# SENATOR ESTES KEFAUVER'S INVESTIGATION OF THE DRUG INDUSTRY

JULIA BALDWIN MAGEE

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An Abstract

Presented to

the Graduate Council of

Austin Peay State University

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In Partial Fulfillment

of the Requirements for the Degree

Master of Arts

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by

Julia Baldwin Magee

March, 1972

## ABSTRACT

The introduction and widespread use of the penicillin and sulfa drugs and the discovery and marketing of many new drugs after World War II drastically changed medical practice and the drug industry. Citizens began to complain that drug prices were too high and complaints voiced over a period of time by a number of citizens tend to reach elected officials in Washington. As these expressions of protest reached the nation's capital, Senator Estes Kefauver of Tennessee, Chairman of the Senate Subcommittee on Antitrust and Monopoly, demonstrated a strong interest in the subject.

This thesis traces some of the background of how and when the question of the prices of drugs reached the attention of Senator Kefauver and his committee. The major portion of the thesis is an analysis of the Congressional drug hearings of 1959 and 1960. These hearings were lengthy and complex; the thesis attempts to present the many facets of information and controversy involved.

These drug hearings resulted in conflicting reports from the Subcommittee members to the Senate. Senator Kefauver then introduced a bill, called the Drug Industry Antitrust Act, S. 1552, which was signed into law on October 13, 1962.

The thesis also presents Kefauver as a senator who was determined to effect a reduction of drug prices and a change in the laws pertaining to drug manufacturers.

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business and industry and the preservation of free trade have been consistently necessary and politically expedient.

As Chairman of the United States Senate Subcommittee on Anti-trust and Monopoly, Estes Kefauver held a position of responsibility and of power. Beginning in July of 1957 he used this committee and his training and skill gathered from many years in Congress to investigate a number of industries. One of these was the drug industry which had never before been questioned by Congress.

Why was Kefauver interested in the drug industry? How did the investigation begin? How did it proceed? What was learned? How did Congress use the information? These are the questions that form the background for this thesis.

To the Graduate Council:

I am submitting herewith a Thesis written by Julia Baldwin Magee entitled "Senator Estes Kefauver's Investigation of the Drug Industry." I recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts.

Major Professor

We have read this thesis and recommend its acceptance:

Second Committee Member

Third Committee Member

Accepted for the Council:

Dean of the Graduate School

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The author wishes to acknowledge her indebtedness to her parents--Sarah D. Baldwin and Woodson S. Baldwin--and to thank them for their love and understanding as well as their examples of scholarship and integrity.

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## Introduction

In 1890 the Sherman Antitrust Act was passed. Twenty-four years later Congress passed the Federal Trade Commission Act and the Clayton Act. These three acts with amendments subsequently added are the basic provisions which make it illegal for businesses to form monopolies, make agreements to fix prices, allocate markets or boycott third parties. These laws attempt to protect the public by making illegal any false or misleading advertising claims and further to protect the public by condemning price discrimination between different purchasers of commodities of like grade and quality. Finally, any corporate acquisitions and mergers between corporations engaged in interstate commerce are condemned if the acquisition or merger will lessen competition or create a monopoly. [1]

Congress has taken as one of its tasks the investigation of any business or industry that appears to be growing too powerful, which holds the same price for the same commodity as others over long periods of time or bids the same on contracts as others, or acquires extensive holdings or patents. Congressional protection of small

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[1] Eugene M. Singer, Antitrust Economics (Englewood Cliffs, N. J.: Prentice-Hall, 1968), pp. 8-13.

## Chapter I

## BACKGROUND TO THE DRUG HEARINGS

Senator Estes Kefauver of Tennessee was well qualified by his background to lead a governmental investigation. After serving in the House of Representatives from 1939 to 1948, he was elected to the Senate. Soon after he became a senator he submitted, on January 5, 1950, a resolution providing for a Senate investigation of interstate gambling and racketeering activities and the way in which the facilities of interstate commerce had been used by organized crime.[1] The resulting investigation during 1950 and 1951, part of which was televised, focused attention not only upon crime and criminals but also upon the investigators; thus, Senator Kefauver became nationally known.

In 1954 Senator Kefauver was very active in what became known as the Dixon-Yates controversy. Edgar F. Dixon and Eugene A. Yates, top executives of private utility systems, proposed to build a plant in West Memphis, Arkansas to supply electric power to the Memphis, Tennessee area. This proposal was bitterly opposed by Senator

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[1] U. S. Congressional Record, 81st Cong. 2nd Sess., Vol. 96, part 1, p. 67.

Kefauver, who considered the plan and the contract made by the government with the Dixon-Yates combine as a threat to the power operations of the Tennessee Valley Authority. Kefauver's investigation of the matter and his struggle in the Senate to defeat the Dixon-Yates proposal were well known.[2]

Senator Kefauver served on the Senate Committee of the Judiciary. On January 12, 1956 the chairman of the committee, Senator Harley M. Kilgore of West Virginia, presented a resolution (S.Res. 170) to the Eighty-fourth Congress asking for funds from February 1, 1956 to January 31, 1957 with authorization as follows:

> . . . to make a complete and comprehensive study and investigation of the antitrust laws of the United States and their administration, interpretation, operation, enforcement, and effect, and to determine the nature and extent of any legislation which may be necessary or desirable . . . .[3]

The resolution was debated by the Senate in February of 1956. Senator Joseph C. O'Mahoney, Democrat, Wyoming, spoke at length on the necessity of Congressional investigation of modern business.

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[2]U. S. Cong. Rec., 83rd Cong. 2nd Sess., Vol. 100, Part 8, pp. 10726-10730. "The ABC's of Dixon-Yates," U.S. News and World Report (November 19, 1954), Vol. 37, pp. 27-29.

[3]U. S. Cong. Rec., 84th Cong. 2nd Sess., Vol. 102, Part 1, p. 362.

He placed in the record part of a report from Fortune magazine of July, 1955, showing the twenty largest industrial corporations in terms of assets. He warned that unless Congress investigated the gigantic new economic system that was developing, there was grave danger for the country. Senator O'Mahoney cited the work of the Attorney General of the United States--Herbert Brownell--who had appointed a commission of approximately sixty members to study antitrust and monopoly conditions in the United States, and particularly the antitrust laws passed to protect and conserve free business. This commission had worked more than a year, and its study had been submitted to the Senate and referred to the Committee on the Judiciary. According to Senator O'Mahoney the report constituted an "excellent" analysis of court cases which had been decided; but "it does not contain many recommendations, if any, dealing with the remedies which should be applied to gear Government to the modern world in such a manner as to preserve free enterprise."[4]

Senator William Langer, Republican from North Dakota, spoke to support the passage of the resolution. He cited several examples of monopolies and price-fixing. Then he called attention to the drug industry with the following statement:

> There is a drug monopoly, as a result of which, for example, if we buy insulin from any of the four large manufacturing companies,

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[4]U. S. Cong. Rec., 84th Cong. 2nd Sess. Vol. 102, Part 3, pp. 3020-3022.

> we find that the price is the same to the penny. Yet Congress has sat idly by without lifting a finger to protect the customer.[5]

Due to illness, Senator Kilgore was unable to speak for the resolution which was passed on February 21, 1956. On February 28, 1956 Senator Kilgore died. Under the seniority rules of the Senate the new chairman of the Committee on the Judiciary was Senator James O. Eastland, Democrat, Mississippi. Senator Kefauver became the Chairman of the **Subcommittee** on Antitrust and Monopoly. He inherited the investigative work begun in 1956 by Senator Kilgore.

One of the major aspects of the American antitrust problem is that area of pricing called **administered prices.**[6] In July, 1957 under the leadership of Senator Kefauver public hearings into administered prices were begun. The investigations and public hearings did not come to a close until February of 1962.[7] In the latter part of 1959, in 1960 and in 1961 the hearings related to the drug industry.

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[5]Ibid., p. 3024.

[6]"Kefauver Takes Off on Prices," Business Week, Vol. No. 1455, (July 20, 1957) p. 34. Definition: The term "administered price" was first used in the 1930's by Gardiner C. Means, an economist. He said, "an administered price is a price set by someone usually a producer or seller, and kept constant for a period of time and for a series of transactions." The opposite is a market price which changes on the basis of supply and demand.

[7]Richard Harris, The Real Voice (New York: MacMillian Co., 1964), p. 136.

