has accomplished all of those things in "good faith" in meeting an equally low price of a competitor.[23]

The decision of the Supreme Court referred to was handed down in what has now come to be known as the *Standard Oil* case. The Federal Trade Commission initiated that case through issuance of a complaint charging the respondent, Standard Oil Company of Indiana, with price discrimination in the sale of gasoline in the Detroit Metropolitan Area in violation of section 2(a) of the Clayton Act.[24] In that complaint, it was alleged that Standard had regularly sold at a "tank car" price to four large gasoline dealers (each of which made substantial retail sales—although some also made sales at wholesale). In addition, it was alleged that Standard at the same time was selling gasoline at higher "tank wagon" prices to numerous other gasoline dealers, totaling about 358, who were competing with the four favored large dealers in the same area. The complaint further alleged that the effect of the discrimination had been to injure, destroy or prevent competition between the favored and the non-

23. Standard Oil Co. v. FTC, 340 U.S. 231 (1951).
24. 38 STAT. 730 (1914), 15 U.S.C. § 13 (1952).

favored dealers in the sale of gasoline directly to the consuming public.

Standard's answer to the complaint admitted that it had engaged in the practice of selling to its 358 small retailer customers in the Detroit area at higher prices than it had been selling to four large favored competing dealers in that area. It sought to justify its practice of charging the different prices to different dealers mainly on three grounds: (1) that the four large sellers had been classed as "jobber" dealers by Standard by virtue of the larger quantities in which they bought and the manner in which they performed their functions; (2) that the different prices that Standard had charged were justified on a basis of differences in costs in servicing the different dealers; and (3) that the lower prices charged the favored dealers had been made in "good faith" to meet the equally low or lower prices of competitors of Standard.

Before discussing additional facts about this practice of price discrimination and its effects, perhaps it would be helpful to refer generally and briefly to the relative size of each of the actors in this little drama of price discrimination in the Detroit area with which that case was concerned.

According to published data, the Standard Oil Company of Indiana is one of the large corporations, doing a world-wide business in refining, transporting, selling and distributing petroleum products, including gasoline. It is the leader in that field of business in one section of the United States. Its principal business is carried on in eleven midwestern states, including Michigan and the metropolitan area of Detroit. According to a survey made by *Fortune Magazine*, based on statistics for 1956, Standard Oil Company of Indiana ranked ninth in industrial corporations in the United States, with assets of $2,437,-196,000.[25] In the same year, its sales totaled $1,890,228,000. A number of its competitors engaged in the sale of gasoline to "jobbers" and to "retailers," in the Detroit metropolitan area, were not large enough to be rated among *Fortune's* listing of 500 largest industrial companies. In fact, many of Standard's competitors are so small that they are not known generally except within the particular local areas in which they operate. For example, in the Detroit metropolitan area one competitor, the Red Indian Oil Company, was engaged in selling a brand of gasoline known as "Fleet Wing." Few people outside of that area have heard of that company or its brand.

Likewise, great disparity existed in the size of Standard's customers. Those from whom Standard exacted the higher price in its conduct of the challenged discriminatory practice were small retail gasoline dealers. Most of those were operating only one gasoline station each. In contrast, the four gasoline dealers who were favored by Standard

25. *500 Industrials*, Fortune Magazine, July 1957.

in that situation were large dealers. For example, each of four favored dealers was handling from one to four million gallons of gasoline per year.

In the course of the proceedings before the Federal Trade Commission, Standard failed to justify its practice of charging different prices to its different competing customers in the Detroit area on any basis of differences in costs of servicing those customers. Also, it failed to show that the four favored customers were engaged strictly as "jobbers" in the sale of gasoline. On the contrary, it was shown that those four favored customers were reselling gasoline at retail in competition with the 358 other customers.

Since Standard's defenses, based on the claim of cost justification and on the claim that its favored customers were operating strictly as "jobbers," had not prevailed, it then placed its reliance upon evidence offered to show that its lower prices were made in order to *retain* those customers and in good faith to meet an equally low price made by one or more competitors.[26] It has been pointed out that Standard's competitors in the Detroit area, whose competition it allegedly was attempting to meet, were mere pigmies in comparison with the giant Standard Oil Company of Indiana. They included such small and relatively unknown companies as the Aurora Oil Company, the National Refining Company, the Red Indian Oil Company and the Stikeman Oil Company.[27] These small companies, which were for the most part only doing business in Michigan and the Detroit area, were selling off-brand and unadvertised gasoline. One used the brand named "Fleet Wing," but it was not a widely advertised brand.

In view of these circumstances, Standard did not allege or attempt to prove that the small local competitors, whose prices it was attempting to meet, were in any position to seriously threaten the market position of the giant Standard Oil Company of Indiana in its fields of operations. Moreover, Standard did not allege or attempt to prove that the small local competitors whose prices it was attempting to meet were engaged in any unlawful or discriminatory conduct. On the contrary, the evidence was to the effect that the conduct and the prices of Standard's competitors were nondiscriminatory and *lawful*.[28] In other words, Standard undertook to defend its discriminatory pricing practices by showing that some small local competitors, who were conducting their business *lawfully*, were making lower, nondiscriminatory price offers to the buyers. Therefore, Standard sought to have excused from the application of the law

26. 340 U.S. at 236.

27. Transcript of Record, pp. 3274, 5278, 1163, 5060, Standard Oil Co. v. FTC, 233 F.2d 649 (7th Cir. 1956).

28. 340 U.S. at 238.

its own discriminatory conduct, even though that conduct had the effect of "substantially lessening competition and injuring, destroying and preventing competition."[29] Its effort in that respect was based on the reasoning that it should be permitted to defend itself from the price action of its small local competitors, even though they were conducting themselves *lawfully*. When the full impact of that line of reasoning is felt and realized, the average lawyer will be startled by it. It is something new in the way of an argument for excusing wrongful conduct from the application of the law. Ordinarily, injurious action is excusable as a matter of self-defense against *unlawful* action.

The Federal Trade Commission ruled that since the evidence had been established that Standard's discriminatory practices had the effect of "substantially lessening competition and injuring, destroying and preventing competition," and had therefore established so conclusively a case against Standard, it did not consider that the "good faith" defense was an

> absolute defense to a charge of unlawful discrimination and proof of meeting a competitor's equally low price can be availed of only to the extent it may rebut the *prima facie* case. The meeting of the equally low price of a competitor in good faith is not a defense to a charge of price discrimination where competitive injury is affirmatively shown and so replaces the rebuttable presumption of the prima facie case.[30]

Therefore, the Commission concluded that under such circumstances, "the proviso of Section 2 (b) does not constitute a substantive justification or defense" and that under such section a defense was "not available to the respondent on the basis of the present record."[31] Accordingly, the Commission, on the basis of its findings and conclusion, entered a Cease and Desist Order, commanding Standard to discontinue the unlawful discriminations in price.[32]

On the petition for review, in the Court of Appeals for the Seventh Circuit, Standard contended that the Commission had erred in its ruling that section 2(b), the "good faith" defense, was not absolute. The circuit court agreed with the Commission and approved its findings and conclusions and, although it made some modifications in the Commission's Order to Cease and Desist, it then affirmed the Commission's Order.[33]

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29. Standard Oil Co., 41 F.T.C. 263, 276 (1945).
30. *Id.* at 282.
31. *Id.* at 283.
32. *Id.* at 283-85. See also modifications made in the Cease and Desist Order, Standard Oil Co., 43 F.T.C. 56-57 (1946).
33. Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949).

The circuit court, in disposing of the matter, stated:

> We agree with the Commission that the showing of the petitioner that it made the discriminatory price in good faith to meet competition is not controlling in view of the very substantial evidence that its discrimination was used to affect and lessen competition at the retail level.[34]

Thereupon Standard sought and secured in the Supreme Court a review of that decision. The Supreme Court approved Standard's contention that the 2(b) "good faith" defense proviso does afford an absolute defense to a charge of price discrimination, irrespective of the fact that the discrimination had been found, as a matter of fact, to have the effect of substantially lessening competition.[35]

The Court reversed the judgment of the Court of Appeals for the Seventh Circuit and the Federal Trade Commission and remanded the case to the Commission to make findings regarding the facts which would show whether or not Standard's lower prices were made in good faith to meet the equally low prices of competitors. In explaining the basis for its ruling, the Court reasoned and stated that the "good faith" defense provided for in section 2(b) should be given faith and credit "without regard to whether there also appears an affirmative showing of actual or potential injury to competition at the same or a lower level traceable to the price differential made by the seller,"[36] and then stated that "we may, therefore, conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor."[37]

Actually, a substantial part of the basis for the Court's reasoning, opinion and decision appeared to be based upon arguments appearing in law review articles in opposition to the Clayton Act provisions against price discrimination as amended by the Robinson-Patman Act.[38] That aspect of the matter will be dealt with in greater detail later in this article.

The decision by the Supreme Court in the *Standard Oil* case was by a vote of four-to-three. Justice Minton did not participate because he had participated in the earlier decision of the Seventh Circuit Court of Appeals. Justice Reed wrote a sharp dissent for himself, Chief Justice Vinson and Mr. Justice Black.[39]

In the dissenting opinion it was pointed out that one of the major purposes for the enactment of the Robinson-Patman Act in 1936 was to narrow the good faith defense, since it, as it existed in the Clayton

34. *Id.* at 214-17.
35. 340 U.S. at 251.
36. *Id.* at 241.
37. *Id.* at 250.
38. *Id.* at 249 n.15.
39. *Id.* at 251-67.

Act of 1914, had proven to be such a loophole frustrating the enforcement of that law. In that connection, it was stated "What follows in this dissent demonstrates, we think, that Congress intended so to amend the Clayton Act that the avenue of escape given price discriminators by its 'meeting competition' clause should be narrowed. The Court's interpretation leaves what the seller can do almost as wide open as before."[40] The dissenting opinion directed attention to the fact that the public policy spelled out in the statute again would be frustrated as a result of the Court's holding in the *Standard* case.[41]

In accordance with the Court's decision, the case was returned to the Commission and the latter proceeded with the reconsideration of the evidence of record. Following such reconsideration, and on the basis of the record, the Commission made findings of facts relating to Standard's contention that although it had discriminated in price, it had done so through meeting in "good faith" the equally low price of a competitor. The Commission concluded that Standard had failed to sustain its burden of proving that its lower price was accorded in "good faith" to meet the equally low price of a competitor. Consequently, Standard again petitioned the Court of Appeals for the Seventh Circuit to review and set aside the Commission's findings and order.[42] On review, the circuit court set aside the Commission's order. It held that Standard's "good faith" defense "was firmly established, and the Commission's reasoning by which it reached a contrary conclusion is untenable and must be rejected."[43]

The Commission's petition to the Supreme Court for review of the decision of the Court of Appeals for the Seventh Circuit[44] has been granted. The Court, on January 27, 1958, by a vote of five to four, held that Standard had acted in "good faith."[44a] The Court so held even though Standard's "good faith" resulted in substantially lessening competition through its action of discriminating in price.

