Suggested Report Language

As Section 7(2) makes clear, the bill is intended to benefit U.S. companies who, especially for reasons of accessing technology and capital and obtaining production efficiencies, choose to enter into agreements to form joint ventures with companies from foreign countries. Foreign participants in joint ventures may be United States subsidiaries of foreign companies or the foreign company itself. Section 7(2) requires that the antitrust laws of a foreign country under whose laws a foreign participant is organized accord national treatment to U.S. companies with respect to participation in production joint ventures. By "laws," the bill intends to encompass international agreements to which such foreign country is a party. Accordingly, a country that is a party to an international agreement with the United States that accords national treatment satisfies the requirements of Section 7(2). The committee therefore believes that the bill is, and should be construed to be, fully consistent with the national treatment commitments of the United States set forth in such international agreements as treaties of friendship, Commerce and Navigation, Bilateral Investment Treaties, Free Trade Agreements, and the various OECD instruments.

- Nadler
- YCR,
- Kam

Proposed Language for Inclusion in Conference Report on S.474

Section 7(2) provides that the protections of section 4 shall not apply with respect to a joint venture's production of a product, process, or service described in section 2(a)(6)(D) unless "each person who controls any party to the venture (including the party itself) is a United States person, or a foreign person from a country *the law of whom accords antitrust treatment no less favorable* to United States persons than to the that country's domestic persons with respect to participation in joint ventures for production." (Emphasis added) The phrase "the law" is intended to include not only a country's domestic antitrust law, but also all international agreements and other binding obligations to which that country and the United States are a party. Thus, all such international obligations, whether bilateral or multilateral, would be examined in determining whether a particular country satisfied the condition contained in section 7(2). For example, any country with which the United States has ~~in force a~~ Bilateral Investment Treaty, which provides for the nondiscriminatory treatment of foreign investment, would satisfy the condition of section 7(2). Similarly, the U.S.-Canada Free Trade Agreement and the proposed North American Free Trade Agreement both contain provisions that satisfy the condition of section 7(2). We cite these agreements for illustrative purposes and do not intend to compile here an exhaustive list of agreements that would meet the statutory requirements of this provision.

an enforceable

enforceable

C

TO: Jonathon Yarowsky

FROM: Ira Shapiro, General Counsel, USTR

SUBJECT: Proposed Language for Insertion into the Conference Report on S. 574

Here is our suggested revised report language, as discussed yesterday afternoon:

> Section 7(2) provides that the protections of section 4 shall not apply with respect to a joint venture's production of a product, process, or service described in section 2(a)(6)(D) unless "each person who controls any party to the venture (including the party itself) is a United States person, or a foreign person from a country <u>the law of whom accords antitrust treatment no less favorable</u> to United States persons than to that country's domestic persons with respect to participation in joint ventures for production." (Emphasis added) The phrase "the law" is intended to include not only a country's domestic antitrust law, but also all international agreements and other binding obligations to which that country and the United States are a party. Thus, all such international obligations, whether bilateral or multilateral, would be examined in determining whether a particular country satisfied the condition contained in section 7(2). For example, any country with which the United States has in force a Bilateral Investment Treaty that provides for the nondiscriminatory treatment of foreign investment would, if the country in question applied and enforced the treaty, satisfy the condition of section 7(2). Similarly, the U.S.-Canada Free Trade Agreement and the proposed North American Free Trade Agreement both contain provisions that, if applied and enforced through domestic law, satisfy the condition of section 7(2). We cite these agreements for illustrative purposes and do not intend to compile here an exhaustive list of agreements that would meet the statutory requirements of this provision.

CC: John Podesta

TO: Jonathon Yarowsky

FROM: Ira Shapiro, General Counsel, USTR

SUBJECT: Proposed Language for Insertion into the Conference Report on S. 574

Here is our suggested revised report language, as discussed yesterday afternoon:

whose

Section 7(2) provides that the protections of section 4 shall not apply with respect to a joint venture's production of a product, process, or service described in section 2(a)(6)(D) unless "each person who controls any party to ~~the~~ such venture (including ~~the~~ such party itself) is a United States person, or a foreign person from a country ~~the~~ law ~~of which~~ accords antitrust treatment no less favorable to United States persons than to ~~that~~ such country's domestic persons with respect to participation in joint ventures for production." (Emphasis added) The phrase "the law" is intended to include not only a country's domestic antitrust law, but also all international agreements and other binding obligations to which that country and the United States are a party. Thus, all such international obligations, whether bilateral or multilateral, would be examined in determining whether a particular country satisfied the condition contained in section 7(2). For example, any country with which the United States has in force a Bilateral Investment Treaty that provides for the nondiscriminatory treatment of foreign investment would, if the country in question applied and enforced the treaty in a manner consistent with nondiscriminatory antitrust treatment, satisfy the condition of section 7(2). Similarly, the U.S.-Canada Free Trade Agreement and the proposed North American Free Trade Agreement both contain provisions that, if applied and enforced through domestic law in a manner consistent with nondiscriminatory antitrust treatment, satisfy the condition of section 7(2). We cite these agreements for illustrative purposes and do not intend to compile here an exhaustive list of agreements that would meet the statutory requirements of this provision.

CC: John Podesta

TELEPHONE CALLS

JOHN PODESTA

Date May 6

TIME	NAME	MESSAGE	TELEPHONE NO.
3:05	Sandy w/ Tom Kalil	have you approved press release?	x 2801 334-7450
3:45	Mary		
3:45	Matt Heyman	re Wash Post enquiry on ltr. to President on clipper chip	301-975-2758
4:00	Ann Harkin		224-3406
4:00	Scott Green	wants copy of ltr to C.J. Silas re Boys + Girls Club	703-760-1550 fax 703-760-1523

6 MARTIN

TELEPHONE CALLS

JOHN PODESTA

Date May, 6.

TIME	NAME	MESSAGE	TELEPHONE NO.
—	Ellen Lovell	Come to Russell Bldg.	224-4242
		lunch on @ 12:30	
11:00	Eli Segal		6444
11:35	Scott Lilley		225-5858

POWELL, GOLDSTEIN, FRAZER & MURPHY
ATTORNEYS AT LAW
SIXTH FLOOR
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20004

TELEPHONE (202)347-0066 | TELEX 650-2510-330 | FACSIMILE (202)624-7222

93 MAY 7 1993

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FACSIMILE TRANSMISSION COVER SHEET

DATE: __/__/19__

TO: Jon Yaronsky — FACSIMILE NO.: 225-4550
CONFIRMATION NO.: 225-3951
Ann Harkins — 224-3595
Iris Coffin — 224-3406
John Podesta — 456-2215
Ira Shapiro — 395-3639
Peter Bass

FROM: Simon Lazarus

Our File No.: ____________

Attorney No.: ____________

TOTAL NUMBER OF PAGES INCLUDING THIS PAGE: ____________

AMOUNT: ____________

Please notify us immediately if total noted above is not received properly.