Senator Kefauver's interest in the drug industry preceded his appointment as chairman of the Subcommittee; in his papers in the Kefauver Collection,[8] there is a report from Irene Till Hamilton entitled "Monopolistic Practices in the Drug Field." Although undated, this report is in a file with papers dated in 1954, and there is a pencil notation saying "hold onto this only copy." The paper stated:

> The newer antibiotics--terramycin, chlormycetin and aureomycin--are individual monopolies whose production and marketing is concentrated solely in the hands of the companies holding the patents. This branch of the industry is characterized by a structure of monopolistic prices virtually identical for the three companies.[9]

A growing concern in the country as a whole over the price of drugs was reflected in an article published by The Nation in the spring of 1957. The article stated that the sales of ethical drugs[10] had expanded from $200,000,000 in 1939 to $1,500,000,000 in 1956, with antibiotics alone accounting for $350,000,000 of the latter figure.

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[8]Estes Kefauver Collection, Kefauver Library, University of Tennessee, Knoxville, Tennessee; hereinafter referred to as the Kefauver Collection.

[9]Kefauver Collection, Series 1, Subject Matter File: Monopoly, Box 62.

[10]Definition: Ethical drugs are drugs which are advertised only to the medical profession and drug trade, and are generally available only by prescription.

Comment was made on the tremendous number of new drugs--400 in 1956--being introduced and information was given on the way they were being promoted and sold. The article stated that the drug industry was becoming very concerned because of consumer irritation over high prices.[11]

In an effort to assure the public that the high cost of drugs was only relative and far cheaper than being sick, an editorial in Today's Health stated:

> Despite the fact that newer drugs assist the family doctor in curing illness more rapidly and effectively and without dangerous ill effects from the drug itself, the public and even the medical profession still question the rise in the cost of treatment by prescription. The rise must be called apparent rather than actual, if we consider the economy that results from the shorter time we have to take our own pills, the fact that we don't even have to go to the hospital and the far fewer visits that have to be made by or to our family physician.[12]

The Federal Trade Commission sent out a questionnaire to the antibiotics manufacturers in 1956 asking for data relative to production, patents, and manufacturing. In June of 1957 the F.T.C. sent out a second questionnaire asking for data on pricing policies for 1956, and

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[11] "Wonder Profits in Wonder Drugs," Milton Moskowitz, The Nation, Vol. 184 (April 4, 1957), pp. 357-360.

[12] "The Price of Pills," Edward R. Pickney, M.D., Today's Health, November, 1957, p. 13.

data on bulk sales. This questionnaire was designed to give the F. T. C. up-to-date information on the economics of the industry.[13]

Congressman John A. Blatnik of Minnesota, Chairman of the Legal and Monetary Affairs Subcommittee of the House Committee on Government Operations, had held hearings in February, 1957 to determine whether the F. T. C. had been doing a proper job of policing the advertising of tranquilizer drugs. The hearings had lasted four days but no further action had been taken.[14]

In the Kefauver papers there is a long memorandum dated February 4, 1957 with a recommended agenda for consideration. Under a listing of matters that urgently required investigation and action, item seven stated: "The Pharmaceutical Industry including antibiotics."[15]

John M. Blair, Chief Economist on the Subcommittee staff, wrote a memorandum to Paul Rand Dixon, Counsel and Staff Director, dated September 26, 1958 on the proposed program for the Subcommittee for 1959. The first item listed on the program was "Administered Price: Drugs." The memorandum stated:

> The inquiry into drugs would represent a continuation of the Subcommittee's

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[13]"F. T. C. Questions Antibiotic Industry," Science News Letter, Vol. 71 (June 22, 1957), p. 303.

[14]Harris, p. 15.

[15]Kefauver Collection, Series 1, Subject Matter File: Monopoly, Box 57.

> investigation into administered price industries. . . . The inquiry would show for most of these products [ethical drugs] an extremely high level of concentration of production, stemming largely from patent monopolies accompanied by policies of issuing no licenses whatever or of restricting them to a very few firms; uniform prices which remain rigid for long periods of time; prices that by any standard are high and in some cases fantastic; an upward trend in retail prices for the products in recent years in spite of extraordinary profit rates; relatively low prices on those products, such as the old forms of penicillin, in which concentration is low and competition is active; . . . identical bids to government procurement agencies despite vigorous efforts on their part to secure lower offers; . . .[16]

The title of an article in the January 3, 1959 Saturday Review reflected, perhaps, part of the growing public attitude--"Taking the Miracle Out of the Miracle Drugs."[17] Perhaps the pressure of public concern as well as the recommendation of his staff were reflected in the letter Senator Kefauver wrote to Senator Eastland, Chairman of the Committee on the Judiciary, on January 21, 1959. He stated as follows:

> Studies have already been launched by the staff of the Subcommittee into

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[16]Kefauver Collection, Ibid.

[17]"Taking the Miracle Out of Miracle Drugs," John Lear, Saturday Review, Vol. 42 (January 3, 1959), p. 37.

> manufacturers pricing practices in bread and drugs. The initial investigation has uncovered such important facts that the Subcommittee has decided to hold early hearings in both of these industries. These studies and hearings will materially contribute to an understanding of the administered price inflation and its relationship to the Antitrust laws.[18]

Twelve days later Senator Kefauver brought before the Senate a resolution asking for $395,000 to continue to investigate the antitrust and monopoly laws of the United States. Senator Everett M. Dirkson, (Republican, Illinois) a member of the Subcommittee, protested. He questioned the increased use of Congressional investigations and suggested that senators had to serve on too many committees. He declared that "I found myself in a state of semifatigue, as a result of trying to keep up with my distinguished compatriot from Tennessee." To this remark from his Republican opposition, Senator Kefauver answered:

> Although the distinguished Senator from Illinois may have been tired when he came to the committee, he was effective enough to prevent our committee from having the Senate pass many measures which should have been passed by the Senate and also by the House of Representatives.[19]

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[18]Kefauver Collection, Series 1, Subject Matter File: Monopoly, Box 57.

[19]U. S. Cong. Rec., 86th Cong., 1st Sess., Vol. 105, Part 2, p. 1569.

Senator Dirksen then took the floor to speak against the resolution and particularly against the increase in the number of congressional investigations. In the Eighty-Fifth Congress the expenses for investigations had amounted to $5,750,000. He deplored the use of subpoena power, the great cost to the industries who had to prepare themselves for the investigation to be accurate and authentic in every particular, and he questioned the duplication of effort by various committees. When he had finished speaking, Senator William Langer, Republican, North Dakota, spoke for the resolution and stated that the Subcommittee needed an even larger appropriation. Several senators called for a vote and the resolution passed.[20]

Much work was done by Senator Kefauver and the Subcommittee staff between February 2, 1959 and December 7, 1959 when the first public hearings were begun to investigate the drug industry. In the Kefauver papers there is a detailed memorandum from Paul Rand Dixon to John M. Blair on the subject of proposed points of inquiry for drug hearings.[21] On April 8, Senator Kefauver made a formal request to the State Department to make a survey of drug prices in foreign countries.[22] The Security and Exchange Commission was asked for a

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[20]Ibid., p. 1575.

[21]Kefauver Collection, Series 1, Subject Matter File: Monopoly, Box 61.

[22]U. S. Cong. Rec., 86th Cong. 1st Sess., Vol. 105, Part 15, p. 19217.

survey of ownership of drug company stock.[23] The Subcommittee staff reached out in many directions for other information.

Senator George Smathers, (Democrat, Florida) on September 12, 1959 submitted Senate Resolution 191 asking that the Senate Small Business Committee be allowed to conduct an investigation to determine whether the prices of drugs were fair and reasonable. He suggested that the Subcommittee on Antitrust and Monopoly was "too busy." Senator Kefauver replied that a great deal of information had been secured as a basis for public hearings; however, due to the magnitude and complexity of the drug industry the hearings could not begin until the fall.[24] Later Senator Smathers was the first person to testify when the drug hearings began. He stated that his interest was personal because his father had suffered from arthritis from the age of thirty-seven. He also stated that the cost of drugs was of primary interest to the State of Florida which had a higher proportion of elderly people than any other state and in Florida the problem of low income and high priced drugs was acute.

Between March and December of 1959 the Subcommittee subpoenaed certain records from twenty drug industries, plus certain

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[23] "Kefauver Unit to Study Financial Groups' Role in Drug Prices; '60 Political Tie-in Seen," Wall Street Journal, Vol. CLIV, September 28, 1959, p. 5.