The question of law decided by the Court on the earlier occasion was not before the Court in the recent proceeding. The Commission, in its

40. *Id.* at 253.
41. *Id.* at 263. With reference to the practice of price discrimination, Mr. Justice Reed stated: "The control of that evil was an important objective of the Robinson-Patman Act. The debates, the Commission's report and recommendation, and statutory changes show this. The Conference Report and the explanation by one of the managers, Mr. Utterback, are quite definitive upon the point. Because of experience under the Clayton Act, Congress refused to continue its competitive price proviso. Yet adoption of petitioner's position would permit a seller of nationally distributed goods to discriminate in favor of large chain retailers, for the seller could give to the large retailer a price lower than that charged to small retailers, and could then completely justify its discrimination by showing that the large retailer had first obtained the same low price from a local low-cost producer of competitive goods."
42. Standard Oil Co. v. FTC, 233 F.2d 649 (7th Cir. 1956).
43. *Id.* at 655.
44. FTC v. Standard Oil Co., *petition for cert. filed,* 25 U.S.L. WEEK 3148 (U.S. Sept. 28, 1956) (No. 465), *cert. granted,* 352 U.S. 950 (1956).
44a. FTC v. Standard Oil Co., 78 Sup. Ct. 369 (1958).

petition for its writ of certiorari in the recent proceeding made reference to the Court's earlier decision in the *Standard Oil* case,[45] and acknowledged that "It is now settled under section 2(b) that an otherwise illegal price discrimination is not prohibited by the statute if shown to have been made in good faith to meet an equally low price of a competitor."[46]

In view of the foregoing, it is clear that the opinion and decision of the Supreme Court in the *Standard Oil* case has in effect, as observed by Justice Reed in his dissenting opinion, gone contrary to the intent of Congress and opened up a large loophole in the Clayton Act as amended by the Robinson-Patman Act to such an extent that although Congress had acted in 1936 to narrow the application of the "good faith" defense proviso, "the Court's interpretation leaves what the seller can do almost as wide open as before."[47]

This situation gave rise to the need for the Congress to amend the law along the lines provided for in H. R. 11 and S. 11. Unless that is done, the law will become almost a nullity.

The action by the Supreme Court in the *Standard Oil* case has proven to be a signal to law enforcement agencies and to lower courts to ease up on the effective enforcement of that part of the public policy governed by the Clayton Antitrust Act as amended by the Robinson-Patman Act. A later section of this article will refer to and document the manner in which the enforcement agencies and courts have reacted to the Supreme Court's signal and to the damage inflicted upon our antitrust public policy.

ADDITIONAL INTERPRETATIONS HAVE HELPED PULL THE TEETH FROM THE LAW

The decisions of the Supreme Court in the *Standard Oil* case made a hole in the Robinson-Patman Act. However, price discriminators used and expanded that loophole to escape the application of the law against price discrimination. The expansion of the escape hatch was made by court decisions and actions of the Federal Trade Commission in other cases. While some of those decisions are not based squarely and solidly upon the "good faith" defense of section 2(b), they nevertheless go hand in hand with the Supreme Court's decision in the *Standard Oil* case in making greater difficulties for the enforcement of our laws against destructive price discriminations. Indeed, they are, in the terminology of the tort case lawyer, the natural and foreseeable consequences of the decision in the *Standard Oil* case.

45. 340 U.S. 231 (1950).
46. FTC v. Standard Oil Co., petition for writ of certiorari p. 8, 25 U.S.L. WEEK 3148 (U.S. Sept. 28, 1956) (No. 465).
47. 340 U.S. at 253.

The effort made by the Government in the *Standard Oil* case for a clarifying interpretation of the Robinson-Patman Act to facilitate its enforcement against destructive price discriminations marked the point of greatest advance in the enforcement effort. That effort having failed, the enforcement agencies adopted an attitude of indifference toward the Robinson-Patman Act. Not only the Federal Trade Commission, but the courts joined in the retreat from the enforcement of our laws against monopolistic price discriminations. Thus, the result of the *Standard Oil* case transcended the immediate area of the cases involving good faith defenses, although in a number of the additional cases the good faith defense was included among others.

In the case of *Balian Ice Cream Co. v. Arden Farms Co.*,[48] the Court of Appeals for the Ninth Circuit not only broadened the "good faith" defense but also added to enforcement difficulties by increasing the plaintiff's burden of proving injury to competition.

The *Balian* case was a consolidation of actions brought by fifteen small producers and distributors of ice cream operating in the Los Angeles, California, area against the large competing Arden Farms Company. Arden not only did business in the sale of ice cream in Los Angeles, but in other sections of California and in other states, including Oregon, Washington, Montana, Arizona, and Idaho.

Arden is one of the largest firms handling dairy products in the West. It owns and operates an ice cream plant in Los Angeles which is one of the largest in the United States. During 1950, one of the years involved in the *Balian* case, Arden sold and distributed 4,200,000 gallons of ice cream in the Los Angeles area, a total of seventeen per cent of all the ice cream sold in that area. During the same year the aggregate sales of fifteen other ice cream companies, who were the vigorous competitors of Arden in Los Angeles, accounted for only thirteen per cent of the total volume of ice cream sold there.

These small producers and distributors of ice cream doing a local business in the Los Angeles area provided the only vigorous competition that concerned Arden. Actually, they sold at lower prices than Arden in the Los Angeles area. Yet, it was not shown that their lower prices were unlawful or discriminatory. However, their lower prices were regarded as "chiselling cuts." Therefore, Arden, while holding the level of its prices in other areas at higher levels, cut its price on certain of its ice cream items to some of its customers in certain sections of the Los Angeles area. It did that only where it was faced with the most vigorous competition from the smaller ice cream companies who were selling at lower prices.

The discrimination in price resorted to by Arden resulted in injury to its smaller competitors in the Los Angeles area. They sued Arden

48. 231 F.2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991 (1956).

for violation of the Robinson-Patman Act. The trial court ruled for Arden.[49] That decision for Arden was affirmed by the Court of Appeals for the Ninth Circuit as above noted. In affirming the case for Arden, the court of appeals rejected the plaintiffs' contention that Arden was wrongfully destroying competition and stated "the court however found that Arden had actually acted in good faith to meet the low price of some of its competitors."[50]

The court of appeals in the *Balian* case ignored the economic significance of price discrimination and the true intent and purpose of Congress in passing the laws against price discrimination. Also, it demonstrated a lack of sympathy for those provisions of our antitrust laws which prohibit price discriminations. The Court concluded:

> The implication of the arguments of plaintiffs is that prices can never be lowered by a concern, which does any interstate business, in one area if it fails to make a corresponding cut in every locality where it does business.
>
> . . . .
>
> Any revenue loss to plaintiffs as a result of the lowering of prices is merely one of the results of local competition.
>
> . . . .
>
> It is true that Arden in certain respects engages in interstate commerce, but it does not follow that the price differentials in different areas have any relation to each other, even if sales involving interstate commerce were given consideration.
>
> . . . .
>
> The "blanket price cut," so called in this area, was unquestionably necessary in the opinion of Arden to eliminate a great many of the chiselling cuts, special advantages and rebates given by its competitors in this very area.
>
> . . . .
>
> It is obvious that Arden, by selling ice cream products in the Los Angeles area at a lower price than it charged for like products in other states, did not violate § 2(a) of the Clayton Act, as amended, [by the Robinson-Patman Act] 15 U.S.C.A. § 13 (a).[51]

The Court in the *Balian* case also found that there was no price discrimination, and hence no competitive injury since all competing customers were charged the same price. It did not consider the sales to customers in other states as being in competition with those in Los Angeles and thereby disregarded the fact that Arden was in competition with smaller sellers not only in the Los Angeles area but also in other areas. Accordingly, since the court failed to see that there were any price discriminations involved, it indicated that

49. Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp. 796 (S.D. Calif. 1952).

50. 231 F.2d at 366. *Compare* Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).

51. 231 F.2d at 366-67.

Arden could have reduced its price "below" that of its competitors, so long as all of its customers in the Los Angeles area competing with each other, receive the same lower price there. Also the Court indicated that it did not matter whether the lower prices of Arden's smaller competitors which were being met were "lawful" or "unlawful." Thus, the *Balian* case decision expanded the loophole in the Robinson-Patman Act previously made by the decision in the *Standard Oil* case.[52]

Even the Chairman of the Federal Trade Commission, who appeared before the Committee on the Judiciary, House of Representatives, and testified in opposition to H. R. 11, admitted that the opinion and decision of the Court of Appeals for the Ninth Circuit, in the *Balian* case "was a somewhat perplexing decision."[53]

In the case of *Enterprises Industries, Inc. v. Texas Co.*,[54] the Court of Appeals for the Second Circuit followed the trend established by the Supreme Court in the *Standard Oil* case and followed by the Court of Appeals in the Ninth Circuit in the *Balian* case. It refused to apply the Robinson-Patman Act to curb price discriminations practiced by The Texas Company.

The Texas Company had temporarily granted price reductions in one area to gasoline dealers operating in the neighborhood of the city of Hartford, Connecticut. The plaintiff, Enterprises Industries, operated a filling station in the town of Wethersfield, Connecticut, a short distance south of the boundary of Hartford. The Texas Company refused to make any price reduction to the plaintiff. The plaintiff alleged that the price discriminations practiced by The Texas Company in that instance injured competition. The court disagreed and stated: "In view of what we have said it is not necessary to consider whether the defendant proved its defense under the proviso of § 13 (b)."[55]

One of the most criticized decisions by the Federal Trade Commission was made in a case arising under the Robinson-Patman Act. It was handed down subsequent to the Supreme Court's decision in the *Standard Oil* case. The case involved a complaint against General Foods Corp.[56] The Commission dismissed that case on the ground that

52. *Compare* Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956).
53. *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess. (1956) (on H.R. 11, and other bills to amend §§ 2 and 3 of the Clayton Act).
54. 240 F.2d 457 (2d Cir. 1957).
55. *Id.* at 460.
56. General Foods Corp., CCH TRADE REG. REP. ¶ 25069 at 35215-16 (1954). *Compare* FTC Document No. 6008, In the matter of Purex Corp., decided September 27, 1954. This decision of the FTC emphasized the fact that the FTC did, as in its decision of the *General Foods* case, require proof of a greater degree of injury than had been required to sustain complaints against price discrimination. Indeed, the degree of proof that the Commission indicated in its *General Foods* decision that it would require in price discrimina-

Government counsel had not presented a sufficient amount of proof relating to the lessening of competition.

Hon. James M. Mead, a member of the Federal Trade Commission, dissented from the views of the majority regarding the dismissal of the *General Foods* case. In his dissent, he stated:

> The record in this case shows that General Foods increased its share of the market and that the competitors of General Foods had a decreasing share of the market. . . . in 1939, the year immediately prior to the initiation of the deals, General Foods controlled 62.2% of the national market in pectin. . . . General Foods' share of the market increased during the "deal" years to 1946 when its share was 80.5% of the market.
>
> Economists may differ as to what particular percentage of the national market a concern may have before it may be classified as a monopoly. A concern having 35 percent of the market may not be a monopoly, but certainly when a concern begins to obtain over 50 percent of the national market in any particular commodity, then such concern, because of such a share, is in the position to exert a very significant effect on the market. An area price discrimination by a concern having 35 percent of the market may not have as great an adverse effect as a discrimination by a concern controlling 80 percent of the market. . . .
>
> It is admitted that Government counsel did not offer in evidence in this case the scalps or the hides of the small-business competitors of General Foods. We do not have in evidence pounds of flesh or buckets of blood. We should not expect the type of evidence that Salome is said to have asked of Herod—the head of John the Baptist on a silver platter.[57]

tion cases was hailed as a revolutionary change in FTC policy in the enforcement of antitrust laws. Shortly after that decision was announced, Business Week Magazine carried a lead article entitled *The Republicans Reshape the FTC*. That article, which appeared in the issue of June 5, 1954, made reference to the Commission's dismissal and closing out of the General Foods case and with reference to the change in the FTC policy stated: "Basically, of course, FTC remains an enforcement agency: . . . FTC's job has in no way changed, but the way it intends to carry it out has changed. As compared to the way the Democrats did things, the Republicans are making it easier for the businessman who is up on the FTC carpet, harder for the FTC lawyers handling the cases. . . . Some observers say that, as a practical matter, FTC is setting standards of proof that will make the lawyers' job almost impossible. . . . Finally FTC has just adopted a complete reorganization program. The immediate significance of the reorganization, however, is that it gives (Chairman) Howrey the chance to name his own team. When the plan becomes effective July 1, the Republican majority will really have come into its own." See *The Organization and Procedures of the Federal Regulatory Commissions and Agencies and Their Effect on Small Business*, H.R. REP. No. 2967, 84th Cong., 2d Sess. 4 n.7 (1956).