Thank you.

Facsimile Operator
Ext.

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COPY OF FORM YES NO

Comments: My weekend numbers at home are (202) 333-8307 (ph) and (202) 337-8554.

MEMORANDUM

TO: Jon Yarowsky
Ann Harkins
John Podesta
Ira Shapiro

FROM: Si Lazarus Si

SUBJECT: Report Language for Joint Production Bill

DATE: May 7, 1993 -- 6:15 P.M.

I just learned that the proposed report language covering the national antitrust treatment issue in Section 7 includes something to the effect that protection under the bill will depend on how a nation "applies and enforces" treaty-based national treatment obligations. I have not seen the language. *However, if this means what it sounds to me like it means, it will go far toward gutting the bill.*

This is so because this is a safe harbor bill -- one that provides that if you enter into a business transaction within certain parameters, then you may be secure that you face a lessened antitrust risk. In order to be effective in encouraging joint ventures of the sort the sponsors want to encourage, the parameters defining the safe harbor area must be crystal clear. That is why CBEMA explained that the whole national treatment approach would work only if the inquiry into whether a nation affords national treatment focused exclusively on the *text* of relevant statutes or treaty obligations. With that standard, one can plan a transaction knowing you're in or you're out. With the "applies and enforces" concept, one will know only after years of litigation, which of course is precisely what the statute is supposed to avoid. Indeed, if this legislation puts a nation's entire administrative system on trial in every case in which someone wants to make use of the Act, it could create a whole new legal sub-specialty industry.

If this language reads as it appears likely to me that it does, this legislation will be of minimal practical value.

I hope this is a misimpression. If it is not, I hope you can fix it!

FAX

93 MAY 7 P 1:46

TO: John Podesta
FROM: Jason Steinbaum, (202)224-8849 (w) (202)337-8919 (h)
DATE: May 7, 1993

Thanks again for your letter of recommendation. As I explained to you on the phone, I had an interview with Keith Gaby at the Pentagon's White House Liaison office last week. Your support was critical in allowing me to obtain that interview.

The liaison office strongly urged me to ask you to call John Emerson (456-6676) or Michael Whouley (456-2819) in the personnel office to personally express your support for my application for a position at the Defense or State Departments. Thanks for offering to make that call.

The following is a list of my activities during the campaign. While I did not work in Little Rock or a regional office, I was very active and spent a great deal of time helping the campaign:

RESEARCH ASSISTANT – Clinton for President, Washington, DC
Assisted trade policy advisory group. Researched Bush record on international trade and other issues. Wrote weekly briefing memo on congressional action regarding international trade. Assisted Little Rock campaign office in identifying Generals/Admirals for endorsements. *May - October 1992.*

PRESIDENT -- AU Law Students for Clinton/Gore, Washington, DC
Established an active group of more than 80 American University Law Students in support of Clinton/Gore. Coordinated volunteer activities, including phone-banking and literature drops. Organized a fundraiser held on evening of first Presidential debate. Designed and distributed persuasion brochure. Organized rally for Clinton/Gore. *January - November 1992.*

CONVENTION AIDE – Democratic National Convention, New York, NY
Assisted convention security. Monitored and guarded VIP section in Madison Square Garden utilized by Hillary and Chelsey Clinton. *July 1992.*

If there is any additional information I can provide, please give me a call. Once again, thanks for your help.

No change is made in the deadline in section 6(a) of the NCRA for a joint venture to file notice with the Justice Department and Federal Trade Commission in order to be covered by the damages detrebling provision. Under current law, the notice must be filed within 90 days after the parties to the joint venture enter into a written agreement to form it. A grace period was provided in the NCRA for pre-existing research and development joint ventures, to permit them to file notice within 90 days after enactment of that Act regardless of when the written agreement was entered into. H.R. 1313 does not extend a similar grace period to production joint ventures, or to research and development joint ventures who have failed to file. Such joint ventures must file notice within 90 days after the written agreement is entered into. Pre-existing joint ventures may, however, "re-form" by the parties' entering into a new written agreement, and thus receive coverage for subsequent conduct. Joint ventures which have filed previously for coverage for research and development activities will have to refile to obtain coverage for production activities.

No change is made in the deadline in section 6(a) of the NCRA for a joint venture to file notice with the Justice Department and Federal Trade Commission in order to be covered by the damages detrebling provision. Under current law, the notice must be filed within 90 days after the parties to the joint venture enter into a written agreement to form it. A grace period was provided in the NCRA for pre-existing research and development joint ventures, to permit them to file notice within 90 days after enactment of that Act regardless of when the written agreement was entered into. H.R. 1313 does not extend a similar grace period to production joint ventures, or to research and development joint ventures who have failed to file. Such joint ventures must file notice within 90 days after the written agreement is entered into. Pre-existing joint ventures may, however, "re-form" by the parties' entering into a new written agreement, and thus receive coverage for subsequent conduct. Joint ventures which have filed previously for coverage for research and development activities will have to refile to obtain coverage for production activities.

or processing

PROPOSED AMENDMENT TO S. 574 - USE OF EXISTING FACILITIES

Amend proposed new section 2(b)(7) of the National Cooperative Research and Production Act of 1993 to read as follows:

"(7) ~~principally~~ using existing facilities for in connection with the production of a product, process, or service by such venture unless ~~such~~ use involves or is for the production of a new product or technology;"

such

Purpose of Proposed Amendment

The proposed amendment would add the word "principally" to proposed new section 2(b)(7) of the National Cooperative Research and Production Act of 1993. The amendment would preserve the basic exclusion in S. 574 from the Act's coverage of the use of existing facilities in production joint ventures unless such use is in connection with the production of a new product or technology. It would add an appropriate degree of flexibility to the Act in this regard, however, inasmuch as some production joint ventures developed principally around new facilities might find it clearly more efficient and therefore generally beneficial to integrate some existing facilities into the ventures.

The proposed amendment would also clarify the exception in exclusion (7) so that the Act would cover using existing facilities where such use "involves or is for" the production of a new product or technology. This clarification would be important to production joint ventures whose primary new-technology component lies in the manufacturing facility itself.