[24] U. S. Cong. Rec., 86th Cong. 1st Sess., Vol. 105, Part 15, p. 19216. Hearings, Part 14, p. 7842.

records of several of the major New York banks as well as several investment companies and mutual funds companies. The Wall Street Journal suggested that this was a "move that could fit in with the Democratic election next year."[25]

The New Republic took a different view, stating that the Subcommittee had been deluged with congratulatory mail from people who were resentful of high prices for drugs. Hope was expressed that the coming hearings would result in legislation that would help the consumer.[26] Some other periodicals, however, defended the drug industry and reminded the people that many of them were alive because of drug research and new drugs.[27]

It is obvious that many years of preparatory events preceded the investigation of the drug industry. Gradually, over the years, the whole industry had changed and grown phenomenally. The new drugs had seemingly accomplished the miraculous, yet the cost worried the public and certain members of Congress, especially some of the members of the Subcommittee on Antitrust and Monopoly. What were the facts? In December of 1959 the Subcommittee was ready to begin public hearings.

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[25] Wall Street Journal, Vol. CLIV (September 28, 1959), p. 5.

[26] "Prices of Drugs," New Republic, Vol. 141 (December 7, 1959), p. 6.

[27] "Drug Costs Climb. Makers, Congressional Probers Launch Debate: Are Prices Too High?" Jerry E. Bishop and John N. Wilford, Wall Street Journal, Vol. CLIX (December 2, 1959), p. 1. "Drugs--The Price You Pay," Newsweek, Vol. 54 (December 7, 1959), pp. 87-89. "Gentlemen's Business," Fortune, Vol. 59 (May, 1959), p. 85.

## Chapter II

## AN ANALYSIS OF FOUR HEARINGS--CORTICOSTEROIDS, TRANQUILIZERS, ORAL ANTIDIABETICS AND ANTIBIOTICS

The first of the Senate hearings on drugs began at 10:07 A.M. on December 2, 1959 in the Caucus Room of the Old Senate Office Building with Senator Kefauver, the chairman of the Subcommittee on Antitrust and Monopoly, presiding.[1] Chairman Kefauver stated the primary concern of the hearings was the pricing methods of the drug industry. The general purpose of the hearings was to determine answers to several questions; primarily (1) were the drug manufacturers setting their prices at excessive levels? (2) were the antiturst laws adequately applied to the drug industry? (3) was the public adequately protected by competition? (4) were laws needed to further protect the public with reference to the drug industry?

Kefauver stated that the drug industry was not being subjected to an inquiry that was different from previous inquiries into other industries

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[1]In 1959 and 1960 there were fifteen senators assigned to the Committee on the Judiciary. The members of the Subcommittee on Antitrust and Monopoly were as follows: Democrats--Estes Kefauver, Tennessee, Chairman; Thomas C. Hennings, Jr., Missouri; Joseph C. O'Mahoney, Wyoming; John A. Carroll, Colorado; Philip A. Hart, Michigan; Republicans--Everett M. Dirksen, Illinois; Alexander Wiley, Wisconsin; Roman L. Hruska, Nebraska.

which had been called before the Subcommittee since the hearings on administered prices began in 1957. He assured the medical profession that the Subcommittee would in no way question the system of private practice, and he assured the druggists there would be no questioning of the retailer's gross margin of profit.

The drug industry had in a period of approximately twenty years grown into a $2,225,000,000 annual business at the manufacturer's level on ethical drugs alone. As most of this growth depended on new drugs patented during those years, the industry was honeycombed with patents and license agreements. While prices for some drugs seemed to be flexible and competitive, for other drugs the prices had remained the same over long periods of time.[2]

The Subcommittee held four sessions of hearings on particular groups of drugs. These were as follows:

1. Corticosteroids-December 7, 8, 9, 10, 11, 12, 1959
2. Tranquilizers-January 21, 22, 26, 27, 28, 29, 1960
3. Oral Antidiabetics-April 26, 27, 28, 1960
4. Antibiotics-September 7, 8, 9, 12, 13, 14, 1960

These particular drugs seem to have been chosen because they were all relatively new; their sales volume had increased tremendously;

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[2]U. S. Senate, Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, 86th Cong., 1st Sess., Hearings on Administered Prices, Part 14 through 26; hereinafter referred to as Hearings. Hearings, Part 14, pp. 7837-7840.

prices within the group showed a constancy over a relatively long period of time; and they were manufactured by some of the largest drug industries in the United States. There was also a peculiarity about the purchase of these drugs in that they had to be bought by prescription only; therefore, he who ordered their purchase did not pay and he who paid did not order. A second peculiarity in contrast with other consumer purchases was the fact that the consumer had almost no opportunity to shop around or compare prices, nor could the druggist help. The laws that protected the purchaser by stating that the druggist must fill prescriptions with exactly what the doctor ordered, with no substitutions, prevented the druggist from using identical drugs under different trade marks even though one was cheaper than the other.

In attempting to produce a body of testimony from which the Subcommittee could make a determination of the answers it sought, the Subcommittee subpoenaed many witnesses and accepted some who volunteered. In these four product hearings official representatives of twelve major drug manufacturers and four smaller manufacturers were questioned. These companies are listed in two groups, alphabetically, as follows:

Larger Industries

1. American Cyanamid Company
2. American Home Products Corporation
3. Bristol Laboratories Division
4. Carter Products, Inc.
5. Ciba Pharmaceutical Products, Inc.

6. Eli Lilly and Company
7. Merck and Company
8. Parke, Davis and Company
9. Chas. Pfizer and Company
10. Schering Corporation
11. Smith Kline and French Laboratories
12. Upjohn Company

Smaller Industries

1. Formet Laboratories
2. Panray Corporation
3. Paul Maney Laboratories, Inc.
4. Premo Pharmaceutical Laboratories, Inc.

Although the major portion of the eight volumes of hearings and appendices pertaining to these four groups of drugs was composed of the testimony and substantiating papers, charts, et cetera from the drug manufacturers and the Subcommittee staff, many other witnesses gave brief testimony. Among these were Senators Clifford Case, Republican, New Jersey; Jennings Randolph, Democrat, West Virginia; George Smathers, Democrat, Florida; Harrison Williams, Jr., Democrat, New Jersey; Ralph Yarborough, Democrat, Texas; and Kenneth Keating, Republican, New York. Representatives of various hospitals, clinics, and other organizations, both governmental and private, which in some way were active in the drug field also appeared to testify. Included in this group were Dr. Philip S. Hench, Nobel prize winner for work in rheumatology, Dr. Alexander Marble, foremost authority on diabetes, Dr. Heinz Lehman of Montreal, Canada, who was the only foreigner to testify, and fifteen other

specialists.[3]

Generally speaking the same topics were discussed in each product hearing in an attempt to determine how a drug industry manufactured, priced and sold its products. The Subcommittee demonstrated a special concern about alleged high prices for it was obvious from the beginning that some persons had already determined that, in their opinion, the prices of drugs were too high. On the first day of the testimony, December 7, 1959, Paul Rand Dixon, Staff Director for the Subcommittee, asked Francis Brown, president of Schering Corporation, "How do you account for the fact that they choose to sell it to you in bulk at this really ridiculously low price and you choose to sell it to the druggist at an extremely high price?"[4]

During the antibiotic hearings, Senator Kefauver stated to Dr. W. G. Malcolm, president, American Cyanamid:

> I think you have a great public duty to perform in getting these prices down, particularly when your profits have been going up so enormously and so rapidly.[5]

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[3]Dr. Russell L. Cecil, Arthritic and Rheumatism Foundation; Dr. Henry Dolger, Mount Sinai Hospital; Dr. Harry F. Dowling, University of Illinois; Dr. George Farrar, Wyeth Laboratories; Dr. Maxwell Finland, Harvard University; Dr. Fritz Freyhan, Delaware State Hospital; Dr. Augustus Gibson, Merck and Company; Dr. Edward C. Kendall, Mayo Clinic; Dr. Nathan S. Kline, Rockland State Hospital; Dr. Ronald Lamont-Havers, Arthritic and Rheumatism Foundation; Dr. Louis Lasagna, Johns Hopkins University; Dr. Samuel Loube, George Washington University; Dr. Frank L. Meleney, formerly of Columbia University; Dr. C. J. O'Donovan, formerly with Upjohn Company; Dr. Robert M. Rees, Pfizer and Company. Hearings, Parts 14 through 26.

[4]Hearings, Part 14, p. 7863.

[5]Hearings, Part 24, p. 13679.