Subsequent to these decisions and after a barage of criticism was leveled at the FTC and other enforcement agencies because of their failure to enforce the laws against destructive price discriminations, the Chairman of the FTC resigned and the Commission appeared to adopt a policy reversing the trend indicated by the decisions in the *General Foods* and *Purex* cases. For example, shortly thereafter a majority of the members of the FTC announced a position in support of H.R. 11. Also a majority of the Commission has recently been quite active in initiating and in concluding a number of significant cases against destructive price discriminations. See Anheuser-Busch, Inc., Cease and Desist Order, CCH TRADE REG. REP. (1957 Trade Cas.) ¶ 26257 at 36061 (FTC, Sept. 10, 1957).

57. See *Price Discrimination, The Robinson-Patman Act, and The Attorney*

This whittling away of our laws against monopolistic price discriminations resulted in numerous protests from small businessmen throughout the nation. Their representatives testified before numerous Committees of the Congress and pled for the passage of H. R. 11 and S. 11.[58]

The Select Committee on Small Business of the House of Representatives of the United States conducted extensive hearings regarding the manner in which the practice of monopolistic price discrimination was being promoted instead of being curbed. In that connection, it reported a showing of how the Robinson-Patman Act had been interpreted away by the Federal Trade Commission and the Courts, with particular reference to interpretations relating to subsection (b) of section 2 of the Clayton Act as amended by the Robinson-Patman Act.[59]

WHAT PROMPTED THE DAMAGING DECISIONS?

Business conditions experienced during the great depression in the early part of the 1930's emphasized need for greater antimonopoly effort if our country was to avoid the cartelization policy to which the countries of Europe had fallen victim. This problem was later described by the Temporary National Economic Committee in the following language:

> Private enterprise is ceasing to be free enterprise and is becoming a cluster of private collectivisms; masking itself as a system of free enterprise after the American model, it is in fact becoming a concealed cartel system after the European model.[60]

Studies and recommendations made in the 1930's for new legislation and for greater effort toward enforcement of existing laws against monopolistic conditions started a trend toward a stronger antimonopoly policy.

The policy for expenditure of greater and more effective effort in

General's National Committee To Study the Antitrust Laws. H.R. REP. No. 2966, 84th Cong., 2d Sess. 67 (1956).

58. See, *e.g., Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary,* 84th Cong., 2d Sess. 132 (1956) (on H.R. 11 and other proposals to amend the Clayton Act); *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 1st Sess. 959 (1957) (on S. 11 and other proposals to amend § 2 of the Clayton Act).

59. See H.R. REP. No. 2966, *op. cit. supra* note 57, at 285. *See also Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 85th Cong., 1st Sess. 1026-92 (1957) (on S. 11 and other proposals to amend § 2 of the Clayton Act), for a listing of speeches and reports to the House of Representatives regarding the need for the strengthening of the law against price discrimination.

60. See Temporary National Economic Committee, *Final Report,* S. Doc. No. 35, 77th Cong., 1st Sess. 12 (1941).

the enforcement of our antimonopoly laws found expression under the leadership of Hon. Thurman Arnold, Assistant Attorney General, then head of the Antitrust Division in the United States Department of Justice, and a newly appointed Federal Trade Commission under the leadership of Hon. Ewin L. Davis, its new Chairman. Assistant Attorney General Arnold earned the title "Trust Buster." The Federal Trade Commission with new vigor also attracted much attention by reason of its stepped up activities in prosecuting antimonopoly cases.

In the period 1938-1943 the Antitrust Division of the Department of Justice, under the leadership of Thurman Arnold, increased its activities six fold over comparable preceeding periods, measured by the number of antitrust cases instituted.[61] Of greater importance was the significance of the individual cases. Perhaps reference to a few of those cases will indicate the significance of the antimonopoly cases instituted by the Antitrust Division of the Department of Justice during that period of time. Price fixing of long standing in important industries, based on license agreements under patents, were enjoined.[62] Section 3 of the Clayton Antitrust Act, prohibiting exclusive dealing agreements and tie-in sales was given new meaning, facilitating its enforcement.[63] Other cases were directed to break up cartel arrangements between American firms and foreign corporations when they were found to be in restraint of trade in this country and to be interfering with the foreign trade of other American concerns.[64] Additional cases were brought to break up arrangements restraining trade in the field of communications.[65] Still other cases were directed to dissolution of monopoly combinations.[66] Greater advances were made in clarifying and strengthening the law against price fixing agreements as such.[67]

The monopoly work of the Department of Justice did not stand alone. Before the middle 1930's the Federal Trade Commission had moved with investigations of the price fixing basing point system in the cement and steel industries. In 1937 it instituted formal proceedings against almost 100 cement manufacturing corporations and their trade association, the Cement Institute.[68] Simultaneously, the Federal

61. See H.R. Doc. No. 240, 85th Cong., 1st Sess. 657-60 (1957).
62. See, *e.g.*, United States v. Line Material Co., 333 U.S. 287 (1948); United States v. United States Gypsum Co., 333 U.S. 364 (1948); Hartford-Empire Co. v. United States, 323 U.S. 368 (1945); United States v. Univis Lens Co., 316 U.S. 241 (1942); United States v. Masonite Corp., 316 U.S. 265 (1940).
63. Standard Oil Co. v. United States, 337 U.S. 293 (1949); United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam*, 343 U.S. 922 (1952).
64. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); United States Alkali Export Ass'n v. United States, 325 U.S. 196 (1945).
65. See, *e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951).
66. See, *e.g.*, United States v. Pullman Co., 330 U.S. 806 (1946).
67. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
68. Cement Institute, 1946-47 Trade Cas. ¶ 57490 (1946). Complaint issued July 2, 1937. The cement industry spent almost $5 million opposing that

Trade Commission moved against price discrimination practices and was remarkably successful in the prosecution of its cases.[69] A number of other cases were instituted during the 1940's by the Federal Trade Commission against the practice of price discrimination in which Cease and Desist Orders were entered by the Federal Trade Commission but the approval by the Courts came much later in proceedings brought for the enforcement of those orders.[70]

Small business concerns and others injured as a result of violations of antitrust laws filed suits for damages in ever increasing numbers.[71] Congress provided in our antitrust laws for these private civil cases. That was done as a measure for deterring further violations of our antitrust laws.

In one private civil antitrust case brought by reason of the price of price discrimination (plaintiff did not prevail because of technical pleading faults) Justice Jackson, in an opinion for the Court, stated that,

> If [the buyer] can show [that the prices charged were discriminatory] ... it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination.[72]

Hardly had that policy for stronger and more effective enforcement of our antimonopoly laws been undertaken and certainly before it had gained much momentum, when representatives of parties who were being accused of violating our antitrust laws began to fight not only the cases but also the stronger policy. They argued for more "reason" and less strictness in the application of our antimonopoly policy. They organized "public relations programs" which were designed as a basis for lobbying against the application of our antitrust policy. One such program was specifically desigued and planned to reach and convince 153,853 Government officials, legislators, newspaper writers, business and professional leaders. It was to be loaded with arguments that certain practices, including the practice of price discrimination,

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action by the FTC but the FTC was sustained by the Supreme Court of the United States. FTC v. Cement Institute, 333 U.S. 683 (1948).

69. FTC v. Morton Salt Co., 334 U.S. 37 (1948); Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945); FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945); Elizabeth Arden, Inc. v. FTC, 156 F. 2d 132 (2d Cir. 1946); Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945).

70. FTC v. Ruberoid Co., 343 U.S. 470 (1952); FTC v. Standard Brands, 189 F.2d 510 (2d Cir. 1951). See also National Biscuit Co., CCH TRADE REG. REP. ¶ 3508.120 (1944).

71. See *The Monopoly Problem*, H.R. Doc. No. 240, 85th Cong., 1st Sess. 662 (1957).

72. Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 757 (1947). See also Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir. 1945).

were "competitive practices and should not be regarded as falling within the purview of our antitrust laws."[73]

Another plan or program provided for a much broader base for "re-educating" not only the leaders but the American public regarding what should be considered as "competitive" and what should be considered as "monopolistic" practices. That plan was designed to provide arguments for use by not only newspaper writers but also for use by debaters in high schools and colleges.[74] That plan has been described as a "blueprint for lobbying against our antitrust laws." It was designed by representatives of a number of parties who had been charged with violations of our antitrust laws.

The arguments set forth in articles, books and speeches having their roots in ideas contained in these "public relations programs" and "the blueprint for lobbying against our antitrust laws" presented a common pattern. They sought to convince the readers, including the reading public, Government officials, legislators and courts that price discriminations and other practices previously found to be monopolistic were in fact "competitive" and that laws directed specifically against those practices were laws inconsistent with an antimonopoly policy for free and unfettered competition.

These plans and programs, along with the writings which followed, gave rise to a *new body* of literature regarding the laws against price discrimination. The arguments in the writings described antitrust laws prohibiting price discriminations as being inconsistent, if not in conflict, with our basic antitrust law, namely, the Sherman Act of 1890.

The arguments directed against our laws prohibiting monopolistic price discriminations frequently were extended to include an attack on the agencies charged with the enforcement of these laws. Those agencies include the Federal Trade Commission.

An informative record on how that attack was carried on against the Federal Trade Commission and the laws it administers appears in a report which was made by Professor Earl Latham of Amherst College, Amherst, Massachusetts.[75]

Soon, articles and speeches were appearing in respectable forums

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73. See *Price Discrimination, The Robinson-Patman Act, and The Attorney General's National Committee to Study the Antitrust Laws,* H.R. REP. No. 2966, 84th Cong., 2d Sess. 18 (1956).

74. *Id.* at 27-28.

75. See the report entitled Latham, *The Politics of Basing Point Legislation,* 15 LAW & CONTEMP. PROB. 272 (1950). This report was reprinted in the record of the *Hearings on Price Discrimination, before the House Select Committee on Small Business,* 84th Cong., 1st Sess. 541-79 (1955). See also Simon, *The Case Against the Federal Trade Commission,* 19 U. CHI. L. REV. 297 (1951), and the answers to that attack on the FTC, Wallace and Douglas, *Antitrust Policies and the New Attack on the Federal Trade Commission,* 19 U. CHI. L. REV. 684 (1952). Additional materials relating to that matter may be found in *Price Discrimination,* H.R. REP. No. 2966, 84th Cong., 2d Sess. 35, 36 (1956).

and printed in highly respected publications. It was well known that those publications would reach the eye, ear and mind of the Justices of the Supreme Court of the United States and the judges of other federal courts having jurisdiction over cases arising under our antitrust laws. These articles and speeches took up the refrain that our antitrust policy was too rigid and strict. A number of them continued the argument that the practice of price discrimination was a "competitive" practice and that the Clayton Antitrust Act as amended by the Robinson-Patman Act to prohibit price discriminations was inconsistent with our national antitrust policy.[76]

Many of the articles and speeches attacking the Robinson-Patman Act were prepared by persons who have represented or who have been employed otherwise by parties charged with violations of our antitrust laws.