U.S. Department of Justice

Antitrust Division

[4843b]

Washington, D.C. 20530

DATE 5/6/93

TO: John Podesta

FAX #

PHONE # 456-2215

FROM:

✓ NEIL ROBERTS (202-514-2512)

___ HOWARD BLUMENTHAL (202-514-2513)

___ ILENE BLOCK (202-514-4773)

___ JOHN FILIPPINI (202-514-2497)

___ BEN GILIBERTI (202-514-4298)

___ JOYCE HUNDLEY (202-514-2570)

___ FRED PARMENTER (202-514-1504)

___ JACK SIDOROV (202-514-3958)

___ CLAUDIA DULMAGE (202-514-7018)

___ ______________________

COMMENTS:

TOTAL PAGES TRANSMITTED: 2 (EXCLUDING TRANSMITTAL SHEET)

PANAFAX NO. 202-514-9082

Faxed to
OMB By OLA
Tues, 4/30

TO: Jim Jukes, Office of Management & Budget

FROM: Ira Shapiro, General Counsel, USTR IJS

SUBJECT: Proposed Language for Insertion into the Conference Report on S. 574

Pursuant to interagency discussions chaired by the National Economic Council, USTR requests that you circulate for interagency clearance language that the Administration will propose for inclusion in the Conference Report on S.574. The purpose of the insert is to make clear the scope of the legislation's amendment of the National Cooperative Research Act of 1984. Among other proposed changes to the 1984 Act, S.574 proposes the insertion of a new provision, section 7(2), which contains a so-called "reciprocity" requirement. That is, section 7(2) provides that the antitrust protections of the Act shall not apply to any joint venture controlled in part by a foreign person from a country "the law of whom accords" antitrust treatment that is less favorable to US persons than that country's domestic persons.

We believe that there should be language in the conference report that makes clear our understanding that the reference in section 7(2) to "the law" includes all international treaties, agreements and other binding obligations between the United States and the foreign country. Accordingly, we request clearance for the following language to be inserted in the conference report:

> Section 7(2) provides that the protections of section 4 shall not apply with respect to a joint venture's production of a product, process, or service described in section 2(a)(6)(D) unless "each person who controls any party to the venture (including the party itself) is a United States person, or a foreign person from a country the law of which accords antitrust treatment no less favorable to United States persons than to the that country's domestic persons with respect to participation in joint ventures for production." (Emphasis added) The phrase "the law" is intended to include not only a country's domestic antitrust law ~~legislation, administrative regulations, and judicial decisions~~, but also all binding international treaties and agreements between that country and the United States. Thus, all such international obligations, whether bilateral or multilateral, would be ~~part of the body of "law" that a factfinder would~~ examined in determining whether a particular country satisfied the reciprocity condition contained in section 7(2). ~~We would~~, For example, ~~expect that~~ any country with which the United States has in force a Bilateral Investment Treaty, which ~~explicitly~~ provides for the nondiscriminatory treatment of foreign investment, would

satisfy the reciprocity condition of section 7(2). Similarly, the U.S.-Canada Free Trade Agreement and the proposed North American Free Trade Agreement both contain ~~investment~~ provisions that satisfy the reciprocity condition of section 7(2). We cite these agreements for illustrative purposes and do not intend to compile here an exhaustive list of agreements that would meet the statutory requirements of this provision.

Adopted by Economic and Commercial Law
Subcommittee, March 24, 1993

Adopted by Full Committee
March 24, 1993

Amendment to H.R. 1313

Offered by FISH

Page 10, strike lines 1 through 7 and insert the following:

(1) a list of joint ventures for which notice was filed under section 6(a) of the National Cooperative Research and Production Act of 1993 during the 12-month period for which such report is made, including—

(A) the purpose of each joint venture;

(B) the identity of each party described in section 6(a)(1) of such Act, and

(C) the identity and nationality of each person described in section 6(a)(3) of such Act; and would likely

2

Agreement and the proposed North American Free Trade Agreement both contain provisions that satisfy the condition of section 7(2). We cite these agreements for illustrative purposes and do not intend to compile here an exhaustive list of agreements that would meet the statutory requirements of this provision.

/c

THE WHITE HOUSE

WASHINGTON

93 APR 21 P5:12

April 21, 1993

MEMORANDUM TO SENIOR STAFF

FROM: ERICH VADEN, PRESIDENTIAL LETTERS AND MESSAGES
PRESIDENTIAL CORRESPONDENCE

EV

THROUGH: MARSHA SCOTT
DEPUTY ASSISTANT TO THE PRESIDENT
AND DIRECTOR OF PRESIDENTIAL CORRESPONDENCE

SUBJECT: CONDOLENCES FROM THE PRESIDENT

Recently, there have been a number of situations in which multiple requests have been issued for the same condolence letter. In order to prevent more than one condolence letter from being sent, all requests for condolences from the President should be sent to me in Room 93 of the Old Executive Office Building. Our office will generate the letter within a day of receiving the request.

APR 21 '93 05:58PM OWELL, GOLDSTEIN, FRA 202

...STEIN, FRAZER & MURPHY
ATTORNEYS AT LAW
SIXTH FLOOR
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20004

TELEPHONE	TELEX	FACSIMILE
(202)347-0066	650-2510-330	(202)624-7222

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FACSIMILE TRANSMISSION COVER SHEET DATE: __/__/19__

TO: John Podesta

FACSIMILE NO.: 456-2215

CONFIRMATION NO.: 2702

FROM: Simon Lazarus

Our File No.: 604346.0008

Attorney No.: 0060

TOTAL NUM[redacted] OF PAGES INCLUDING THIS PAGE: 3

AMOUNT: ______

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COPY OF FORM YES NO

Comments:

93 APR 21 P6:11

POWELL, GOLDSTEIN, FRAZER & MURPHY

ATTORNEYS AT LAW

Sixteenth Floor
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
404 572-6600
Facsimile 404 572 6999

PLEASE RESPOND: Washington Address

Sixth Floor
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202 347-0066
Facsimile 202 624 7222

MEMORANDUM

TO: John Podesta

FROM: Si Lazarus

SUBJECT: Suggested report language for production joint venture bill

DATE: April 21, 1993

Attached is suggested report language that CBEMA has provided to the Senate and House Judiciary Committee staffs to address the national treatment issues raised by Section 7(2) of H.R. 1313 and S. 574.[1/] If the question should arise whether report language should be part of the resolution of these issues, I thought that it would be helpful for you to be aware of the formulation we suggested.

There are two critical points in this language, reflected in the last three sentences in the attached paragraph:

- First, that the word "laws" in Section 7(2) includes international agreements and that therefore a party to an international agreement with the U.S. according national treatment satisfies the requirements of the section.
- Second, that the bill should be construed as consistent with U.S. national treatment commitments in the categories of agreements and treaties specified in the last sentence of the paragraph.

I have also furnished this language to others in the administration concerned with this issue.

Attachment

[1/] As you know, Section 7(2) limits participation in joint ventures covered by the bill to "United States person[s] or . . . foreign persons from a country the law of whom accords antitrust treatment no less favorable to United States persons than to domestic persons . . . ."

Suggested Report Language

As Section 7(2) makes clear, the bill is intended to benefit U.S. companies who, especially for reasons of accessing technology and capital and obtaining production efficiencies, choose to enter into agreements to form joint ventures with companies from foreign countries. Foreign participants in joint ventures may be United States subsidiaries of foreign companies or the foreign company itself. Section 7(2) requires that the antitrust laws of a foreign country under whose laws a foreign participant is organized accord national treatment to U.S. companies with respect to participation in production joint ventures. By "laws," the bill intends to encompass international agreements to which such foreign country is a party. Accordingly, a country that is a party to an international agreement with the United States that accords national treatment satisfies the requirements of Section 7(2). The committee therefore believes that the bill is, and should be construed to be, fully consistent with the national treatment commitments of the United States set forth in such international agreements as treaties of friendship, Commerce and Navigation, Bilateral Investment Treaties, Free Trade Agreements, and the various OECD instruments.