Nor did Senator Kefauver hesitate to tell the president of Carter Products, Inc. that his salary was too large. He scolded Henry A. Hoyt from Carter Products with a lecture about profits and said:

> I don't know of anybody who has been before us, even from the large corporations, who has had any salary, or other overall compensation as high as you make. . . We are dealing with something that people must have, drugs--. . . I think you have a responsibility to all the people.[6]

When Walter A. Munns, president, Smith Kline and French Laboratories, was on the stand, Senator Kefauver had advice for him too:

> I think your profits on the products that we have talked about here, thorazine and compazine, and certainly your overall profits, are entirely too high and out of line.[7]

Despite the occasional scolding from Kefauver, the probing questions which lasted for long hours under the glare of the television cameras, the insinuations of price fixing and private deals, the drug representatives of the major companies insisted to the last man that their prices were not high or unreasonable. While they defended their position, they had to stand in the national news spotlight.

On December 8, 1959, on the front page of the New York Times a

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[6]Hearings, Part 16, p. 9231.

[7]Hearings, Part 16, p. 8981.

a write-up stated:

> Senate Panel Cites Mark-Up on Drugs Ranging to 7,079%.
>
> Senate Antitrust investigators produced evidence today showing that the wholesale price of a wonder drug to combat arthritis had been increased more than 1,000 percent over cost by a major drug producer.
>
> The Senate inquiry also noted that the same concern had made a mark-up of 7,079 percent on estrogen harmone drugs used in the treatment of female ailments.[8]

The Subcommittee also had national attention. Time magazine was not sympathetic to Senator Kefauver as was suggested by this critical sentence: "Last week, opening an investigation of drugmakers, the Keef got in his broad stroke as soon as nervous industry witnesses settled uncomfortably in their hot seats."[9] The Committee's actions were part of a lengthly report published in the New York Times which suggested it would be an adversary proceeding:

> As the first week of half-scientific, half-economic testimony unfolded, it became obvious that the subcommittee was out to prove that a few large drug concerns were making excessive profits and charging unnecessarily high prices to the sick who must buy their products.[10]

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[8]New York Times, December 8, 1959, p. 1.

[9]"Double Dosage," Time, Vol. 74 (December 21, 1959), p. 70.

[10]New York Times, December 13, 1959, Sec. 4, p. 8. "The Drug Industry: What It Is And How It Operates."

Other newspapers and periodicals presented their views. If part of Senator Kefauver's intention was to conduct an investigation in such a way as to focus national attention on the hearings, it could truly be said that he succeeded.[11] It could also be said he was well aware of the adverse criticism. Included among Senator Kefauver's papers were clippings; one contained this comment:

> The two most productive hearings in generating headlines this year are the probe into broadcasting conducted by Representative Oren Harris of Arkansas and the probe into drug prices by Senator Estes Kefauver of Tennessee. Both illustrate how hearings can degenerate into adversary proceedings--with the adversary having the protection of neither a judge nor a defense counsel.[12]

Nevertheless, there were those who urged Senator Kefauver to continue. Hundreds of letters poured in to Washington, according to Senator Kefauver, telling of the need for lower prices of drugs. If the

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[11]"Tranquilizer Workers Put on Spot," Business Week, Vol. 1588 (February 6, 1960), p. 32; "Those Profitable Prescriptions," New Republic, Vol. 142 (February 29, 1960), pp. 11-12; "Pills and Pills--and Prices," Newsweek, Vol. 54 (December 21, 1959), p. 67; "Merck and Company on Defense, Wall Street Journal, Vol. 154 (December 10, 1959), p. 1; "Tranquilizer's Cost Us $280,000,000 Each Year," Science News Letter, Vol. 77 (January 30, 1960), p. 73.

[12]Kefauver Collection, Series 1, Subject Matter File; Monopoly, Box 60; "The Shame of Congress," Printer's Ink, a reprint of August 19 and August 26 Special Reports, 1960, p. 2.

drug manufacturers were of the opinion that prices were not unreasonable, how did they justify their opinion? Senator Kefauver and his staff demanded the answers.

Part of the answer was in the difference between the cost of the product and its selling price. The annoying percentage figures protested by the manufactures and which more than once were carried in the headlines reflected the difference between the cost of the raw materials or the actual manufacturing cost and the selling price of the finished product. It soon became apparent that the drug industry was similar to other industries in that the cost of raw materials or manufacture was only a portion of the cost of the finished product.

In all four product hearings Senator Kefauver and his staff wanted to know in detail why the mark-ups were so high. This edited exchange of questions and answers was typical:

> SENATOR KEFAUVER: The mark-up is from 11.7 cents--or a little over 11 cents--to $8.40. You did no research on this drug. All you did was put it in a tablet, put it out under your name and sell it at a mark-up of 7,079 percent.
>
> MR. BROWN: What am I expected to say? I have repeated a number of times that we are engaged in an overall operation.
>
> SENATOR KEFAUVER: Mr. Brown, what I can't understand is that small companies buy the same product from Roussel and sell it for $2 or $3; you sell it for $8.
>
> MR. BROWN: Senator, the small companies, as I tried to point out this morning, so far as I know are not engaged in the kind of service that we are engaged in. I have spent considerable time this morning trying to explain that we have a total operation, and this total operation consists

> first, on one side of selling products, and on the other side, of doing things, and the things that we do are a composite group of things, and they consist not only of manufacture, but they consist of informational work, of development work, of research work, of informing the medical profession concerning what we do, advertising, and it, of course, consists of profit, and the profit figures are the ultimate measure of what we have done.[13]

The staff of the Subcommittee and the drug manufacturers prepared many charts showing the profit picture, the cost structure, a breakdown of the sales dollar, net profit after taxes as percent of sales, research costs, costs of advertising items involved, and many others. As these charts were presented by the manufacturers or by the staff, long arguments developed over the information shown. Generally speaking, the companies maintained a position as follows: (1) Manufacturers did not separate the cost of a particular product from the many dozens or many hundreds of products produced by the individual manufacturers. (2) All costs other than actual manufacturing costs had to be allocated by percentage. (3) If the manufacturer could make a cost analysis of a specific drug, the cost would be a trade secret. Revealing a trade secret would severely damage business since competitors could know how to establish a price that would drive the manufacturer's product off the market. (4) In addition to the actual manufacturing costs, all

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[13] Hearings, Part 14, pp. 7881-7883.

larger drug companies spent millions of dollars for research, development, advertising, information programs for doctors, administrative costs, expansion programs, and taxes. (5) The manufacturers stated that drug prices were reasonable since the overall profit picture showed no higher percentage of profit than many other businesses in America. They maintained that a growth industry must have a profit sufficient to maintain research and expansion.

Senator Kefauver was not convinced. How could the drug manufacturers maintain their prices were reasonable when prices had remained unchanged on certain drugs for years? In fact, prices had been identical on certain items. One of the outstanding examples was one of the antibiotics called tetracycline. A bottle of sixteen 250 milligram tablets was sold by five companies and the price had remained unchanged from 1954 to 1960 as follows:

Tetracycline (generic name)

| Company | Trade Name | Price, 1954-1960 |
|---|---|---|
| American Cyanamic | Achromycin | $ 5.10 |
| Bristol | Polycycline | 5.10 |
| Squibb | Steclin | 5.10 |
| Pfizer | Tetracyn | 5.10 |
| Upjohn | Panmycin | 5.10[14] |

> SENATOR KEFAUVER: The natural question is how do all of you get exactly the same price, Dr. Malcolm?. . . How do you get together on price, exactly the same on different products and keep it exactly the same over a period of ten years?

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[14] Hearings, Part 24, p. 13664.

DR. MALCOLM: Mr. Chairman, we don't get together. That is illegal.

SENATOR KEFAUVER: Whether you get together or not, your prices got together.

DR. MALCOLM. We felt that the price was fair and reasonable. We felt that it was within the framework of the plan that we had set up for ourselves in order to continue our research and development work for the immediate and for the future. It gave us a return that was in keeping with our formula that we set up for the conduct of our business.[15]

Later, Paul R. Dixon asked questions of Dr. Phillip I. Bowman, president, Bristol Laboratories, in regard to charging the same price for the same drugs as charged by other manufacturers:

MR. DIXON: According to our observation, it was the same as everybody else's, for all comparable products that you made.

DR. BOWMAN: This is correct. We cannot sell our products at any higher prices than the others. People won't buy them.

MR. DIXON: Can you sell them for less?

DR. BOWMAN: If we reduce our prices others will follow, and we cannot really afford to get into a really competitive battle of that kind. If you will look at our financial picture, you will see the reasons for it. We went through that in penicillin. We have adopted a pricing policy of being competitive with the lowest prices of our competitors.[16]

When Harry J. Loynd, president, Parke-Davis, was called to testify he was asked why he had not reduced the price of $5.10 which was an identical price to others. He stated:

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[15] Hearings, Part 24, p. 13665.