Some of those articles referred to containing arguments against the laws prohibiting the practice of price discrimination were noted and considered by the members of the Supreme Court and other courts in making their decisions. There is no doubt about the fact that members of the courts actually relied upon arguments in those articles in making their decisions against the application of our laws which were designed to prohibit monopolistic price discriminations. It is clear that the arguments in those articles were a factor in leading the Court to the decision it made in the *Standard Oil* case.[77]

Once it was noted and realized by those charged with violating our antitrust laws that the Supreme Court and other courts were beginning to read, consider and rely upon the arguments appearing in law review articles and other such works regarding what should be done about applying our laws against the practice of price discrimination,

76. For articles relating to that matter, see Adelman, *Effective Competition and the Antitrust Laws,* 61 HARV. L. REV. 1289 (1948); Burns, *If You Are In Business You Are Probably Guilty,* 28 BARRON'S WEEKLY 5 (1948); Clark, *Toward a Concept of Workable Competition,* 30 AM. ECON. REV. 241 (1940); Hilder, *The Attack Upon Delivered Price Systems,* 14 GEO. WASH. L. REV. 397 (1946); Kittelle & Lamb, *The Implied Conspiracy Doctrine and Delivered Pricing,* 15 LAW & CONTEMP. PROB. 227 (1950); Mason, *Current Status of the Monopoly Problem in the United States,* 62 HARV. L. REV. 1265 (1949); Mason, *Lets Stop Kicking Business Around,* American Magazine, May 1948; McAllister, *Price Control by Law in the United States,* 4 LAW & CONTEMP. PROB. 273 (1937); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised Antitrust Policy,* 50 MICH. L. REV. 1139-1244 (1952); Simon, *Price Discrimination to Meet Competition,* U. ILL. L. FORUM 575, 581-83 (1950); Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws,* 26 N.Y.U.L. REV. 405 (1951).

77. 340 U.S. at 249. See also a speech made in the House of Representatives of the United States regarding this subject entitled "The Effect of Lobbyists' Propaganda On Our Supreme Court," 103 CONG. REC. 14758-67 (daily ed. Aug. 27, 1957). See also how reliance upon those articles by the Supreme Court of the United States was carried over and borrowed by the judges of other federal courts for their use as a basis for their decisions in cases against the application of laws prohibiting price discrimination. Standard Oil Co. v. Brown, 238 F.2d 54, 57 (5th Cir. 1956).

the number of such articles multiplied.

Suggestions were made for the formation of a committee which would write a "compendium of articles" in the form of a report which would contain recommendations to the enforcement officials and to the courts for a "revision of antitrust policy."[78] In that connection, it was suggested that such a "Committee on Revision of National Antitrust Policy" should be organized and financed as a private body.[79] Such a committee was formed. The Attorney General of the United States was persuaded to appoint the members of that committee. Therefore, it became known as "The Attorney General's Committee to Study the Antitrust Laws." Although that Committee was organized as a private body, with its members serving without compensation, the Attorney General drew upon the appropriations which were voted by Congress to the Department of Justice for the enforcement of the antitrust laws for use in defraying the traveling expenses of the members of the Committee.

One of the disappointing aspects about the selection of sixty-one members of the Attorney General's National Committee To Study The Antitrust Laws, is the fact that a large majority selected were from among the ranks of those who had been representing violators of our antitrust laws. Approximately two-thirds of all the practicing lawyers who were included in the membership of the Attorney General's Committee had appeared directly or through their law firms as advocates for persons charged with violations of the antitrust laws. A large number of them were attorneys of record in opposition to the Government in pending antimonopoly cases.

A number of the members of the Attorney General's Committee had authored articles which appeared in law reviews and other publications in opposition to the Government's strong antimonopoly enforcement program.

Attorney General Brownell made perfectly clear the objective of his Committee when he stated:

> Our aim was to gather articulate spokesmen for responsible points of view to formulate future antitrust policy.[80]

The Report of the Attorney General's Committee was published March 31, 1955.[81] It is an odd tool for use in making more effective our antimonopoly policy.

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78. Oppenheim, *Federal Antitrust Legislation: Guideposts To a Revised Antitrust Policy*, 50 MICH. L. REV. 1139 (1952).

79. *Id.* at 1143.

80. *Hearings on Price Discrimination Before the House Select Committee on Small Business*, 84th Cong., 1st Sess. 813 (1955).

81. THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955).

The Report recommended to the courts and to the enforcement agencies that they approve the standards accepted by the Federal Trade Commission in the *General Foods* case and the rule laid down by the Supreme Court in its decision in the *Standard Oil* case.[82]

The Report[83] recommended to the courts and the enforcement agencies that they stop short and not apply section 3 of the Clayton Antitrust Act and the Sherman Antitrust Act to situations which had been approved by the Supreme Court of the United States in the case of *Standard Oil Co. v. United States*,[84] commonly known as the *Standard Stations* case. Also it recommended to the courts and the enforcement agencies,[85] that the Federal Trade Commission Act, section 5 should not be interpreted and applied to prohibit pricing practices which substantially lessen competition and tend to create a monopoly as unfair methods of competition or as an unfair act or practice in commerce unless there was found also present the ingredient of "collusion" which would make the offense violative also of the Sherman Antitrust Act.

The Report treated kindly license agreements restricting price competition in the sale of products covered by patents. It endorsed interpretations of antitrust laws favoring leniency of the application of antitrust laws to such license agreements, even when involving and requiring competing sellers to adhere to prices fixed by agreement.[86] Thus, the recommendations in the Report provided for a retreat from the application of the antitrust law as had been approved by landmark decisions, such as *United States v. Line Material Co.*,[87] and *United States v. United States Gypsum Co.*[88] The Report thus argued for a diluted and relaxed antimonopoly policy.[89] Following those recommendations would be tantamount to approving price fixing agreements condemned in the *Gypsum* case and the *Line Material* case.

Key recommendations made in the Report to the courts and to the enforcement agencies were those dealing with so-called "workable" or "effective" competition. The recommendations called for the inclusion of this new economic concept of "workable" or "effective" competition in the consideration of antimonopoly cases. The keystone upon which that economic concept is founded was the argument for a "rule of reason." It was proposed as a starting point for evaluating challenged business practices, methods and conditions. It was proposed

82. *Id.* at 163, 181.
83. *Id.* at 146-49.
84. 337 U.S. 293 (1949).
85. THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 216-19 (1955).
86. *Id.* at 231.
87. 333 U.S. 287 (1948).
88. 333 U.S. 364 (1948).
89. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 233-35 (1955).

that this be done before determining whether any business practice is violative of our antimonopoly laws.[90]

Thus, the principal purpose of the committee was to provide a restatement of law, interpreting antitrust policy according to an economic "rule of reason," pointing toward "effective competition." The connotations were quite plain. None could deny the value of "reason," or reject competition as a goal—and the more "effective" the competition, the better.

As observed previously, the roots of the concept of "effective competition" go back to J. M. Clark's article "Toward a Concept of Workable Competition."[91] The idea had a contagious appeal and it was quickly adopted by other writers. It soon went through a metamorphosis and emerged as "effective competition." This latter term was perhaps the result of a psychological block in the mind of someone who felt that it is not enough for competition to be merely workable, it must also be effective. However, the advocates of neither branch have concisely spelled out the conditions of either effectiveness or workability; and if there was ever any real conceptual difference, it has been forgotten. Since the appearance of the monopolists' handbook, put out under the name of "Effective Competition," by the Business Advisory Council of the Department of Commerce on December 18, 1952, the latter term has been more generally adopted, perhaps as a matter of euphony. It appears to have been the purpose of the Attorney General's Committee to consider and use the two terms synonymously.

With equal aplomb, and considerably more inaccuracy, the Committee was also to treat "pure" and "perfect" competition as synonymous in arriving at its policy recommendations.

The purpose of the Attorney General's Committee for treating as synonymous the terms "pure" and "perfect" competition becomes clearer when the chapter of that Committee's Report dealing with economic indicia is studied. It is around that chapter that the entire Report is written. The purpose of that chapter is to analyze what it called the "main course of antitrust policy" and to give an evaluation of "antitrust development . . . in light of established antitrust goals."

The organizational idea for such "evaluation" and the intent behind the so-called "established" antitrust goals was to merge an argument from the lawyer's realm on one hand and certain ideas which had been expressed by several economists on the other. From the lawyer's realm the idea borrowed encompassed "the rule of reason" standards approved in the old *Standard Oil* case of 1911.[92] From the economists

90. *Id.* at 5-12, 318-42.
91. 30 AM. ECON. REV. 241 (1940).
92. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

was borrowed the idea of "effective competition" which had begun to appear in the writings of a few economists in very recent times.[93] However, the Report claimed:

> Economists have in recent years given increasing attention to the study of detailed factual situations, and have developed a more complex and multiform theory of "workable" or "effective" competition to take account of a much wider range of market factors, bearing on the identification of competition and monopoly in the economic sense.[94]

Continuing in the same vein, the Report contains no scarcity of such references to a *theory* of "workable" or "effective" competition; and at one place this *theory* is alluded to as having the classic attributes of a theory, so much so that it can serve the classic function of a theory, namely, as a tool for analysis. As such, it is presented not merely as a tool for use by economists, but by the courts, "which permits the systematic study of a great variety of market facts."

> [T]he theory is here offered as one which, from an economic standpoint, permits the systematic study of a great variety of market facts. . . . [I]t provides the courts with tools of analysis in making the factual inquiry into problems of competition and monopoly . . . .[95]

Some of the members of the group who concurred on the indicia chapter nevertheless objected to the use of the term "theory" in connection with the literature on "workable" or "effective" competition, but conceded, presumably out of politeness, the term "doctrine." Thus at the conclusion of the general discussion of the "theory" the Report adds:

> A few members stress that the "doctrine" of workable competition is only a rough and ready judgment by some economists, each for himself, that a particular industry is performing reasonably well—presumably relative to alternative industrial arrangements which are practically attainable. There are no objective criteria of workable competition, and such criteria as are proffered are at best intuitively reasonable modifications of the rigorous and abstract criteria of perfect competition.[96]

Similarly the Report carries a cautionary note from the father of "workable" competition, Professor J. M. Clark, himself a member of the indicia group,

93. Prof. J. M. Clark is generally credited with having started the literature on "workable" or "effective" competition in a paper titled *Toward A Concept of Workable Competition,* read at a joint round table of the American Economic Association and the Econometric Society in 1939, and later published in 30 AM. ECON. REV. 241 (1940).
94. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 316 (1955).
95. *Ibid.*
96. *Id.* at 339.

> The attempt to select economic concepts which are usefully relevant to antitrust problems results in a presentation which is selective, not only as to concepts included, but as to views held by economists on these concepts: . . .[97]

While referring repeatedly to the economists' "theory" of "effective" or "workable competition" nowhere does the Report indicate where a statement of this alleged "theory" is to be found. Yet the Report cautions that the chapter dealing with this "theory,"

> is not a complete balanced review of the economic theory, for it is concerned only with some selected concepts which are useful in the analysis in situations frequently encountered.