Adopted by full Judiciary Committee on 3/25

AMENDMENT NO. ____ Calendar No. ____

Purpose: Committee amendment.

IN THE SENATE OF THE UNITED STATES—103d Cong., 1st Sess.

S. 574

To amend the National Cooperative Research Act of 1984 with respect to joint ventures entered into for the purpose of producing a product, process, or service.

Referred to the Committee on ____________________ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by Mr. LEAHY

[Omit the part struck through and insert the part printed in italic]

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Cooperative Production Amendments Act of 1993".

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) technological innovation and its profitable commercialization are critical components of the ability of the United States to raise the living standards of Americans and to compete in world markets;

(2) cooperative arrangements among nonaffiliated businesses in the private sector are often essential for successful technological innovation; and

(3) the antitrust laws may have been mistakenly perceived as inhibiting cooperative innovation arrangements that promote competition, and accordingly, clarification of the law would serve a useful purpose in helping to promote such arrangements.

(b) PURPOSE.—It is the purpose of this Act to promote innovation, facilitate trade, and strengthen the competitiveness of the United States in world markets by clarifying the applicability of the rule of reason standard and establishing a procedure under which businesses may notify the Department of Justice and Federal Trade Commission of their cooperative ventures and thereby qualify for a single-damage limitation on civil antitrust liability.

SEC. 3. AMENDMENTS.

(a) SHORT TITLE.—Section 1 of the National Cooperative Research Act of 1984 (15 U.S.C. 4301 note) is amended by striking "National Cooperative Research Act of 1984" and inserting "National Cooperative Research and Production Act of 1993".

(b) DEFINITION.—Section 2(a)(6) of the National Cooperative Research Act of 1984 (15 U.S.C. 4301(a)(6)) is amended—

(1) in the matter preceding subparagraph (A) by striking "research and development";

(2) in subparagraph (D) by inserting "or production" after "research";

(3) in subparagraph (E) by striking "and (D)" and inserting "(D), (E), and (F)";

(4) by redesignating subparagraphs (D) and (E) as subparagraphs (F) and (G), respectively;

(5) by inserting after subparagraph (C) the following:

"(D) the production of a product, process, or service,

"(E) the testing in connection with the production of a product, process, or service by such venture,"; and

(6) by striking "research" the last place it appears and inserting "such venture".

(c) EXCLUSIONS.—Section 2(b) of the National Cooperative Research Act of 1984 (15 U.S.C. 4301(b)) is amended—

(1) in the matter preceding paragraph (1) by striking "research and development";

(2) in paragraph (1) by striking "that is not reasonably required to conduct the research and development that is" and inserting "if such information is not reasonably required to carry out";

(3) by amending paragraph (2) to read as follows:

"(2) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the marketing, distribution, or provision by any person who is a party to such venture of any product, process, or service, other than—

"(A) the distribution among the parties to such venture, in accordance with such venture, of a product, process, or service produced by such a venture,

"(B) the marketing of proprietary information, such as patents and trade secrets, developed through such venture formed under a written agreement entered into before the date of enactment of the National Cooperative Production Amendments Act of 1993, or

"(C) the licensing, conveying, or transferring of intellectual property, such as patents and trade secrets, developed through such venture formed under a written agreement entered into on or after the date of enactment of the National Cooperative Production Amendments Act of 1993,";

(4) in paragraph (3)—

(A) in subparagraph (A) by striking "or developments not developed through" and inserting ", developments, products, processes, or services not developed through or produced by";

(B) in subparagraph (B) by striking "such party" and inserting "any person who is a party to such a venture"; and

(C) by striking the period at the end and inserting a comma; and

(5) by adding at the end the following new paragraphs:

"(4) entering into any agreement or engaging in any other conduct allocating a market with a competitor,

"(5) exchanging information among competitors relating to production (other than production by such venture) of a product, process, or service if such information is not reasonably required to carry out the purpose of the venture,

"(6) entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production (other than the production by such venture) of a product, process, or service,

"(7) using existing facilities in connection with the production of a product, process, or service by the venture unless the use is for the production of a new product or technology, and

"(8) except as provided in paragraphs (2), (3), and (6), entering into any agreement or engaging in any other conduct to restrict or require participation by any person who is a party to the venture, in any unilateral or joint activity that is not reasonably required to carry out the purpose of the venture.".

(d) RULE OF REASON STANDARD.—Section 3 of the National Cooperative Research Act of 1984 (15 U.S.C. 4302) is amended—

(1) by striking "research and development" the first place it appears;

(2) by striking "and development" the last place it appears and inserting ", development, product, process, and service"; and

(3) by adding at the end the following:

"For the purpose of determining a properly defined, relevant market, worldwide capacity shall be considered to the extent that it is appropriate in the circumstances.".

(e) TECHNICAL AMENDMENTS.—The National Cooperative Research Act of 1984 (15 U.S.C. 4301 et seq.) is amended—

(1) in section 4 (a)(1), (b)(1), (c)(1), and (e) by striking "research and development" each place it appears; and

(2) in section 5(a) in the matter preceding paragraph (1) by striking "research and development".

(f) DISCLOSURE.—Section 6 of the National Cooperative Research Act of 1984 (15 U.S.C. 4305) is amended—

(1) in the heading by striking "RESEARCH AND DEVELOPMENT";

(2) in subsection (a)—

(A) by striking "and" at the end of paragraph (1);

(B) by striking the period at the end of paragraph (2) and inserting ", and"; and

(C) by inserting after paragraph (2) the following new paragraph:

"(3) if a purpose of the venture is the production of a product, process, or service described in section 2(a)(6)(D), the identity and nationality of any person who is a party to the venture or who controls any party to the venture, whether separately or with 1 or more other persons acting as a group for the purpose of controlling that person."; and

(3) in subsections (a), (d)(2), and (e) by striking "research and development" each place it appears.

(g) LIMITATION.—The National Cooperative Research Act of 1984 (15 U.S.C. 4301 et seq.) is amended by adding at the end the following new section:

"APPLICATION OF SECTION 4 PROTECTIONS TO PRODUCTION OF PRODUCTS, PROCESSES, AND SERVICES

"SEC. 7. Notwithstanding sections 4 and 6, the protections of section 4 shall not apply with respect to a joint venture's production of a product, process, or service described in section 2(a)(6)(D) unless—

"(1) the principal facilities for such production are located in the United States or its territories, and

"(2) each person who controls any party to the venture (including the party itself) is a United States person, or a foreign person from a country the law of whom accords antitrust treatment no less favorable to United States persons than to that country's domestic persons with respect to participation in joint ventures for production.".