[16] Hearings, Part 24, p. 13909.

> Well, we don't feel there is any justification for reducing the price. The fact of the matter is that the costs of all materials, labor, research, development, that go into this particular field, we don't think we can afford to reduce the price any further, at least for the time being.[17]

When Senator Kefauver continued to press the point Harry J. Loynd said, "Personally, I don't think there is any crime in making money, provided you make it honestly and you distribute it properly, and that is exactly what we are doing."[18]

The Subcommittee tried again and again to determine why some prices were the same for other drugs besides antibiotics. For example:

> SENATOR KEFAUVER: We have in the record the prices of Schering, Merck, and Upjohn on cortisone acetate. From 1956 on, the price was the same for all three of the companies, and on hydrocortisone from 1956 on it has been the same. For prednisone and predisolone, from the day of inception when it was brought on the market, it has been the same.
>
> DR. UPJOHN: If I remember correctly, I pointed out that in the natural history of competition the price comes down until it reaches a stabilization. This is the natural history of any competitive process, and this is what happened in the case of steroids. . . this is an era of rising costs, of rising expenses, and we are very proud of the fact that we had at no time raised the price of steroids.[19]

If the mark-up in this country was necessary, which some members of the Subcommittee obviously doubted, why was the price so much lower

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[17] Hearings, Part 24, p. 13963.

[18] Ibid.

[19] Hearings, Part 20, p. 11040.

in certain foreign countries? The Subcommittee staff had prepared charts and figures showing the costs of various drugs in foreign countries. In the December, 1959 hearings on corticosteroids two of the large drug manufacturers were questioned on their foreign operation. The companies and their presidents were as follows:

Merck and Company - John Connor

Upjohn Company - Dr. E. Clifford Upjohn

John Connor displayed confidence and thoroughness in his answers. Senator Kefauver finally remarked, "Mr. Conner, every time I ask you a question you have some book or paper that you start reading from." John Connor replied, "I thought I would do you the honor of coming well prepared, sir."[20] Dr. Upjohn was not only well prepared but also seemed unruffled by any question asked. His answers were factual yet he seemed relaxed and affable. When Senator Kefauver tried to chide, he would turn the question by his answer into something different. For example:

> SENATOR KEFAUVER: And you have been maintaining this same price for quite a number of years.
>
> DR. UPJOHN: Well, I am glad you said that, Senator. We are rather proud of that.[21]

Although Francis Brown, who also was president of a large company,

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[20] Hearings, Part 14, p. 8074.

[21] Hearings, Part 14, p. 8290.

Schering Corporation, testified in the corticosteroid hearings, he was not questioned on foreign operations and, in fact, did not furnish the Subcommittee with the material they had subpoenaed until after he was placed on the witness stand and Senator Kefauver demanded his foreign license agreements. Francis Brown stated:

> . . . our interpretation of the subpoena was that this investigation was not to extend to international trade between foreign countries and other foreign countries as distinguished between international trade between this country and foreign countries, because we didn't understand that the antitrust laws extended beyond the confines of the United States.[22]

Senator Kefauver told Francis Brown he would have to return at a later date to testify on his foreign operations, but there was no published record of his being called back.

The following table was typical of the many tables showing a comparison of prices of drugs manufactured by different companies in foreign countries compared with cost in the United States.

**PREDNISONE AND PREDNISOLONE**
**Comparative United States and foreign prices to druggists by Merck and Upjohn**
**1959**
**(5 mg. tablets, bottles of 100)**

| City and Country | Merck | Upjohn |
|---|---|---|
| London, England | $ 7.53 | $ 7.53 |
| United States | 17.90 | 17.90 |
| Toronto, Canada | 20.80 | 20.80 |
| Sydney, Australia | 24.00 | 24.00 |
| Tokoyo, Japan | 27.78 | 27.78 |

[22] Hearings, Part 14, p. 7916.

Source: U. S. price: "American Druggists Blue Book 1959-60." Foreign prices: Collected by the U. S. Department of State through the American Embassies in Spring of 1959.[23]

Why the difference in price?

John Connor and Dr. Clifford Upjohn had substantially the same answer. Foreign markets were different; labor costs and costs of material were often lower; some countries charged import duties; advertising was not conducted in quite the same way; discount structures were different. Since foreign currency could be devalued in terms of U. S. dollars it was exceedingly difficult to get an accurate comparison. Some countries had price control laws. Competition varied from one country to another. In summary, they agreed that there was no way to compare foreign prices with prices in the United States because the question had to be answered separately in relation to all the conditions in each country and the question was one of such complexity that the figures on the chart were meaningless.

Eugene N. Beesley, president, Eli Lilly & Co., which sold its products in 126 countries throughout the world, stated, "there is little, if any, basis for comparison of marketing practices and prices with those existing in the United States."[24] When Senator Kefauver asked Alvin G. Brush, Chairman of the Board, American Home Products

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[23] Hearings, Part 14, p. 8314.

[24] Hearings, Part 24, p. 14101.

Corporation, why he could sell so low in England, Senator Kefauver received a lecture in reply. Alvin Brush explained that they did not sell in dollars but in pounds, shillings and pence. He stated they employed Englishmen to work in English factories and sold their products on the British market and that the cost of doing business there was about half of what the costs were in the United States. He concluded by saying you can't compare that kind of an economy with United States economy.[25]

Page after page of testimony went into such questions as whether or not a specific drug manufacturer shipped a finished product or a bulk product to a specified foreign country, on whether or not large amounts of advertising were used in a foreign country, on how many foreign plants a company owned and where they were located. It seemed to be exceedingly difficult for Senator Kefauver or his staff to accept what all the drug manufacturers jointly contended--there was no meaningful comparison of prices that could be made except in man hours of work that it took to buy a drug. As the drug manufacturers presented it, less hours of work were needed to purchase drugs in the United States than in any foreign country.

During its preliminary investigation previous to the drug hearings the Subcommittee had tabulated much information on government

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[25] Hearings, Part 16, p. 9261.

purchases of drugs. The Military Medical Supply Agency of the United States Armed Forces was the source of many of the figures used. Rear Admiral William L. Knickerbocker was called upon to testify as he was the executive director of the M. M. S. A., which had been initiated in June of 1956.

According to the testimony of Admiral Knickerbocker, the primary function of the M. M. S. A. was to provide medical supplies and equipment to the armed forces. His prepared statement gave an overview of the functioning of the agency, presented figures showing beyond question that the United States government bought tremendous quantities of drugs, and explained the procedure of bids and purchases. Again the Sub-committee was presented charts, this time to show price patterns of specific drugs. There were fifteen separate charts and Admiral Knickerbocker explained each. It was in his explanation of the last two charts that he encountered a substantial number of questions. Using the last two charts, he explained, and defended, drug purchases in Italy during 1959 in the amount of $1,700,000. He stated that these drugs if purchased in the United States would have cost $3,600,000, therefore the M. M. S. A. had saved the taxpayers $1,900,000.[26]

It was brought out that these purchases had been properly made under the Buy America Act, that plants had been inspected in Italy,

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[26] Hearings, Part 24, pp. 13714-13803.

and products had met all requirements. When the Charles Pfizer Company had protested the Italian purchase, the matter had been referred to the Comptroller General for decision. The Comptroller General had ruled that the purchases were in accordance with the Buy America Act, the Armed Service Procurement Regulation and Navy regulations. The Comptroller General further ruled the Pfizer Company was not correct in contending violation of the Antidumping Act or section 337 of the Tariff Act of 1930.[27]

Senator Dirksen then began to ask questions. As has been indicated previously, Senator Dirksen was an outstanding Republican who had tried, as a minority member of the Subcommittee, to block the actions of the Subcommittee with reference to the hearings, to block appropriations for the Subcommittee and to block legislation which Senator Kefauver had wanted as a result of hearings on other industries. Senator Dirksen's questions brought out other facets of the Italian purchase situation.