The Report does, however, offer discussions on the characteristics of "effective" competition, not without many qualifications and contradictions; and it offers several abortive definitions of "effective" competition. Least unequivocal of these definitions is the following:

> The essence of full monopoly power resides in being the sole source of a product, so that the buyer must meet the seller's terms or go without. The essence of competition is to free the buyer from this power by access to alternative sources of the product.[98]

Thus it was made clear at the outset that the theory placed its emphasis on access of all buyers to alternative sellers; or conversely, access of all sellers to each individual buyer. This is the first indication of the concept, fully employed at another stage of the Report, which makes each buyer a separate and distinct "market," where sellers' prices are to be equated.

In one of the alternative definitions it is said that a basic characteristic of "effective" competition is that "no one seller and no group of sellers acting in concert have the power to choose their level of profits." At a later point however, profits are discussed as one of the indicia of "effective competition," or one of the tests of performance, and are dismissed as having no particular relationship to either "effective competition" or "effective monopoly."

A proper definition of "the market" is held out to be of crucial importance to "effective competition," but the imprecise one which is offered proposes that:

> [T]he market is the sphere of competitive rivalry within which the crucial transfer of patronage from one supplier of goods or services to another can take place freely.[99]

97. *Id.* at 317.
98. *Id.* at 318.
99. *Id.* at 322.

Here the discussion places considerable emphasis on "substitute products" but then, again, this emphasis is counterbalanced with a warning that public policy cannot "afford to be indifferent to the elimination of competition to the industry."

There follows, then, a discussion of ten topics, or indicia, "bearing on identification of workable competition." Thus, the first of the indicia has to do with the number of "effective competitive" sellers and the relative strength of firms. Here it is said that the number and relative size of firms required "cannot be compressed into a formula," but light is thrown on the matter by describing it as an absence of "effective monopoly."

> For effective competition, in the economic sense, to exist, there should be that degree of self-interested independent rivalry in any given market that exists where there is no one firm or group of firms acting in concert which have effective monopoly power, as heretofore defined.[100]

And so are the other nine indicia discussed, each with similar indefiniteness, and each carrying finely counterbalanced statements concerning their significance, as a factor bearing on workable competition. Yet, somehow, these ten indicia, taken together, are supposed to provide a "tool for analysis" by which the courts are to determine whether or not competition is satisfactorily "workable."

Finally, again, there is a definition of "effective" or "workable competition":

> The economic definition of workable competition concentrates on the effective limits it sets on the power of a seller, or group of sellers acting in concert, over their price.[101]

In elaboration of a theory which concentrates on price, the indicia have strange and incomplete things to say about "price." In the first place, the discussion proclaims that "no particular definition of price is required"; and then in the same sentence it proceeds to supply a very particular definition, as follows

> "price" is simply what the buyer has paid the seller as consideration for the goods and related services he has sought and purchased.[102]

One unfortunate circumstance of this definition is that the prohibitions of the Robinson-Patman Act go to discriminations in the *seller's* price. More specifically, section 2 (a) of the Act forbids the *seller* to discriminate in *his* prices under the circumstances and with the qualifications set out; and section 2 (f) forbids the buyer to coerce or knowingly

100. *Id.* at 325.
101. *Id.* at 324.
102. *Id.* at 334.

accept an illegal discrimination in the seller's price.

A second unfortunate result of a definition which limits the examination of prices to a question of whether a particular buyer pays identical prices to all sellers who care to sell, or quote, that buyer, is that it eliminates a useful tool for analysis by which the courts have, in the past, been able to make deductions about the existence of price-fixing conspiracies among sellers. This tool, in short, has been the traditional competitive theory, by which the *sellers'* price behavior is examined.

Why, then, is a new "tool for analysis" needed to replace the old? The answer seems to be, not that the traditional theory contains errors, or that it fails to provide an unchanging standard by which departures from competitive performance may be compared and the causes analyzed, but, rather, that there is a danger in this theory for the reason that it may be used not merely as a tool for analysis, but, indeed, that it may be mistaken as a literal goal of public policy. The Report of the Attorney General's Committee states:

> Under pure competition (and a fortiori under the perfect competition) no price discrimination could exist. Every seller would sell at the going price and would have no power to charge more and no need to take less. But any attempt to infer from this that price discrimination, in the economic sense, is "inherently monopolistic" or presumptively anti-competitive, is implicit acceptance of pure or perfect competition as a workable goal of public policy. We have already shown that the terms "pure" and "perfect" mean merely precise or complete in the theoretical sense, not ideal or desirable. We therefore repudiate pure and perfect competition as direct goals of antitrust policy.[103]

An effective answer has been made to that argument by an eminent economist who testified in hearings before the Select Committee on Small Business of the House of Representatives on this subject. Professor Holbrook Working of Stanford University, on that point, testified as follows:

> Consider why the theory of perfect competition was constructed. Its purpose was to analyze the effects of competition under conditions which are somewhat artificially simplified for purposes of analysis but which were supposed to fairly well approximate actual or attainable conditions in a considerable part of the economy. The results of this analysis were to show that competition of the sort considered had desirable results. Among those results that were considered desirable are some that depend directly on absence of price discrimination. The belief that price discrimination tends to be objectionable runs as a thread through all the history of economic thought on the effects of competition. Any implication that economists have held only that price discrimination was objectionable under the peculiar and special conditions of perfect competition, and under those considerations only, is untrue.[104]

103. *Ibid.*
104. *Price Discrimination, The Robinson-Patman Act, and The Attorney*

Much additional testimony was received in congressional hearings from expert economists, serving as leaders in our fine educational institutions all over the country, regarding this matter.[105] In their testimony they fully supported the view expressed by Professor Working. One thing to remember about the testimony of these expert economists, who testified on this subject before the congressional committees, is that they had only the public to serve in giving their testimony. Therefore their testimony may be accepted as objective and as an expression of unbiased thinking on this subject. They have indeed assisted considerably in helping us to straighten out the record about the nature of the Report of the Attorney General's National Committee to Study the Antitrust Laws.

Professor Louis B. Schwartz of the Law School, University of Pennsylvania, one of the members of the Attorney General's Committee who dissented from the position taken by the majority in the Report stated:

> The majority report would weaken the antitrust laws in a number of respects, and, even more important, it fails to adopt necessary measures for strengthening the law so as to create a truly competitive economy in this country. On 30 specific issues discussed in this dissent, the report takes a position inimical to competition, either by approving existing narrow interpretations or by suggesting additional restrictions.[106]

The Majority Report, without the full text of dissenting members organized and attached as the dissents were written, was mailed by the Attorney General to each of the Justices of the Supreme Court of the United States and to all Federal judges serving on courts having jurisdiction over cases arising under our antitrust laws.

Perhaps no one will be able ever to appraise fully the effect that the "Report of the Attorney General's National Committee to Study the Antitrust Laws" has had upon our federal judges. It has all the appearances of an official government publication, approved by the Attorney General of the United States. Yet, in fact, it has no official standing. The Committee was not an agency of the Government. The Attorney General has now denied that he ever approved the Report.

During a hearing before the Antitrust Subcommittee of the Committee on the Judiciary, House of Representatives, in May 1955, the possible effect the copies of the Report would have on judges in their consideration of antitrust cases was discussed. Congressman Keating of New York, a member of the Committee, at first was inclined to

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General's National Committee to Study the Antitrust Laws, H.R. REP. No. 2966, 84th Cong., 2d Sess. 220 (1956).

105. *Id.* at 190-222.

106. *Id.* at 132. For the complete text of Prof. Schwartz' dissent to the Report of the Attorney General's Committee, see *id.*, app. c.

discount the effect of any such Report on judges. Then the following discussion took place between members of the Committee and a Mr. McConnell, a witness. The record of that discussion is quoted as follows:

> MR. KEATING. Well, they have no probative value, do they?
> MR. McCONNELL. They didn't in this instance, but they may have in some other cases, I don't know. It depends on how much weight a court wants to give them.
> MR. KEATING. Well, no court worthy of its salt would ever give any weight or cite in its opinion a recommendation of some committee which had no legal force and effect whatever.
> . . . .
> THE CHAIRMAN. I think the statement of the gentleman from New York is absolutely sound, but I can prognosticate that many of the conclusions of this Attorney General's committee are going to be cited in all manner and kinds of briefs in the future.
> MR. McCONNELL. Why certainly.
> MR. KEATING. In briefs?
> MR. McCONNELL. As an authoritative statement of the antitrust laws.[107]

Hon. Thurman Arnold, former Assistant Attorney General and a former judge on the United States Court of Appeals for the District of Columbia, gave the following testimony:

> I have been arguing a case on the Robinson-Patman Act in New York, and I found the report of the Attorney General was the principal authority used against me, . . .[108]

Subsequently, one of the lawyers who had been a member of the Attorney General's Committee and therefore was apparently one of the authors of the report of that committee cited and relied upon proposals contained therein supporting his position in a case in which he was representing defendants charged with violations of the antitrust laws.[109]

One of the witnesses who testified on this subject before the Select Committee on Small Business of the House of Representatives of the United States, during 1955, referred to the Report of the Attorney General's Committee in the following language:

> This is a headline saturated document that is going to affect and color the thinking of American courts and American lawyers and law-school students and professors for many years to come.[110]

107. *Hearings on Current Antitrust Problems Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 1st Sess. 405 (1955).
108. *Hearings on Price Discrimination Before the House Select Committee on Small Business*, 84th Cong., 1st Sess., pt. 1, at 5 (1955).
109. Chain Institute v. FTC, 246 F.2d 231 (8th Cir. 1957).
110. *Hearings on Price Discrimination Before the House Selcct Committee on Small Business*, 84th Cong., 1st Sess., pt. 2, at 871 (1955).

The Select Committee on Small Business of the House of Representatives of the United States completed its hearings and study of the Attorney General's Committee and its report during the 84th Congress and made a report thereon to the House of Representatives.[111] The report to the House of Representatives condemned the Attorney General's Committee as not having been fairly composed to represent the public interest and the public antimonopoly policy. Also, the report of the Attorney General's Committee was seriously criticized as one containing recommendations which, if followed, would seriously damage our antimonopoly effort.[112]

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111. H.R. REP. No. 2966, 84th Cong., 2d Sess. (1956).

112. *Id.* at 221-28.

These pages contain the findings of the House Small Business Committee regarding the Attorney General's Committee and its Report. Among those findings were the following statements:

"Therefore, the Committee concludes and finds that—

1. The Attorney General's National Committee To Study the Antitrust Laws was not fairly composed to represent the diverse national interests which are injured by monopoly and protected by our antimonopoly laws and which, accordingly, have a fundamental equity in the vigorous enforcement of these laws and their revision as necessary to meet the fast-changing conditions of the world in which we live.

2. The 61-man committee appointed by Attorney General Brownell with the approval of President Eisenhower was dominated by corporation lawyers who had spent a substantial part of their careers representing large corporate defendants charged with the violation of the antimonopoly laws. Thus, of the 46 lawyers on the committee, 39 had represented corporate defendants in cases involving charges of antitrust violation and 26 of these had pending cases of this character during their service on the Attorney General's committee.

Of the remaining members of the committee, one-third of the law professors who were members, had appeared as advocates for alleged violators of antitrust laws in proceedings and investigation in the past, and almost one-half of all the economists included in the membership of the committee had appeared as advisers or otherwise as advocates in defense of antitrust law violators.