SEC. 4. REPORTS ON JOINT VENTURES AND UNITED STATES COMPETITIVENESS.

(a) PURPOSE.—The purpose of the reports required by this section is to inform Congress and the American people of the effect of the National Cooperative Research and Production Act of 1993 on the competitiveness of the United States in key technological areas of research, development, and production.

(b) ANNUAL REPORT BY THE ATTORNEY GENERAL.—In the 30-day period beginning at each 1-year interval after the date of enactment of this Act *for 9 years*, the Attorney General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate—

~~(1) a list of joint ventures for which notice was filed under section 6(a) of the National Cooperative Research and Production Act of 1993 during the 12-month period for which the report is made, including the purpose of each joint venture and the identity and nationality of each party to the joint venture as described in that section; and~~

(1) a list of joint ventures for production for which notice was filed under section 6(a) of the National Cooperative Research and Production Act of 1993 during the 12-month period for which the report is made, including—

(A) the purpose of each joint venture;

(B) the identity of each party described in section 6(a)(1) of that Act; and

(C) the identity and nationality of each person described in section 6(a)(3) of that Act; and

(2) a list of cases and proceedings brought during that period under the antitrust laws by the Department of Justice and the Federal Trade Commission with respect to joint ventures for which notice was filed under that section at any time.

(c) TRIENNIAL REPORT BY THE ATTORNEY GENERAL.—In the 30-day period beginning at each 3-year interval after the date of enactment of this Act *for 9 years*, the Attorney General, after consultation with such other agencies as the Attorney General considers to be appropriate, shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate—

(1)(A) a description of the technological areas of research, development, and production most commonly pursued by joint ventures *for production* for which notice was filed under section 6(a) of the National Cooperative Research and Production Act of

1993 during the 3-year period for which the report is made; and

(B) an analysis of the trends in the competitiveness of United States industry in those areas; and

(2) a supplement to the report submitted by the Attorney General under subsection (d) reflecting changes in antitrust treatment of joint ventures *for production* under the laws of other nations.

(d) REVIEW OF ANTITRUST TREATMENT UNDER FOREIGN LAWS.—Not later than 1 year after the date of enactment of this Act, the Attorney General, after consultation with such other agencies as the Attorney General considers to be appropriate, shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the antitrust treatment of United States businesses that are parties to joint ventures *for production* under the law of each foreign nation in which there is operating a business that filed notice under section 6(a) of the National Cooperative Research and Production Act of 1993.

PROPOSED AMENDMENT TO S. 574 - REPORTS

Amend section 4 of S. 574 to read as follows:

"SEC. 4. REPORTS ON JOINT VENTURES AND UNITED STATES COMPETITIVENESS

"(a) PURPOSE.--The purpose of the reports required by this section is to inform Congress and the Amercian people of the effect of the National Cooperative Research and Production Act of 1993 on the competitiveness of the United States in key technological areas of production.

"(b) REPORT BY THE ATTORNEY GENERAL.--Two years after the date of enactment of this Act, the Attorney General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate--

(1) a list of joint ventures for the production of a product, process, or service for which notice was filed under section 6(a) of the National Cooperative Research and Production Act of 1993 during the two year period after the date of enactment of this Act, including the purpose of each such joint venture and the identity and nationality of each party to such joint venture as described in such section; and

(2) a list of cases and proceedings, if any, brought during such two year period under the antitrust laws by the Department of Justice and by the Federal Trade Commission with respect to joint ventures for the production of a product, process, or service for which notice was filed under such section.

"(c) REPORT BY THE SECRETARY OF COMMERCE.--Three years after the date of enactment of this Act, the Secretary of Commerce shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a description of the technological areas of production most commonly pursued by joint ventures for the production of a product, process, or service for which notice was filed under section 6(a) of the National Cooperative Research and Production Act of 1993 during the three year period after the date of enactment of this Act, and an analysis of the trends in the competitiveness of United States industry in such areas.

"(d) REVIEW OF ANTITRUST TREATMENT UNDER FOREIGN LAWS.--Not later than one year after the date of enactment of this Act, the Attorney General shall submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate a report on the antitrust treatment of United States businesses that are parties to joint ventures for the production of a product, process, or service under the law of each foreign nation whose domestic businesses filed notice of a joint venture for the production of a product, process, or service under section 6(a) of the National Cooperative Research and Production Act of 1993 at any time."

Purpose of Proposed Amendment

The proposed amendment would limit the scope of the reports required by section 4 to production joint ventures, which are the focus of S. 574 and the only joint ventures that are required by the proposed amendments to section 6(a) of the Act to submit information on nationality of parties. It would also substitute initial reports, which could be supplemented by such follow-up reports as are deemed necessary, for permanent reporting requirements. Permanent reporting requirements consume scarce agency resources and can outlive their usefulness. Finally, the proposed amendment would substitute the Secretary of Commerce for the Attorney General as the reporting agency on trends in competitiveness of United States industry. The Secretary of Commerce is better situated to develop and submit such reports.

PROPOSED AMENDMENT TO S. 574 - PREEXISTING JOINT VENTURES

Amend section 6(a) of the National Cooperative Research and Production Act of 1993 in pertinent part to read as follows:

"SEC. 6(a) Any party to a joint venture, acting on such venture's behalf, may, not later than (i) 90 days after entering into a written agreement to form such venture, or (ii) 90 days after the date of enactment of this Act (or, in the case of a joint venture the purpose of which is the production of a product, process, or service, as referred to in section 2(a)(6)(D), 90 days after the date of enactment of the National Cooperative Production Amendments of 1993, in which case notification under this section shall convey the protections of section 4 only prospectively), whichever is later...."

Purpose of Proposed Amendment

The proposed amendment would permit production joint ventures formed before the National Cooperative Production Amendments of 1993 to file notifications under section 6 of the National Cooperative Research and Production Act of 1993 (the "Act") and thereby obtain the damage-reduction protection of section 4 of the Act. Under the amendment, however, section 4 protection for such preexisting production joint ventures would be prospective only.

The proposed amendment is a middle ground between the retroactive section 4 protection offered to preexisting joint R&D ventures by the National Cooperative Research Act of 1984 and the approach in S. 574 as introduced, which would generally deny the protection of section 4 to preexisting production joint ventures. The purpose of the amendment is to accord equal treatment, on a prospective basis, to all production joint ventures under the Act.

While it might be argued that preexisting production joint ventures could bring about this same result by disbanding, reforming, and then filing a notification under the Act, it is uncertain whether the courts would recognize such action as adequate to obtain the protection of section 4. Thus, the amendment is appropriate to clearly level the playing field for all production joint ventures on a prospective basis.