He asked where Admiral Knickerbocker got the money he spent. He pointed out that since he got it out of the U. S. Treasury some attention should be paid to how money got into the treasury. Senator Dirksen said that U. S. drug manufacturers had to put 52 percent of

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[27] Hearings, Part 24, p. 13799.

their profit back into the treasury under the corporate tax statutes. He wanted to know if the M.M.S.A. could save the taxpayers such large sums by purchasing drugs overseas why didn't Admiral Knickerbocker purchase all of the drugs overseas? Senator Dirksen said, "And then come back and tell us, 'well, look, on this deal we did not save $1,900,000, we saved $30 million.' and then I want to hear the roar that goes up and start for the timber."[28]

Admiral Knickerbocker began to defend his position by pointing out he had purchased only 3 items out of 835 drug items on only five contracts. Senator Dirksen seemed somewhat amused. He told the Admiral:

> But this morning, Admiral, when he [Senator Kefauver] asked Mr. Duncan of Lederle how they managed to fix this floor on certain items, the Chairman said, Why didn't you confer with the drug trade?
>
> And, of course, I made the point that if they had done so he would have hauled him up before this committee on the grounds of collision.
>
> You see you can't win before this committee, any way you take it. (Laughter) Certainly no business people can win here.[29]

Later, in a more serious vein, Senator Dirksen said:

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[28] Hearings, Part 24, p. 13810.

[29] Hearings, Part 24, p. 13810.

> My distinguished friend and chairman--he is my friend no matter how I abuse him, he is always my friend--he lives down in the Tennessee Valley area. They bought some British turbines and dynamos down there; I don't know the exact price; the contract was about $13 million. And they will underbid the American producers. But General Electric was down here, and Westinghouse was down here raising the devil. And shortly after, they closed up a Westinghouse plant in New Jersey, and put a thousand people out of work.[30]

Admiral Knickerbocker then pointed out in an equally serious manner that he had been to Denmark and to Italy to negotiate the drug purchases and said, "I would say both the Ambassadors over there were quite pleased with these procurements because we were buying from our military allies. That is just another facet that enters into the situation, from my point of view at least."[31]

It was further brought out in the testimony of Admiral Knickerbocker, as well as by the staff of the Subcommittee, that the large drug manufacturers sold to the government for a reduced price. When questioned as to whether or not they made a profit on the government's business they did not always state that they made a profit. Usually they qualified their statements by saying they could sell for less because the government orders were very large, and that they sold

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[30] Hearings, Part 24, p. 13812.

[31] Hearings, Part 24, p. 13813.

for more than their manufacturing costs. They said that they occasionally bid at a price that was a loss to the company on a particular contract because they had to consider their overall picture. They explained that in order to keep their machines running and their work force employed full time without seasonal layoffs that it was better to take a large government order, even at a loss, and keep operating. Prices for various drugs were repeatedly brought before the drug manufacturers showing price to the druggist and price to the government on or about the same date. Since there was a large discrepancy, it was inferred that the drug manufacturers were asking the public to pay all the traffic would bear. The drug manufacturers were usually uncomfortable when so accused and some of them stated that if they sold at the prices quoted to the government they would go out of business; others stated that they would have to curtail their research, educational and advertising programs. They were then asked about these programs.

No one questioned the effectiveness of the large research programs developed and sustained by the drug industry. To present the scope of their research programs various drug companies brought to the hearings some of the outstanding medical and drug authorities in the United States. The Subcommittee also requested certain medical authorities to testify. During the drug product hearings eighteen doctors appeared on the witness stand. Their testimony made it

abundantly clear that research was costly, time consuming, and often fruitless.

The Subcommittee was impressed with the research story but their interest lay in the cost of research. The companies said it was expensive. How expensive?

Here was an example from the Upjohn Company:

| Year | Total Sales | Percent for Research And Development |
|---|---|---|
| 1958 | $146,135,770 | 8.9 |
| 1959 | 156,913,526 | 9.7[32] |

American Cyanamid presented a chart showing the rise in expenditures for drug research for a twenty year period from 1939 through 1959. Their expenditure for that period had totaled $138,185,000. The same company explained another chart showing an investment of $37,000,000 in specific research, such as cancer, with no significant commercial products to date.[33] American Cyanamid's Lederle division presented a chart showing the distribution of the division's consumer dollar paid for Lederle drugs in 1958 which indicated that 3.3 cents of every dollar was spent for research.[34]

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[32] Hearings, Part 20, p. 11067.

[33] Hearings, Part 24, p. 13631.

[34] Hearings, Part 24, p. 13643.

Bristol Laboratories, Inc. presented figures covering a period of 1944 through 1959 showing research and development expense as a percent of sales which ranged from a high of 23 percent in 1944 to a low of 5.6 percent in 1945 and up to a 16.3 percent high in 1958.[35]

It was stated by various companies that the drug industry as a whole spent from 7 to 9 percent of the sales dollar on research. While this percentage was higher than for other industries, the drug manufacturers claimed that research was essential not only to help humanity but to save themselves, since the discovery of a better drug by a rival company would immediately push a less effective drug off the market.

John Connor of Merck and Company stated:

> This, as I see it, is the heart of the matter we are exploring here. The secret of the success of our company is the delicate partnership we have been able to develop over the years between the quest for scientific knowledge on the one hand and the drive for financial success on the other.[36]

When Senator Kefauver appeared to look at the heart of the matter of research, he saw patents and license agreements. By law, a drug manufacturer who discovered or developed a new drug had the right to apply for a patent. If all the various regulations of the government

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[35] Hearings, Part 24, p. 13830.

[36] Hearings, Part 14, p. 8015.

were satisfactorily completed, the manufacturer became the sole owner of the patent for a period of seventeen years with a right to retain the patent for his own operation or to grant to others a license to manufacture and sell in various limited or unlimited ways his rights under the patent. It was the opinion of the Chairman that some legislation was probably needed in the area of patents and license agreements to enforce more competition which would force prices of drugs to be lower.

The drug industry put up an almost solid front of protest. One of the most angry outbursts in all of the drug hearings came as a result of questions on patents. The following exchange took place between Paul R. Dixon of the Staff of the Subcommittee and Alvin G. Brush of American Home Products Corporation:

> MR. DIXON: You have a monopoly of Sparine and you can set the prices as you please.
>
> MR. BRUSH: You can call it a monopoly. We say we have a patent.
>
> MR. DIXON: I mean a 17 year--
>
> MR. BRUSH: And that patent was issued under the laws of Congress. Now, the only thing I don't want to get traded into here--there are certain rules and regulations. This is like a football game. Now, if the legislature is going to change the patent law, they will change the patent law. But I don't want to be sitting here today as if I was some kind of criminal and being pointed out I have got a monopoly when I have lived

> meticulously and have done what the patent law says you can do, and I don't think you ought to infer, when monopoly today has this urgly (sic) sound, when all we have done is followed what we believed to be a legal process.[37]

Yet Senator Kefauver did continue to imply that a patent was a monopoly until finally there was such protest that he and the staff began to use the term legal monopoly. Much testimony was presented on patents and patent rights, on how a new drug became patented, on some of the ways drugs were marketed when several companies filed for a patent at approximately the same time and an investigation had to be made to determine which company had the prior claim. At times these patent investigations were continued over a period of several years. Senator Kefauver brought up questions concerning some of the companies claiming patents on the same new drugs and questions on some of the litigation between companies and the government with reference to patents. The larger drug manufacturers were accompanied by counsel, and they raised much objection to questions in the areas under governmental investigation or litigation, however, it did them little good to protest most of the time. Senator Dirksen and Senator Hursks stepped in to divert the line of questioning and to raise objections of their own.

Myron Pantzer, vice president of Panray Corporation, which was one of the smaller drug companies, was in agreement with the larger

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[37] Hearings, Part 14, p. 8015.

companies in regard to the protection of patents. He said, "I believe the entire status of our public health would be thrown into jeopardy if we took the incentive out of new drug development; and if we took the incentive out of trying to vie for the professional medical market."[38] Pantzer then expressed an opinion that was not stated elsewhere in these product hearings:

> We are dealing with an industry that is barely 25 years old in its present concept; and my feeling, yes, is as follows: that no matter where you drive the price of drugs down to, the public is going to think that drugs are always high, because health is something precious and should be free.[39]

There were some who pointed out that certain foreign countries had very different laws concerning patents. In France a company could not get a product patent on a drug, meaning a new discovery belonged to the public. It was possible, however, to get a process patent in France to protect the way a company manufactured a drug for sale. Since drug making is exceedingly complex, the process patent sometimes served almost as well as a product patent due to the expense of developing a process.

One of the foreign countries mentioned most often relative to patents was Italy because under Mussolini the patent laws were voided.

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[38] Hearings, Part 16, p. 9370.

[39] Ibid.