Almost all of the other economists who were members of the committee dissented in some respect from the position of the report. When one deducts the law professors, who had appeared for antitrust law violators, one finds only a small number of the remainder actually subscribed to the position taken in the report. Two of these law professors wrote sharp dissents to the position taken in the report by the Attorney General's committee. The Attorney General and his co-chairmen of the committee refused to have these dissents published in full as a part of the report of the committee.

There was only 1 member of the 61-man committee who could possibly be described as a representative of American small business. There was no representative of American labor; there was no representative of American farmers; there was no representative of American consumers.

3. The Attorney General's committee was largely a one-sided committee, representing almost exclusively the large business interests of the United States, who, of course, are the principal violators of our antimonopoly laws and who represent the principal monopoly threat in this country.

4. The Attorney General's committee also contained, among its most active members, lawyers who had been well-known lobbyists for monopoly, big business. Thus Mr. William Simon was a key member of the Attorney General's committee. Mr. Simon has been probably the most energetic lobbyist in the country for the monopolistic basing-point lobby. He was a registered lobbyist for this monopoly-minded special interest group in the period of 1949-51.

Another member of the Attorney General's committee was Mr. George Lamb, a Washington lawyer, who in 1948 was the author of a lobby blueprint, laying down the outline of what a basing-point lobby should consist of and

In view of the buildup which had been given to the Report of the

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how it should operate in order to restore to legality the monopolistic practice of basing-point pricing. This blueprint was written by Mr. Lamb and his associate, Mr. Sumner Kitelle. It was then placed in the hands of Mr. William Simon, who at that time was the general counsel of the Capehart committee, which was studying basing-point pricing practices in the light of the Supreme Court's decision in the Cement case earlier in 1948 which had outlawed such pricing practices as a principal tool of monopoly.

Mr. William Simon, in his capacity as chairman of the antitrust section of the American Bar Association, following the publication of the report of the Attorney General's committee in 1955, presented a resolution to the house of delegates of the American Bar Association which would have placed it on record as endorsing the principles enunciated in the report of the Attorney General's committee. In February of 1956 the house of delegates adopted this resolution.

5. When the operations of the lobby provided for in the Lamb "lobby blueprint" of 1948 are considered, along with the operations of the Attorney General's National Committee To Study the Antitrust Laws, they all appear to be part and parcel of the same scheme for lobbying against our antitrust laws.

6. The Attorney General's committee did not even attempt to study, much less answer, the basic questions which confront the Nation in the monopoly field, namely, Where does the United States stand today with respect to monopoly and economic concentration? How far have we gone in that direction? How serious is the situation? What should we do about it?

Indeed, the committee, in the report it issued and caused to be published, stated:

> Our aim is not to add to the storehouse of statistical data or to survey the economic effects of antitrust applications to specific industries * * * [rather] to make out as clearly as possible the path that antitrust has traveled and what it augurs for the future. (See p. 52 of this report.)

The report demonstrates that the Attorney General's committee adhered to that aim except where it proceeded to make recommendations for future antitrust policy. This report (pp. 60-72) contains an analysis of a number of the recommendations made in the report of the Attorney General's committee and shows how they contrast with the recommendations which were contained in the final report of the Temporary National Economic Committee. The TNEC made a study of our economy problems and the concentration of economic power in the hands of a few. It made recommendations designed to remedy that situation. Among those recommendations were those for strengthening our antitrust laws. In contrast, the report of the Attorney General's committee made no findings concerning the monopoly conditions in the country and most of its recommendations were for weakening rather than strengthening our antitrust laws.

In the words of one of the members of the Attorney General's committee, who dissented from the majority views presented in the report of that committee, Prof. Louis B. Schwartz, of the University of Pennsylvania Law School:

> The majority report would weaken the antitrust laws in a number of respects, and, even more important, it fails to adopt necessary measures for strengthening the law so as to create a truly competitive economy in this country. On 30 specific issues discussed in this dissent, the report takes a position inimical to competition, either by approving existing narrow interpretations or by suggesting additional restrictions.

Professor Schwartz and others who dissented took the position that the Attorney General's National Committee To Study the Antitrust Laws had missed a great opportunity to render a public service. In that connection it was pointed out that there had been a failure to study the monopoly problem and to make recommendations for the strengthening of our antimonopoly laws. (See p. 4-5 and appendix C of this report.)

A statement on the character of the report of the Attorney General's committee was made by Senator Estes Kefauver, a member of the Judiciary Committee, United States Senate, and a widely recognized authority on problems relating to small business and monopoly.

Senator Kefauver said:

Attorney General's Committee and the solid basis it had acquired in

To paraphrase General Bradley, the basic thing wrong with the majority report is that it asks the wrong questions, at the wrong time, of the wrong people. Among the "right" questions to which the report should have been directed are these: What is to be done about monopolistic control in those industries where it is not merely a threat to the future but is with us here and now? What should public policy be toward those industries where monopolistic control has already been established by the Big Three, the Big Four, the Big Five? What should be done about the continuing trend of concentration to even greater heights? What steps need to be taken in order to halt the wave of mergers now sweeping the country? Why have so few mergers been proceeded against under the new antimerger law, the Celler-Kefauver law, which was referred to in the report as the antimonopoly law of 1950?

Does responsibility lie with Congress for failing to appropriate enough money, with some organic defect in the law, or with the present administration for failure to enforce the law? What should public policy be toward the problem of price leadership, where one big company calls the tune and everyone else follows? If the law against price discrimination is rendered completely ineffective, will not the power to obtain price concessions replace efficiency in determining economic survival.

These, Mr. Chairman, are just a few of the fundamental questions which the committee, that is the Attorney General's committee, passes over or handles in such a way as to give us no helpful clue for the framing of public policy. The report is written as if its authors were completely out of touch with reality—with the nature of the world in which we live and have our being.

The report of the majority of the Attorney General's committee does not even recognize this most ominous of trends. And, since it ignores what is obvious to everyone else, it can afford to ignore, as it does, the important related questions: What have been the causes of this upward trend in economic concentration? To what extent has it been due to mergers, to the use of predatory practices, such as price discrimination, to the use of swollen reserves made possible by fabulous profits, to changes in the tax laws which have favored big business, to the procurement policy of the Defense Department, to the failure of the administrative agencies to enforce the law, and to other causes? And what should be done to arrest this onward march of monopoly? What new legislation needs to be passed to halt the growth of giant monopolistic corporations while there is still time? On all of these questions, which represent the essence of the monopoly problem, the report is silent. Like the ostrich, the committee apparently operated on the basis of the assumption that that which it chose not to see does not exist. (See pp. 5 and 6 of this report).

Although the Attorney General's Committee To Study the Antitrust Laws and the report of that committee admitted that it was not its purpose of function to study and report upon the economic and business conditions which require our antimonopoly policy, the report of the Attorney General's committee nevertheless seeks to lend respectability to and peddle the new economic concept of "workable" or "effective" competition. That concept, as previously noted, originated with and was sponsored by writers defending violators of our antitrust laws.

It originated in the arguments of industries hard pressed by public resentment and by legal necessity to rationalize their basing-point systems. In connection with cement, steel, glucose, and conduit, the monstrous conclusion was reached that the matching of delivered quotations by a number of sellers at a given destination was the inevitable result of competitive behavior.

Almost invariably, these economic "analyses" have reasoned in effect: (1) perfect competition results in a single price in any one market; (2) all buyers at a given destination pay identical amounts to all sellers who sell on a delivered basis; (3) therefore, basing-point systems providing for and resulting in a matching of delivered-price quotations by a number of sellers are competitive. The causal sequence implicit in this series of nonsequiturs has been developed by a judicious application of a few competitive principles alternately to one side of the market or the other, as the rationalization required, but never to both sides at once.

the *new body* of economic and legal literature arguing that the practice

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For instance, consider the definition of "price" which is crucial to their conclusion. The report of the Attorney General's committee defined the relevant price to be the "actual, laid-down cost to the buyer." This would be all right, as far as it goes, except that it entirely ignores the seller's side of the market, without which obviously no competition can exist.

In averring that competition is present, on the other hand, the arguments switch to the other side of the transaction, and claim that delivered pricing systems are made competitive by the presence of many sellers quoting in a given market. Here, the buyer's side of the market is conveniently overlooked. On closer scrutiny, it is plain that the multibuyer characteristic of the competitive arrangement is absent, and the "market" contemplated is the individual buyer's destination.

Much has been made of the homogeneity of products, for instance in the cement and conduit cases. In the cement case, it was found that this alleged homogeneity was mainly myth. But even if it were true that the physical qualities were unvarying as among suppliers, still the element of transportation has been excluded from the characteristics of the product, but included in the price—the "actual, laid-down cost"—which the buyer pays for that product. Thus, the "relevant" price which is supposed to derive from this "effective" competition bears no relationship to the "homogeneity" whose presence is presumed to contribute to the competitiveness of the situation.

This discrepancy was dismissed by the Attorney General's committee with the magnificently irrelevant remark that such theoretical refinements leave the buyer cold, since he is not interested in costs or receipts of the seller, but only in the cost to himself. If the buyer were free to bargain separately for the homogeneous product and for its delivery service, it is highly unlikely that he would long remain cold to this technicality. For example, in the case of the glucose basing-point systems, it was hardly a matter of indifference to buyers in Decatur who received delivery from Staley's Decatur plant, that they paid for glucose-plus-freight from a Chicago basing point.

Moreover, this product homogeneity led to the conclusion, argued explicitly in the conduit case, that "no buyer will pay more for the product of one seller than he will for that of another." The germ of truth in this half of the story is, however, not relevant to the delivered pricing situation. For if competition exists in a meaningful sense, there is an inevitable corollary: that no seller will take less for the product from one buyer than from another. The pretense that "mill net" is not relevant merely because it is not quoted only serves to veil the obvious fact that in delivered pricing systems, the seller does indeed receive varying amounts from buyers at different locations.

Thus, the conclusions of "effective competition" rest on selective use of competitive characteristics, and the arguments leap with agility from one side of the market to the other. Because delivered prices are uniform at a given destination, the "market" is so defined at the buyer's location. This ignores the fact that competition requires not only "many sellers" but also "many buyers." Clearly, there are not many buyers at the individual buyer's doorstep, where the "actual laid-down cost to the buyer" constitutes the "relevant" price. The arguments ignore the fact that homogeneity of a product means homogeneity of services supplied by the seller, as well as homogeneity of services received by the buyer. They ignore the fact that the term "price" applies not only to the amount the buyer pays, but also to the amount the seller actually receives for the product he sells. While it is true that a buyer will not pay more to one seller than to another, it is equally true that in a competitive market a seller will not accept less from one buyer than from another. Thus when the market is viewed as a two-sided relationship, it is clear that the tests imposed by "effective competition" are no test of competitiveness at all.

7. The report of the Attorney General's committee was released on March 31, 1955, with considerable fanfare and publicity. There were speeches of praise by the Attorney General of the United States, Assistant Attorney General Stanley N. Barnes, and his cochairman, Prof. S. Chesterfield Oppenheim, when they addressed an evening meeting of the antitrust section of the American Bar Association in Washington, D.C., on the day the report was released. Immediately, thousands of copies of the report were printed by the Government Printing Office and were distributed widely. At the suggestion of Professor

of price discrimination is a "competitive" practice and that we needed

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Oppenheim, Attorney General Brownell took steps to distribute copies of the report to every judge who would have jurisdiction over, and be responsible for making decisions, in future antimonopoly cases. Likewise, educational leaders, who would be expected to teach what our antimonopoly laws are and should be, were supplied with copies of the report. Also officials of Government agencies who are charged with the responsibility of determining what action should be brought under our antimonopoly laws were supplied with copies of the report. (See pp. 60-63 of this report.)