Final Draft

TO: Jim Jukes, Office of Management & Budget

FROM: Ira Shapiro, General Counsel, USTR ISS

SUBJECT: Proposed Language for Insertion into the Conference Report on S. ~~574~~ HR 1313

Pursuant to interagency discussions chaired by the National Economic Council, USTR submits the following interagency-cleared language for inclusion in the Conference Report on S.574. The purpose of the insert is to make clear the scope of the legislation's amendment of the National Cooperative Research Act of 1984. Among other proposed changes to the 1984 Act, S.574 proposes the insertion of a new provision, section 7(2), which contains a so-called "reciprocity" requirement. That is, section 7(2) provides that the antitrust protections of the Act shall not apply to any joint venture controlled in part by a foreign person from a country "the law of whom accords" antitrust treatment that is less favorable to US persons than that country's domestic persons.

We believe that there should be language in the conference report that makes clear our understanding that the reference in section 7(2) to "the law" includes all international treaties, agreements and other binding obligations between the United States and the foreign country. This language reflects and incorporates interagency on a draft previously circulated by OMB. Accordingly, we request that you transmit the following language to the Congress for insertion in the conference report:

> Section 7(2) provides that the protections of section 4 shall not apply with respect to a joint venture's production of a product, process, or service described in section 2(a)(6)(D) unless "each person who controls any party to the venture (including the party itself) is a United States person, or a foreign person from a country ~~the law of whom~~ accords antitrust treatment no less favorable to United States persons than to ~~the~~ that country's domestic persons with respect to participation in joint ventures for production." (Emphasis added) The phrase "the law" is intended to include not only a country's domestic antitrust law, but also all international agreements and other binding obligations to which that country and the United States are a party. Thus, all such international obligations, whether bilateral or multilateral, would be examined in determining whether a particular country satisfied the condition contained in section 7(2). For example, any country with which the United States has in force a Bilateral Investment Treaty, which provides for the nondiscriminatory treatment of foreign investment, would satisfy the condition of section 7(2). Similarly, the U.S.-Canada Free Trade

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PROPOSED AMENDMENT TO S. 574 - PREEXISTING JOINT VENTURES

Amend section 6(a) of the National Cooperative Research and Production Act of 1993 in pertinent part to read as follows:

"SEC. 6(a) Any party to a joint venture, acting on such venture's behalf, may, not later than (i) 90 days after entering into a written agreement to form such venture, or (ii) 90 days after the date of enactment of this Act (or, in the case of a joint venture the purpose of which is the production of a product, process, or service, as referred to in section 2(a)(6)(D), 90 days after the date of enactment of the National Cooperative Production Amendments of 1993, in which case notification under this section shall convey the protections of section 4 only prospectively), whichever is later...."

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MAKE-FILE
ANTITRUST
MAXIMUM
price
fixing

ANPA American Newspaper Publishers Association

STATEMENT OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

ON S. 429, THE CONSUMER PROTECTION AGAINST PRICE-FIXING ACT OF 1991

The American Newspaper Publishers Association (ANPA) supports the provisions of S. 429, the Consumer Protection Against Price-Fixing Act of 1991, that exempt maximum price setting from the statutory per se rule for resale price maintenance. However, in order to avoid confusion, maximum price setting should also be excluded from Section 8(a) of the bill, the section which establishes an evidentiary standard sufficient to overcome summary judgment. In addition, ANPA urges Congress – in light of recent trends in antitrust case law and significant consumer benefits – to endorse a rule of reason standard for maximum price setting cases.

A Rule of Reason Analysis for Maximum Price Setting

In Albrecht v. Herald Co., 390 U.S. 145 (1968), the Supreme Court held that any type of price setting arrangement would be a per se violation of Section 1 of the Sherman Act[1]. No possible benefits would be analyzed; no "effect on competition" analysis needed to be done. The Albrecht decision has been roundly criticized by a wide range of legal scholars and clearly avoided in recent lower court decisions. In fact, the Supreme Court itself has indicated that Albrecht may not be correctly decided. In Atlantic Richfield Co. v. U.S.A. Petroleum Co., 110 S.Ct. 1884 (1990), the Court stated (in a footnote) that it was only *assuming* that Albrecht was correctly decided. In a later footnote, the Court pointed out the possible procompetitive effects of vertical maximum price setting and indicated that these effects are clearer now than at the time of the Albrecht decision. The Court listed a multitude of scholarly articles identifying the potential procompetitive effects of vertical price setting.

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[1] In Atlantic Richfield Co. V. USA Petroleum Co., 110 S.Ct. 1884, the Supreme Court stated, in a footnote, that Albrecht was "the only case in which the Court has confronted an unadulterated vertical, maximum price-fixing arrangement." (ARCO at 1890).

Per se rules are established as a means of saving courts' time. If a practice is so pernicious that it always has anticompetitive effects, then the courts need not waste time -- in fact, plaintiffs need not waste time -- proving these effects. However, the Sherman Act was designed to protect American consumers against restraints of trade, against anti-competitive behavior. For practices that may be anticompetitive, but are not necessarily so, the Court studies the practices, determines the effects, and evaluates the extent to which the practice is anticompetitive, if at all. This is known as a rule of reason analysis. In ARCO the Supreme Court was clear that maximum price setting schemes have the potential for being procompetitive. If this practice does not always have anticompetitive effects, if there is the potential for consumer benefits, shouldn't the Court evaluate each instance and determine whether the spirit of the Sherman Act has been violated?

The ANPA urges Congress to recognize the trend in recent antitrust case law to examine the Supreme Court's decision in ARCO and then to go on record in support of the rule of reason standard in maximum price setting cases. Congress can send a clear signal to the courts that there are consumer benefits and a clear economic rationale for maximum price setting. Application of the per se rule in such cases is outmoded and contrary to the public interest.

The newspaper business provides a clear example of why this is so. The profit earned by a newspaper publishing company is not derived directly from sales of the newspaper. In fact, the nominal price of a daily paper does not come close to covering the cost of news-gathering and printing. A newspaper's revenues are derived primarily from advertising revenues, the rates of which are based directly on the newspaper's circulation. Therefore, the number of readers of a paper dictates its economic success, not because of the price each of these readers is willing to pay each day, but because of the amount each of the paper's advertisers is willing to pay to reach those readers. When independent distributors increase the price of the newspaper, fewer papers are sold, which decreases advertising revenue.

Many newspaper publishers distribute their newspapers in whole or part through independent distributors. These distributors buy the newspaper from the publisher, and often have exclusive delivery routes or sales areas. In contrast to the publisher, these distributors derive revenue only from the sale of the newspaper. They may make more money by selling newspapers at higher prices, even though those higher prices may cause fewer sales -- and will cause consumers to pay more.

Absent resale price maintenance or other factors, the distributor may choose to raise its prices to consumers to a level which it believes will maximize its profits. Although the distributor may gain by doing so, the distributor is the only beneficiary. The newspaper publisher loses, because the newspaper's circulation and attractiveness to advertisers decrease. Advertisers lose, because their advertisements in the newspaper will reach fewer readers. Most strikingly, consumers lose, because if they buy from the distributor, they pay higher prices. As the Supreme Court recognized in Arco, in such circumstances maximum resale price setting can protect consumers against exploitation by the dealer acting as a local monopolist.