Italy could, therefore, "steal" new drugs from all other nations and manufacture them. This made the American drug manufacturers particularly angry. Senator Kefauver had to admonish two of the witnesses not to insult our friends in Italy by their criticism; however, they were able to make their point that since Italy had no patent protection no new drugs had been produced in Italy. Drug manufacturers warned that if the United States government put new drugs in the public domain that there would follow the death of research programs which often poured millions of dollars into research before finding anything of value. Business could not take the risk of losing tremendous sums of money, unless there was the protection of patents for effective new drugs.

The various license agreements the drug companies had with each other and with foreign manufacturers were subpoenaed and made a part of the record. Testimony concerning these agreements was detailed and complex. Senator Kefauver was trying to prove a monopoly existed by showing that a company with a patent controlled a product and often refused to license other companies. When the companies were questioned on this matter, no particular pattern emerged. Some companies granted a license to anyone who applied; some did not. Some companies granted a license on a few drugs; some granted licenses on many. All insinuations that the companies were unfair were met by the drug companies' statements that all their actions were legal, that the patents were theirs, not only by law but by right since they had spent tremendous amounts of time

and money before they could put a new drug on the market.

The amount of money spent to advertise drugs was put under attack by the Subcommittee. During the first of the drug product hearings Paul R. Dixon tried to explain the jurisdiction of the Federal Trade Commission and the Food and Drug Administration, as both were involved in the advertising controversy.

According to Dixon, the Federal Trade Commission Act contained a section of laws dealing specifically with false and misleading advertising to the public, Ethical drugs, however, were advertised to doctors who were not considered a part of the public but were considered experts. Therefore, the F. T. C. had not proceeded against any advertising published in medical journals.

The Food and Drug Administration had jurisdiction over labeling. Labeling was different from advertising in that labeling had to meet legal requirements of specified factual information for use of the doctor. F. D. A. had interpreted that the literature accompanying medicine was labeling and the manufacturers must be answerable for the information contained therein. However, a great deal of information on drugs was mailed directly to the doctor. The drug manufacturers who habitually sent drug information directly to the doctor disputed the interpretation that such literature was labeling.

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[40] Hearings, Part 14, p. 7995.

Questions on advertising went down many strange roads. As could be expected in days of testimony involving many kinds of questions to different witnesses, sometimes the Subcommittee would get badly off tract, however Senator Hurska was adept at setting it back to its true purpose. In advertising, however, there were serious controversies; Senator Dirksen said the committee was completely off track, yet Senator Kefauver refused to change or to stop the line of questions concerning the effectuality of certain drugs. Senator Kefauver contended that the manufacturers were making false claims in the medical journal advertisements. When doctors began to disagree publicly over the effectiveness of drugs there was great concern from those who were taking one drug or the other.[41]

The drug manufacturers contined to point out that they were complying with all regulations. They had submitted their labeling for F. D. A. approval before sending it to the doctors. As for the medical journals, the drug manufacturers contended that this type of advertising was principally to keep the name of the drug and its manufacturer before the physician and specific or detailed information was neither legally required or necessary.

The question then arose and was answered repeatedly as to what effect the advertising had on physicians. The answer had a wide range--

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[41]"Accuracy of Merck's Claims for New Drug Draws Conflicting Views from 2 Doctors," Wall Street Journal, Vol. 154 (December 11, 1959), p. 6; Hearings, Part 20, p. 11174.

from little or no effect to a very great effect, according to the opinion of the one on the witness stand. It was quite plain, however, that huge sums were being spent on advertising and it would appear that the drug manufacturers were in a race for the doctor's attention. The manufacturers contended advertising was essential, that far from being a monopoly with little or no competition, the drug industry was engaged in fierce competition. While it was true that one company might have a patent on a specific drug, other companies had patents on other drugs that could be prescribed by the doctor for treatment of the same condition.

The drug manufacturers not only mailed information and advertised in journals but maintained many employees, called detail men, who were not salesmen but were designated by the companies to call on doctors and give them full information on the companies' products, including information on clinical testing and the side effects of new drugs. While the Subcommittee staff and Senator Kefauver obviously felt that advertising was excessive and misleading, the drug manufacturers contended it was a necessary part of their business operation. Drug manufacturers felt the Subcommittee was lacking in understanding of the problems involved and actually derelict in allowing public testimony on whether or not certain drugs were more effective than other drugs.

The information gained from all the hours and days of study, preparation, and testimony became a part of the record for further

study and action. Next the Chairman wanted to ask questions of certain physicians and professional authorities.

## Chapter III

## AN ANALYSIS OF THREE HEARINGS: THE SUBCOMMITTEE QUESTIONS PHYSICIANS AND OTHER PROFESSIONAL AUTHORITIES

In February, April and May of 1960 the Subcommittee continued its investigation of the drug industry by requesting the testimony of persons not directly engaged in the manufacture of drug products but connected in various ways with the drug industry. These three hearings which were designed to cover a wide range of drug topics were:

1. Physicians and Other Professional Authorities--February 25, 26, April 12, 13, 14, 15, 1960.
2. Pharmaceutical Manufacturers Association--February 23, 24, April 20, 1960.
3. Generic and Brand Names--May 10, 11, 12, 13, 1960.

Twenty-three persons appeared as witnesses at these hearings which were designated as Part 18, Part 19 and Part 21 of the total hearings published on Administered Prices, pursuant to Senate Resolution 238. Of these twenty-three witnesses, eight were from the staffs of medical colleges or universities, two were doctors engaged in private practice, three were employed by

large hospitals, two represented national associations of drug manufacturers, and eight held a variety of other drug-related jobs. These witnesses came from nine states from California to Connecticut and included the District of Columbia.

The questions that were uppermost in these three hearings were the ones concerning generic and brand names: (1) Was it safe for a physician to prescribe by generic name? (2) When could a pharmacist use a generic-named drug instead of a brand-named drug?

On February 15, 1960 before the Subcommittee had begun its official investigation into answers to these questions, Life magazine had brought generic and brand names to the attention of its readers. As part of its coverage of the drug controversy, Life showed a chart with various prices of trade-named and generic-named drugs. One example shown was the cost of Serpasil or Reserpine, which were trade names for drugs used in treating hypertension. Cost by prescription for a certain quantity was $5.50, however if the same quantity was bought under the drug's generic name the cost was $1.75. Life concluded:

> The blame for the high price of prescriptions cannot be laid entirely to the big drug companies. A good part of the responsibility must be borne by the physician. Too busy to keep tract of all the new drugs, he is frequently persuaded by the ceaseless flow of company propaganda to prescribe drugs by their brand names. If he would instead prescribe the drug by its generic name, as he was taught to do in medical school, he could often save the patient

> substantial sums of money. A brand name drug frequently has an equivalent known simply by its generic name. There is no real difference between the two--except price. Druggists can usually provide either of them.[1]

In order to provide some understanding of the controversial questions, witnesses explained at some length the background of generic and brand names. Although there were brand names for some products before 1900, it was not until World War I that brand names began to be widely used for drugs.[2] Brand names can gradually become "lost" and fall into public domain, as example: aspirin, kerosene, nylon, cellophane.[3] In 1911 there was a court case in which a company had lost its brand name. This resulted in the idea that if chemical substances had a common name a company could protect its brand name. Nylon is now used as a name by everyone to designate a certain fabric, yet nylon originally was a name invented by the producers. A Thermos bottle is a vacuum bottle but the public often refers to any vacuum bottle as a "thermos." Some drugs have had this same difficulty.[4]

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[1] "In M.D's RX: Way to Save," Life, Vol. 48 (February 15, 1960), p. 102.

[2] Hearings, Part 21, p. 11703.

[3] Hearings, Part 21, p. 11497.

[4] Hearings, Part 21, p. 11509.

By 1959 as a matter of general use, a drug could have a brand name, which was always capitalized, a generic name, which was not capitalized, a chemical name, and other names or synonyms. The large number of new drugs which had been placed on the market since 1940 had created much confusion.

To illustrate the confusion, Dr. Charles O. Wilson, Dean, School of Pharmacy, Oregon State College, gave many examples. One example will suffice to indicate his point.

DR. BLAIR: This chemical substance has one chemical name, is that correct?

DR. WILSON: Yes, sir.

DR. BLAIR: Could you, in order to make the record complete, supply us with that chemical name?

DR. WILSON: This is alfaphenoxyethyl penicillin potassium.

DR. BLAIR: This is the one chemical name denoting the chemical substance of this new synthetic penicillin derivative?

DR. WILSON: There is a more complicated name, but that is a pretty good one.

DR. BLAIR: The chemist knows, presumably, that this name means that substance?