8. The purpose in publishing and distributing the report of the Attorney General's committee in the manner and to the extent utilized was to affect the thinking and views of enforcement officials, judges, and others who would be concerned about our antitrust laws and antitrust policy. (See p. 61 of this report.)

One of the prominent members of the Attorney General's committee, when asked as to whether the report of the Attorney General's committee as distributed to the Federal judges would impress them, answered "I hope so" (p. 61 of this report).

One of the witnesses who testified in the hearings before the House Small Business Committee with reference to the report of the Attorney General's National Committee To Study the Antitrust Laws stated that report is—

> a headline-saturated document that is going to affect and color the thinking of American courts and American lawyers and law school students and law school professors for many years to come.

9. The report of the Attorney General's National Committee To Study the Antitrust Laws is being cited in pending cases in the courtroom to influence the decisions of the courts. One remarkable aspect of such citations is that the Attorney General's report is being cited as an authority to support in court the views of those who helped write it. One instance of that has occurred in an antimonopoly case pending in a United States Circuit Court of Appeals. In that case, an attorney who was a member of the Attorney General's committee cited the report of that committee which he helped write as an authority to support the position which he was taking in the case at bar. In that connection he failed to disclose to the court that he helped write the document upon which he was relying. The report of the Attorney General's committee has been cited and relied upon in other court cases. (See pp. 62-63 of this report.)

Other lawyers who have cases in court involving problems arising under the Robinson-Patman Act are busy writing law-review articles in which they are paraphrasing and summarizing attacks upon the Robinson-Patman Act in the Attorney Generl's report. In addition to citing, as an authority, the report they helped write, they also cite and rely upon other writings of others who were members of the Attorney General's committee. Some of that self-lifting technique is utilized without informing the readers that the authors of the writings are partisans advocating the same causes in pending court cases. Perhaps this is not the rule-of-reason approach, but certainly it is an approach in the direction of an effort of one to try his lawsuit not in the newspapers but in law reviews.

Recently there appeared in the Yale Law Journal an article written by an attorney who was a member of the Attorney General's committee. That article adroitly failed to disclose that the author is affiliated with a law firm presently opposing the Government in a pending case arising under the Robinson-Patman Act. The article attempts to deprecate the Robinson-Patman Act and proceeds to argue many issues of fact and law arising under that act and present in pending litigation. It is copious in its use of footnotes citing "authorities" upon which it relies for support for the position presented. A substantial number of all of the "authorities" thus cited, a total of 57, were either to statements contained in the report of the Attorney General's committee or to writings by members of the Attorney General's committee. Actually the author of the article appearing in the Yale Law Journal cited seven times his own writings as "authorities." If this matter were not so serious as to its probable effect upon future enforcement and interpretation of our antimonopoly laws, this instance could be dismissed lightly as an amusing incident of one attempting to lift himself by his own bootstraps and the bootstraps of his colleagues.

10. The committee deplores these efforts to influence the weakening of the enforcement and interpretation of our antitrust laws and our antimonopoly policy.

a policy of a "rule of reason" for enforcing our antitrust laws so as to permit the practice of "effective" competition it is not surprising that the Supreme Court of the United States and the other courts have perhaps unwittingly relied upon that *new body* of economic and legal literature including a Report of the Attorney General's Committee in making decisions in important antitrust cases.[113]

In the meantime the avalanche of additions to that *new body* of economic and legal literature continues. Those additions serve to cover up and hide the real issues regarding the significance of monopolistic price discrimination. One of the most recent articles on this subject appeared in the *Harvard Business Review,* November-December 1957, entitled "Is Competitive Pricing Legal?" In a subheading to that article, it was stated:

> The answer to this paradox still hangs in the balance, but the FTC and the courts now seem to be getting closer to the realities of business.[114]

As has been observed, the Supreme Court, in its decision in the *Standard Oil* case, relied upon a substantial part of that new body of economic and legal literature accumulated to the date of that decision, and adopted the arguments of that group which opposed the application of our antitrust laws to the use of the practice of monopolistic discriminations.[115] The Court in adopting those arguments and the topsy-turvy notions about price discrimination stated:

> It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor. For example, if a large customer requested his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to

11. The antimonopoly laws are essential to the preservation not only of our economic but also of our political liberty. A nation in which all economic power is concentrated in the hands of a relatively few giant business firms cannot long survive as a political democracy. The history of other nations makes this clear. Given a choice between private socialism in the form of business monopoly, or public socialism in the form of government monopoly, or some other form of totalitarianism, a nation will always eventually select the latter. If we are to preserve, therefore, our political liberty, we must make certain that economic concentration of power does not get beyond the danger point in the United States.

12. A fair and searching study of our antitrust laws and the monopoly situation in the United States is essential. It is made more essential by the appearance and distribution of the "stacked" and "loaded" report of the Attorney General's committee with the great prestige accorded that committee by the fact that its membership was personally approved by President Eisenhower at the instance of Attorney General Brownell.

113. United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377 (1956).

114. Robbins, *Is Competitive Pricing Legal?* Harv. Bus. Rev., Nov.-Dec. 1957, p. 83-89. See also Rowe, *Borderland Issue in Court and Commission Cases Under Subsections 2 and 3 of the Clayton Act,* 8 ABA Antitrust Section Report 60-82 (1956).

115. Standard Oil Co. v. FTC, 340 U.S. 231 (1950).

> meet that price rather than to lose the customer. It might be that this customer is the seller's only available market for the major portion of the seller's product, and that the loss of this customer would result in forcing a much higher unit cost and higher sales price upon the seller's other customers. . . .[116]

Thus, it appears that one of the factors contributing to the making of these damaging decisions, including that in the *Standard Oil* case, has been this *new body* of economic and legal literature which has made it appear to the Court that the practice of price discrimination is a "competitive" practice and that laws passed by Congress to curb monopolistic price discriminations are laws against "competition."

Another factor which appears to have played a part in prompting the damaging decision in the *Standard Oil* case was a misconstruction that the Court placed upon one of its earlier decisions.

In seizing upon the self-defense concept as a basis for approving Standard's use of the practice of price discrimination, the Court not only turned to the writings of persons who had been employed by violators of our antitrust laws, but also misconstrued an earlier decision in the *Staley* case.[117] The partisan law review articles had served to "educate" the Court on what to do about the *Standard Oil* case. Some of those writings were to the effect that Standard was required to use monopolistic practices as a matter of self-defense. In other words, it was argued that it was necessary for Standard to engage in the practice of price discrimination and destroy its smaller competitors in order to defend itself from the effects of *lawful* competitive pricing practices of those smaller competitors.

Finally it appears that the Court, in concluding that it made no difference whether the smaller competitors were acting in a lawful manner, misconstrued and used as a basis for that conclusion the Court's earlier decision in the *Staley* case.[118]

In the earlier *Staley* case opinion and decision, the Court had rejected a plea by Staley that it was justified in engaging in price discrimination because it had done so under section 2(b) in "good faith" in adopting in toto a competitor's illegal basing point system of pricing. The Court had decided that Staley was not justified. It was clear that Staley, in meeting the prices of its competitors, was doing nothing more than adopting and becoming a party to an illegal basing point system of pricing. One of the immediate and direct effects was a fixing of prices by competitors through the use of that system. It appeared that one of the later effects would be a substantial lessening of competition among Staley's customers.

116. *Id.* at 249.
117. FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945).
118. *Ibid.*

In no respect did the facts before the Court suggest that Staley's discriminations were made for the purpose of defending itself against an unlawful attack or, for that matter, against an attack of any kind. However, it does appear that the Court was aware that both Staley and its competitor, whose prices it was meeting, in earlier years had been charged with using a conspiracy in violation of the Sherman Act by reason of their use of the mentioned basing point system of price discrimination and price fixing. Staley and its competitor had entered into a consent decree in the disposition of that case.

In the light of the record of the *Staley* case, and what the Court in the *Standard Oil* case recited about the failure of Staley's "good faith" defense, it appears that the Court merely decided that Staley was not justified in violating the law simply because its competitor had influenced it to join in that violation. In other words, "one violation of law does not justify another."

Now, when the Court picked up the *Standard* case and started its consideration of it under the influence of all the writings of apologists for monopolists who were opposing the Robinson-Patman Act, it found in the *Staley* case that Staley had not been permitted to take advantage of unlawful conduct of its competitor to establish Staley's "good faith" defense. The Courts seized upon that idea as an excuse for holding in effect that if Standard's small competitors had been also engaged in unlawful conduct perhaps Standard should not be permitted to make its "good faith" defense.

In the *Standard Oil* case, the Court pointed out that Standard's smaller competitors were engaged in lawful conduct. Therefore, it held that the situation in that case was different from the situation it found in the *Staley* case. Indeed, the situation was different because, in the *Standard Oil* case, Standard's smaller competitors were in no conspiracy with Standard to use an unlawful pricing system to the detriment of the consuming public. They were engaging in *lawful* conduct only. They were vigorous competitors of Standard, offering goods and merchandise at lower, non-discriminatory, *lawful* prices. Thus, the bitterest pill of all, and one of the most ironic developments in all of our antitrust history, befell a valiant effort to arrest the march of monopolistic price discrimination. The Court put the rubber stamp of approval on Standard's continuation of that monopolistic practice.

LEADERS IN CURRENT OPPOSITION TO H. R. 11 AND S. 11

Current powerful opposition is being expressed to the enactment of H. R. 11 and S. 11 into law. Who are the principal leaders in that opposition? It is no longer a secret that representatives of the Standard Oil Company of Indiana and representatives of other major

oil companies met at 9:30 a.m., in the Crystal Ballroom at the Blackstone Hotel, Chicago, Illinois, October 12, 1956, and secretly formulated plans for an undercover lobbying campaign against H. R. 11 and S. 11.[119] That meeting was called by an official of the American Petroleum Institute and the Shell Oil Company. The call for the meeting was in the form of a letter dated October 1, 1956, directed to a highly selected group of representatives of major oil companies. It was marked "Private and Confidential."[120]

During the course of that meeting plans were discussed for basing the lobbying campaign against H. R. 11 and S. 11, principally upon a brief which had been prepared by the American Petroleum Institute.[121] That brief, in reference to H. R. 11 and S. 11 attached a most sinister meaning to the proposed legislation.[122]

The API brief proceeded to argue how small businessmen, including jobbers and retailers, would be adversely affected by the bill. Included in those arguments were the following statements: "Legislation Means the End of Opportunity,"[123] the "Bill Crushes Hope of the Enterprising Dealer,"[124] "Price Cutters Would Be Protected by Bill,"[125] "Jobbers Will Suffer Most,"[126] "Supplier Cannot Take Chance With Jobber,"[127] and "How H. R. 11 Hurts the Retail Gasoline Dealer."[128] In addition, arguments were made that if H. R. 11 and S. 11 were enacted the rule of evidence regarding the burden of proof would be reversed to the extent that a person charged with the violation of the Robinson-Patman Act would have the burden of proving that discriminations in price did not have the effect of substantially lessening competition. Many additional arguments were put forward too ridiculous for recitation here.