The effects of the per se rule on newspaper publishers and others are real. In addition to dealing with circulation losses and consumer complaints caused by price gouging distributors, newspaper publishers have been forced to defend themselves in private antitrust litigation against charges that they have engaged in maximum resale price maintenance, and to fight huge treble damage claims. At least before Arco, newspaper publishers could not defend themselves by proving that the conduct alleged by plaintiffs actually would have benefitted consumers.

Moreover, the Albrecht rule has not served to protect independent distributors, but in many cases, has eliminated them. In response to Albrecht and potential antitrust challenges, many newspaper publishers have terminated their independent distributor arrangements, and converted to employee or agency distribution systems. Finally, newspaper consumers in many areas have been forced to pay higher prices than they would have had maximum resale price setting been permitted.

We firmly believe that the per se rule for maximum price setting is detrimental to American consumers and should clearly be discarded. While there may be some cases in which maximum price setting proves to violate the Sherman Act, this is clearly not the case in the newspaper industry, thus maximum price agreements should be analyzed individually, not on a per se basis. Congress can and should send a clear message to the courts endorsing this rule of reason approach.

ANPA American Newspaper Publishers Association
TO ADVANCE THE CAUSE OF A FREE PRESS
Offices: The Newspaper Center, 11600 Sunrise Valley Dr., Reston, Va. 22091
(703) 648-1000
Direct Dial: (703) 6[illegible]-[illegible]065

May 8, 1991

Claudia M. James
Vice President/Legal and Government Affairs

The Honorable Hank Brown
717 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Brown:

On behalf of the American Newspaper Publishers Association (ANPA), I write to let you know of our strong support for the provision in your amendment to S. 429, the Consumer Protection Against Price-Fixing Act of 1991, that would codify a "rule of reason" analysis for maximum price setting cases. This would allow publishers to ensure reasonable newspaper prices for their readers. For this reason we support passage of your amendment to S. 429. By establishing a price cap we give consumers a low-cost, high-quality newspaper, while providing our advertisers with a large audience.

In Albrecht v. Herald Co., (390 U.S. 145 (1968)), the Supreme Court held that any type of price setting arrangement would be a per se violation of Section 1 of the Sherman Act. No possible benefits would be analyzed; no "effect on competition" analysis needed to be done. The Albrecht decision has been roundly criticized by a wide range of legal scholars and clearly avoided in recent lower court decisions. In fact, the Supreme Court itself has indicated that Albrecht may not be correctly decided. In Atlantic Richfield Co. v. U.S.A. Petroleum Co., 110 S.Ct. 1884 (1990), the Court stated (in a footnote) that it was only *assuming* that Albrecht was correctly decided. In a later footnote, the Court pointed out the possible pro-competitive effects of vertical maximum price setting and indicated that these effects are clearer now than at the time of the Albrecht decision. The Court listed a multitude of scholarly articles identifying the potential pro-competitive effects of vertical price setting.

Per se rules are established as a means of saving courts' time. If a practice is so pernicious that it always has anticompetitive effects, then courts need not waste time -- in fact, plaintiffs need not waste time -- proving these effects. However, the Sherman Act was designed to protect American consumers against restraints of trade, against anti-competitive behavior. For practices that may be anticompetitive, but are not necessarily so, the Court studies the practice, determines the effects, and evaluates the extent to which the practice is anticompetitive, if at all. This is known as a rule of reason analysis. In ARCO the Supreme Court was clear that maximum price setting schemes have the potential for being procompetitive. If this practice does not always have anticompetitive effects, if there is the potential for consumer benefits, shouldn't the Court evaluate each instance and determine whether the spirit of the Sherman Act has been violated?

The ANPA urges Congress to recognize the trend in recent antitrust case law, to examine the Supreme Court's decision in ARCO, and adopt your amendment codifying a rule of reason analysis for maximum price setting cases. Clearly there are consumer benefits from maximum prices and an obvious economic rationale for setting them. Application of the per se rule in such cases is outmoded and contrary to the public interest.

The newspaper business provides a clear example of why this is so. The profit earned by a newspaper publishing company is not derived directly from sales of the newspaper. In fact, the nominal price of a daily paper does not come close to covering the cost of news-gathering and printing. A newspaper's revenues are derived primarily from advertising revenues, the rates of which are based directly on the newspaper's circulation. Therefore, the number of readers of a paper dictates its economic success, not because of the price each of these readers is willing to pay each day, but because of the amount each of the paper's advertisers is willing to pay to reach those readers. When independent distributors increase the price of the newspaper, fewer papers are sold, which decreases advertising revenue.

Many newspaper publishers distribute their newspapers in whole or part through independent distributors. These distributors buy the newspaper from the publisher, and often have exclusive delivery routes or sales areas. In contrast to the publisher, these distributors derive revenue only from the sale of the newspaper. They may make more money by selling newspapers at higher prices, even though those higher prices may cause fewer sales -- and will cause consumers to pay more.

Absent a maximum resale price, the distributor may choose to raise its prices to consumers to a level which it believes will maximize its profits. Although the distributor may gain by doing so, the distributor is the only beneficiary. The newspaper publisher loses, because the newspaper's circulation and attractiveness to advertisers decrease. Advertisers lose, because their advertisements in the newspaper will reach fewer readers. Most strikingly, consumers lose, because if they buy from the distributor, they pay higher prices. As the Supreme Court recognized in Arco, in such circumstances maximum resale price setting can protect consumers against exploitation by the dealer acting as a local monopolist.

The effects of the per se rule on newspaper publishers and others are real. In addition to dealing with circulation losses and consumer complaints caused by price-gouging distributors, newspaper publishers have been forced to defend themselves in private antitrust litigation against charges that they have engaged in maximum resale price maintenance, and to fight huge treble damage claims. At least before Arco, newspaper publishers could not defend themselves by proving that the conduct alleged by plaintiffs actually would have benefitted consumers.

Moreover, the Albrecht rule has not served to protect independent distributors, but in many cases, has eliminated them. In response to Albrecht and potential antitrust challenges, many newspaper publishers have terminated their independent distributor arrangements and converted to employee or agency distribution systems. Finally, newspaper consumers in many areas have been forced to pay higher prices than they would have, had maximum resale price setting been permitted.

We firmly believe that the per se rule for maximum price setting is detrimental to American consumers and should be discarded. While there may be some cases in which maximum price setting proves to violate the Sherman Act, this is clearly not the case in the newspaper industry. Maximum price agreements should be analyzed individually, not on a per se basis.

We urge the Senate to adopt your amendment.