It should be sufficient for the purposes of this article to discuss one of the arguments made in the API "master brief" in order to demonstrate the reckless abandon with which the lobbying arguments were advanced. For example, on page 4 of the API "master brief" there appeared the following statement:

> Furthermore, it is important to note that the Robinson-Patman Act marked a departure from the traditional ideal of American justice by putting the burden of proof upon the person charged with violating the law . . . unless he could *prove* that his price decision had no effect on

119. *Hearings Before the Subcommittee on Antitrust and Monopoly, Senate Committee on the Judiciary*, 85th Cong., 1st Sess. 59-60, 72-82 (1957).
120. *Id.* at 59-60.
121. *Id.* at 85-107.
122. *Id.* at 157.
123. *Id.* at 97.
124. *Id.* at 96.
125. *Id.* at 94.
126. *Id.* at 87.
127. *Id.* at 89.
128. *Id.* at 165.

competition, he would probably be in violation of the law if this legislation should pass.

Now what are the facts?

The general common-low rule regarding the burden of proof in a case in litigation applies in price discrimination cases arising under the Robinson-Patman Act. In general that rule is to the following effect: The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side—regard, of course, being had to any presumption which may appear upon the pleadings.

Let us analyze how that rule applies in a price discrimination case arising under the Robinson-Patman Act. First of all, pleadings by the plaintiff or the Government in order to state a cause of action in a price discrimination case under the Robinson-Patman Act must, among other things, allege that:

(1) The party charged with a violation of the law is engaged in commerce (meaning, of course, interstate commerce).

(2) In the course of such commerce the party charged has discriminated in price between different purchasers of commodities of like grade and quality and that some of those purchases involved in such discrimination were in interstate commerce.

(3) The sale of the commodities involved in the discrimination were sold for use, consumption, or resale within the United States or some other place under the jurisdiction of the United States.

(4) The effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them.

Pleadings by the plaintiff or the Government in such litigation not containing allegations to the effect indicated above would fail as not having stated a cause of action.

What about the burden of proof in such proceedings? First, let us assume that a simple answer had been filed by the defendant who merely denied the allegations made by the plaintiff. Assume further that no evidence was offered by either party. Then under the general rule regarding the burden of proof the plaintiff would fail. He had alleged a good cause of action but he had failed to prove his case. The burden of proving the case is upon the plaintiff and that means proving each of the necessary allegations as above indicated. The defendant need not prove any of those allegations. In his pleadings it is sufficient for him merely to deny them.

Momentarily, when they have lapsed into unguarded pose and permitted their better selves to express their inner thoughts, arch opponents of S. 11 and H.R. 11 have acknowledged that what is contended in the API "master brief" is not true. They admit that the person charged does not have the burden of proving "that his price decision had no effect on the competition."

At page 7 of the API "master brief," the statement was made:

> If all manufacturers in an industry complied with this law, they would be in danger of being charged with a conspiracy to fix prices.

That, like the API argument about the *burden of proof*, is utter nonsense. Nothing in the Robinson-Patman Act requires any two or more sellers of any commodity to charge the same or different prices. Nothing in that law requires any seller to act in any particular way regarding his relationship with another seller. The Act applies only against a single seller's action in discriminating in price among his own customers. It is significant that the API "master brief" failed to cite any decision in a case supporting its nonsensical arguments.

The method used by these leaders, opposing H.R. 11 and S. 11, included a wide distribution of the arguments contained in the API "master brief" to the hundreds of thousands of petroleum distributors in the United States, most of whom are small businessmen.[129] Not only were these arguments widely distributed to the hundreds of thousands of small businessmen but also many of the latter, who were operating under contracts to secure their gasoline from the major oil companies, found themselves under pressure from their suppliers to use the API "master brief" arguments in communications to Congressmen and Senators, asking them to vote against H.R.11 and S. 11.[130]

Of course, that pressure by suppliers on small businessmen resulted in many Congressmen and Senators receiving telegrams and other communications from small businessmen requesting that H.R. 11 and S. 11 be defeated.[131]

Some of the small businessmen, who were thus pressured into communicating with members of Congress indicating opposition to H.R. 11 and S. 11, gained enough courage to shake off the influence of that pressure and to renounce the opposition to H.R. 11 they had ex-

129. *Id.* at 74-79, 85-110, 157-66, 171-80, 186-88, 228-29, 234-36.

130. *Id.* at 178-80.

131. See, *e.g.*, speeches and debates on this subject which were made in Congress, "Major Oil Companies Organize False Front Lobby To Oppose Equality of Opportunity Bill," 103 CONG. REC. 930 (daily ed. Jan. 28, 1957); "Big Oil Companies Pressuring Service Station Operators to Wire Congressmen Against H.R. 11," 103 CONG. REC. 1102 (daily ed. Jan. 29, 1957); "Standard Oil Company of California Admits Influencing Its Dealers to Oppose H.R. 11," 103 CONG. REC. 1401 (daily ed. Feb. 5, 1957).

pressed. An example of evidence to that effect was placed before the House of Representatives on January 28, 1957. At that time a copy of a telegram by one small businessman was called to the attention of the House. It is as follows:

HON. ALAN BIBLE,
United States Senator,
Senate Office Building,
Washington, D. C.:

About 7:30 p.m. last Friday, January 18, I sent you a wire which I desire to explain the true circumstances about.

I did not send this wire voluntarily but was pressured into sending it by representative of my supplying company, Standard Oil Company of California, who told me that H. R. 11, the equality of opportunity bill, would be injurious to service-station operators.

I have since learned that this is wholly untrue and that our national organization and State association are both unanimously supporting this legislation.

I ask you to support this legislation in the interest of service station operators and to be on the watch for this propaganda lobbying campaign by which major oil companies are victimizing and pressuring service-station operators to send wires against the operator's own interests.

RAY EYLER,
Ray Eyler's West End Service Station.

RENO, NEV.[132]

SMALL INDEPENDENT COMPETING BUSINESS CONCERNS NEED AND PLEAD FOR H.R. 11 AND S. 11.

We know that small business and many of the friends of small business are asking for relief from destructive price discriminations. They have appeared before a number of congressional committees and testified in support of legislation such as is proposed by H.R. 11 and S. 11. In some of their appearances, they have stated that among the many things that small businesses wish from the Congress, and particularly in the field of antimonopoly legislation, is legislation to strengthen the law against price discrimination. They have said that there are many things that small business needs and wants, and that there are several pieces of legislation which they strongly recommend, including tax relief. But they said that (just to make things simple) they want the Congress to pass promptly the legislation provided for in H.R. 11 and S. 11. Included among those who have taken that position are the representatives of a large segment of the small business firms of the country. They include the following:

National Association of Retail Druggists, representing 40,000 independent druggists.

National Association of Retail Grocers, representing 65,000 grocers.

132. 103 CONG. REC. 931 (daily ed. Jan. 28, 1957).

U. S. Wholesale Grocers Association, representing about 2,000 wholesale grocery firms.
National Congress of Petroleum Retailers, representing approximately 35,000 retail gasoline dealers.
National Association of Independent Tire Dealers, representing 3,000 retail tire dealers and tire retreaders.
United Fresh Fruit and Vegetable Association, representing 2,800 wholesale distributors of fresh fruits and vegetables.
National Federation of Independent Business with a membership of more than 100,000 small and independent business firms.[133]

Equally significant is the showing that small businessmen and their representatives have made in their appearances before Congressional Committees regarding the need for legislation to strengthen the law against destructive price discriminations. Striking testimony was presented showing how the small independent manufacturing bakers are being destroyed by price discrimination practiced by the large nation-wide chain bakers.[134] Representatives of small businessmen engaged in the distribution of food products testified concerning the matter in which price discrimination practices are destroying competition in that industry.[135] Representatives of small businessmen engaged in the distribution of petroleum products testified how price discrimination is leading to monopoly control in that segment of industry.[136]

Under date of March 8, 1957, the Armstrong Creamery Company of Wichita, Kansas, wrote a letter to members of the House and to members of the Senate in which price discrimination practices of the National Dairy Products Corporation were outlined. That up-to-date instance of price discrimination was described by the Armstrong Creamery Company as follows:

> Recently the National Dairies Division (Sealtest) at Kansas City lowered the price of ice cream 25¢ per gallon throughout this area. Discounts and all other factors considered, this new price is lower than 97% of the sales volume in the area before Sealtest lowered the price. This low price makes it impossible for *any* dairy to sell ice cream at a profit, and if continued very long will force a number of independent plants out of business. At the same time Sealtest has been raising prices in other areas where competitive situations are as bad, or worse, than they are here.
>
> The plain fact is that through ineptness and mismanagement, Sealtest

133. *Hearings on Price Discrimination Before the House Select Committee on Small Business*, 84th Cong., 1st Sess. 346 (1955); *Hearings Before the Antitrust Subcommittee, House Committee on the Judiciary*, 84th Cong., 2d Sess. 132 (1956) (on H.R. 11 and other proposals to amend § 2 of the Clayton Act); *Hearings before the Subcommittee on Antitrust and Monopoly, Senate Committee on the Judiciary*, 84th Cong., 2d Sess. 959 (1956) (on S. 11 and other proposals to amend § 2 of the Clayton Act).
134. *Hearings on Price Discrimination, House Select Committee on Small Business*, 84th Cong., 1st Sess. 335-400 (1955).
135. *Id.* at 400-25.
136. *Id.* at 425-49, 914-32.

has lost a lot of volume in the past few years and has taken this method of regaining their position. Right now they can use the excuse that they are meeting the price of the 3% of the volume which was sold at a cut-throat figure (and which will always be sold that way).

Of course Sealtest's profits in other areas will more than carry the losses they will take in this one.

. . . .

We would appreciate the favor if you would take the time to tell us what your objections are. We hope they can be overcome and that you will do everything you can to pass the bill.

It is the only salvation for a great number of independent businesses.[137]

CONCLUSION

The problem is now up to Congress. It is stated in the question, "What can be done to help correct the error that was made by the Supreme Court of the United States in the *Standard Oil* case?" H.R. 11 and S. 11 provide the answer to that question.

H.R. 11 is to amend subsection 2(b) of the Robinson-Patman Act. The intent of the bill is to accept the *Standard Oil of Indiana,* opinion up to the point where the effects of a discriminatory price reach a certain degree of seriousness, but to put a limit on the good-faith defense, so that it will not be a bar to a cease-and-desist order where the effects of the discrimination go beyond this degree of seriousness. This degree of seriousness is at the point where, in the language of the bill:

> The effect of the discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce.

The bill does nothing more than that. The protection which this language would give falls far short of the protection which the language of the prohibition in subsection 2(a) would offer. The language there refers to discriminations:

> Where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

As was observed in the first part of this article, H.R. 11 will leave competitors free to expend effort to take customers away from each other by *lawful* and competitive methods.

H.R. 11 will deny that privilege to giant business concerns which attempt to take the customers away from their small competitors

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137. *Hearings Before the Subcommittee on Antitrust and Monopoly, Senate Committee on the Judiciary,* 85th Cong., 1st Sess. 1459 (1957) (on S. 11 and other proposals to amend § 2 of the Clayton Act).

through the use of *unlawful* price discrimination practices where the effect would be to substantially lessen competition. In other words, H.R. 11 simply says that we do not want monopoly in this country, whether or not it results from acts and practices carried on in "good faith." Preservation of competition is the paramount aim of H.R. 11. It strikes at practices which have the effect of lessening competition, irrespective of intent.