Sincerely,

Claudia James

Claudia James
Vice-President, ANPA

prevent competition. Mr. Hill be-
es this is a bad bill. He does not
k it is in the interest of the con-
ers.

hese are people that are appointed
he President as members of his ad-
istration, and they feel that this
is not in the interest of consumers.
he Federal Trade Commission is
set up especially to see that there
air trade and to prevent combina-
s that would hurt the public and
sumers. They are opposed to this

he American Bar Association has
died this bill for years, and they
e concluded that it is a bad bill.
t it should not pass, that it is not in
interest of consumers.

any business associations oppose
bill. Many antitrust experts
ose this bill. If we are going to
pete in the world, we had better
pass this bill. It is not in the best
rest of the people of America. It is
in the best interest of business. It
not in the best interest of consum-

he Supreme Court has handed
n two decisions that this bill would
rrule, two Supreme Court deci-
ns—one that was unanimous, and
ther that was a 6 to 2 vote. So I
nk my colleagues had better think
ll before they vote to support this

We will have a voice vote in a little
But I want to say that, in my opin-
, if this bill passes—and should it
s the House—we can expect a veto,
d I think the veto will be upheld.

f, after the Senate acts, something
be worked out among the Govern-
nt agencies, the House, and the
nate, to get legislation that is not
rimental, that is one thing. If not, I
tainly hope the President will veto
s bill. I urge my colleagues to vote
ainst this bill.

yield the floor.

The PRESIDING OFFICER. The
nator from South Carolina yields
e floor.

Is there further debate?

Mr. METZENBAUM. Mr. President,
uggest the absence of a quorum.

The PRESIDING OFFICER. The
rk will call the roll.

The legislative clerk proceeded to
ll the roll.

Mr. METZENBAUM. Mr. President,
ask unanimous consent that the
der for the quorum call be rescind-

The PRESIDING OFFICER. With-
t objection, it is so ordered.

The question is on the engrossment
d third reading of the bill, as
nended.

The bill, as amended, was ordered to
engrossed for a third reading, was
ad the third time, and passed, as fol-
ws.

S. 429

Be it enacted by the Senate and House of epresentatives of the United States of merica in Congress assembled, That this Act may be cited as "The Co[illegible] Protection Against Price-Fixing Act of 1991".

SEC. 2. The Congress finds that—

(1) consumer welfare is greatly enhanced by an ability to purchase goods and services at lower prices as a result of vigorous price competition;

(2) vertical price restraints generally have an adverse impact on competition that results in higher consumer prices;

(3) recent court decisions have so narrowly construed the laws against vertical price restraints that consumer welfare has been put in jeopardy; and

(4) it is necessary to enact legislation that protects the interests of consumers in vigorous price competition while recognizing the needs of manufacturers and others to maintain reasonable service, quality and safety standards.

SEC. 3. The Sherman Act is amended by redesignating section 8 and any references to section 8 as section 9 and by inserting between section 7 and section 9, as herein redesignated, the following new section:

"SEC. 8. (a)(1)(A) In any civil action based on section 1 or 3 of this Act, including an action brought by the United States or by a State attorney general, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination or conspiracy to set, change, or maintain prices (other than a maximum price), if pursuant to the Federal Rules of Civil Procedure the court finds that there is sufficient evidence, direct or circumstantial, from which a trier of fact could reasonably conclude that a person who sells a good or service to the claimant for resale entered into a contract, combination, or conspiracy with a competitor of such claimant to curtail or eliminate price competition by such claimant in the resale of such good or service, then the court shall permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such good or service in violation of such section.

"(B) For purposes of paragraph (1), the court shall find the existence of 'sufficient evidence' that a person who sells a good or service entered into a contract, combination, or conspiracy if the claimant presents evidence that such person—

"(i) received from a competitor of the claimant an express or reasonably implied request or demand that the seller take steps to curtail or eliminate price competition by the claimant in the resale of such good or service, and

"(ii) terminated the claimant as buyer of such good or service for resale or refused to continue to supply to the claimant some or all of such goods or services requested by the claimant and such request or demand was the major cause of such termination or refusal to continue to supply.

"(C) For purposes of subparagraph (B)(ii), no such request or demand shall be deemed to constitute the major cause of such termination or refusal to continue to supply unless, at a minimum, there is evidence that such person—

"(i) expressly or impliedly acquiesced to the request or demand, or

"(ii) expressly or impliedly threatened, or took actions, in addition to the termination or refusal to continue to supply at issue in the case, to curtail or eliminate price competition by the claimant or others engaged in the resale of goods or services.

"(D) A decision by such person to alter, wholly or in part, its distribution policy through adoption of exclusive distributor outlets or vertical location, customer or territorial clauses shall not constitute an action to curtail or eliminate price competition for purposes of subparagraph (C)(ii).

"(2) In making its determination with respect to the existence of a contract, combination or conspiracy, the court shall consider evidence in rebuttal supporting any actual, bona fide nonprice business justification for the termination of the claimant or the refusal to continue to supply the claimant.

"(3) The court shall not permit the trier of fact to consider whether such person and such competitor engaged in concerted action to set, change, or maintain prices for such goods or service in violation of such section if the court determines that the trier of fact could only find that such person and such competitor engaged in concerted action by making inferences which are implausible.

"(b) In any civil action based on section 1 or 3 of this Act, including an action brought by the United States or by a State attorney general, or by the Federal Trade Commission under section 5 of the Federal Trade Commission Act, which alleges a contract, combination, or conspiracy to set, change or maintain prices, the fact that the seller of a good or service and the purchaser of a good or service entered into an agreement to set, change or maintain the resale price of a good or service shall be sufficient to constitute a violation of such section, except that this section shall not apply when the agreement to set, change, or maintain the resale price of a good or service in an agreement to set, change, or maintain the maximum resale price of a good or service. Such maximum resale price agreements shall not be deemed illegal per se; such agreements shall be judged on the basis of their reasonableness, taking into account all relevant factors affecting competition in the relevant market for the good or service that is the subject of the agreement. An agreement between the seller of a good or service and the purchaser of a good or service to terminate another purchaser as a dealer or to refuse to continue to supply such other purchaser shall constitute a violation of such section if such purchaser's discount pricing was the major cause of such termination or refusal to continue to supply, whether or not a specific price or price level is agreed upon.".

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SEC. 4. Nothing in this Act shall be construed to change the requirement of the Sherman Act that a violation of section 1 or 3 of that Act may only be found upon a determination that the defendant entered into an illegal contract, combination, or conspiracy.

SEC. 5. Nothing in this Act shall affect the application of the rule of reason standard to vertical location clauses or vertical territorial restrains under the antitrust laws, or the existing state of law with respect to other types of nonprice vertical restraints.

Mr. METZENBAUM. Mr. President, I move to reconsider the vote.

Mr. RUDMAN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

MORNING BUSINESS

Mr. METZENBAUM. Mr. President, I ask unanimous consent that there now be a period for morning business with Senators permitted to speak therein.

The PRESIDING OFFICER. Without objection, it is so ordered.