DR. WILSON: Yes, sir.

DR. BLAIR: Now, there are for that substance three generic names?

DR. WILSON: This is included. There are two others.

DR. BLAIR: There are two other generic names. One of them is?

DR. WILSON: Potassium penicillin 152, and phenethicillin potassium.

DR. BLAIR: And there are five trade [brand] names?

DR. WILSON: Yes, sir.

DR. BLAIR: Syncillin, Darcil, Alpen, Chemipen, Dramcillin-S, and Maxipen. So there here is the structure: one chemical name, three generic names, approximately five trade names?

DR. WILSON: Yes, sir.[5]

Dr. Solomon Garb, Professor of Pharmacy at Albany Medical College, tried to indicate to the Subcommittee that brand names in the pharmaceutical industry were quite different from brand names in most other industries. He used beans as his illustration. Suppose a grocery carried baked beans by Heinz, Libby and Campbell companies. Then suppose these companies decided to label and sell their beans in the same manner that the drug manufacturers labeled and sold their drugs. Beans would no longer be called beans for each manufacturer would re-name the product. You could have Heinz "Sneabs," or Campbell's "Nabes," or Libby's "Lo Cals." Each year as other companies added baked beans there would be additional names. To keep up with all the new names of the multiplicity of new products would be almost impossible. Since a similar situation existed in the drug industry, it had become an almost impossible task to keep up

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[5] Hearings, Part 21, p. 11524.

with new drugs.[6]

When Captain Herman R. Fahlbusch of the Military Medical Supply Agency testified before the Subcommittee, he presented a chart which showed, among other information, that the government purchased reserpine tablets (tranquilizers) under the following trade marks: Serpasil, Rau-Sed, Sandril, Reserpoid, Roxinoid, and Serpanray.[7]

Various recommendations were made to alleviate the confusion of the many names of a single drug. Some witnesses suggested Congress make laws to force simplicity and clarification; others suggested meetings be held under sponsorship of the United Nations or World Health Organization for a world wide system to be formulated. Others wanted the American Medical Association to take a more active role in the simplification of generic names. There could be no doubt that all who testified regarded the way drugs received both generic and brand names to be complex and needlessly confusing.

There were three official publications which established the official drug standards. They were: (1) The United States Pharmacopoeia 15, called the U. S. P. (2) the National Formulary, called the N. F. and the New and Nonofficial Drugs, called the N. N. D., an annual publication of the Council on Drugs of the American Medical Association. Dr. Lloyd C. Miller, director of the U. S. P.,

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[6]Hearings, Part 18, p. 10481.

[7]Hearings, Part 21, p. 11551.

testified that the U. S. P. had been recognized since 1906 as providing the standards of strength, quality, and purity for the articles that it described and defined, that the standards set constituted the basis for the enforcement of the Food, Drug, and Cosmetic Act. Therefore, any manufacturer of drugs had a standard to meet and any purchaser of drugs could test them against the standards set out by the U. S. P. or the N. F. or the N. N. D. It was, in fact, illegal to put drugs on the market which failed to meet the U. S. P. standards. Testimony of reliable witnesses, however, suggested that it was not safe to prescribe drugs by generic name. How would Dr. Miller answer such testimony when he had stated that drugs on the market had to meet strict standards to be on the market. Dr. Miller stated that the U. S. P. set standards but was in no way policing agency. Policing was done by the Food and Drug Administration.[8]

If the drugs on the market met the U. S. P. standards and had the same generic name, irregardless of the various trade names, were they then identical? Dr. Charles O. Wilson said a positive No.

> DR. WILSON: Prednisone is a generic name for a pure chemical compound. Meticorten by Schering is a tablet containing prednisone. . . Just any tablet of prednisone is not equivalent to Meticorten tablets any more than just any beefsteak is equivalent to a Kansas City beefsteak.
>
> SENATOR HRUSKA: Or an Omaha beefsteak, Doctor.

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[8] Hearings, Part 21, pp. 11665-11669.

> DR. WILSON: Yes. It is not the generic name, but the dosage form that is the key. A tablet of generic name A, manufactured by X, is not equivalent to a tablet of generic name A, manufactured by Y. However A is the same compound.[9]

Other witnesses agreed that this was true. Some indicated it should not be so and many indicated that they would be glad to have prescriptions filled by generic name by any manufacturer that they had found to be completely reliable.

Was every drug manufacturer reliable? The answer was no. Not one witness, even those who most favored using generic names in writing prescriptions, would testify as to the reliability of the thirteen hundred drug manufacturers in the United States. Solomon Garb who strongly advocated the use of generic names also advocated a system of continuous plant inspection by the government similar to the inspection of meat. In his opinion any physician could then prescribe by generic name without reluctance.[10]

Dr. Alek A. Rozenthal, a professor of economics, reported in an article in May of 1960 that England had had similar problems to those in the United States with reference to the names of drugs. According to his report, a study was undertaken by the Hinchliffe Committee set up by the British Minister of Health in June of 1957.

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[9] Hearings, Part 21, p. 11522.

[10] Hearings, Part 18, p. 10480.

The committee report had appeared in May of 1959. Rozenthal stated:

> Many of its recommendations are fully applicable to our own situation. For example, the committee found that when doctors prescribe by generic rather than by trade names the cost of drugs could be reduced by at least one-fourth. It urged that drug ads give not only the generic name but also the price of the drug. . . .[11]

Was it true that money could be saved by use of generic name prescribing? The answer shown by the witnesses was yes. While it was true that some companies had maintained the same price for certain drugs for long periods of time, it was equally true that in the case of many drugs there was wide variation in prices. This fact was revealed especially in the figures of government or large hospital buying. A Military Medical Supply Agency chart showed cortisone acetate tablets for the same quantity priced from $5.70 to $13.70 and prednisolone tablets priced from $116.00 to $198.33 by various drug manufacturers.[12] By using its system of plant inspection and drug testing the government was able to test the quality of the drugs purchased, therefore the government bought only by generic name.

Some hospitals also were able to save money by buying by generic name. For example Dr. August H. Groeschel, Associate

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[11] "The Strange Ethics of the Ethical Drug Industry," Alek A. Rozenthal, Harper's Magazine, Vol. 220 (May, 1960), p. 82.

[12] Hearings, Part 21, p. 11557.

Director, The New York Hospital, stated that they had a formulary which saved money. His testimony stated:

> DR. GROESCHEL: We purchase approximately a half million dollars worth of drugs every year. I asked him [the pharmacist] what it would cost the hospital if we were not to operate our formulary and were forced to use trade names in the manner which has been pushed by the National Pharmaceutical Council. He told me that conservatively it would cost us another quarter of a million dollars a year. This is a lot of money.[13]

Since the formulary system saved money, how did the formulary system work? All physicians who practiced at the New York Hospital used the list of drugs in the official publication, or Formulary. The listed drugs had been carefully approved by the hospital's pharmacy and therapeutics committee in cooperation with the medical staff. A physician who was accepted for practice in the New York Hospital agreed in writing to use the Formulary for prescriptions for ward patients and clinic outpatients. If the doctor wished a prescription to be filled with a specific brand-named drug for his private patients, he could indicate his directions for a patient on the prescription and any additional price would be charged to the private patient.

Dr. Walter Modell of Cornell University Medical College, which was affiliated with the New York Hospital, stated that the hospital Formulary stocked three hundred fifty nine drugs, while a hospital

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[13] Hearings, Part 21, p. 11575.

pharmacy not controlled by a system similar to the New York Hospital's system would have to stock approximately 2500 different drug names.

Modell made a forceful presentation for the use of generic names to eliminate the complexity of the brand names, but especially because he believed the many names caused enough confusion to create some danger to a patient. Modell also testified that drugs that had the same generic name were identical because they had to have the same standards as provided by law. Questioning by the Subcommittee brought out the fact that the New York Hospital had excellent facilities through Cornell University to run tests on drugs to check on the quality. Dr. Modell also stated that in his opinion the F. D. A. was not policing the drug manufacturers quite enough and said, "it is possible without good control on the part of the manufacturers for some lots to get through that are not up to U. S. P. standards."[14]

The National Pharmaceutical Council and the Pharmaceutical Manufacturers Association were absolutely against the use of generic names. Except in a few cases, they considered the filling of a prescription with a generic-named drug in place of a trade-named drug to be illegal, unethical, and potentially dangerous. Dr. Austin Smith, president of the Pharmaceutical Manufacturers Association, reminded the Subcommittee that drugs manufactured within a state to supply a local

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[14] Hearings, Part 21, p. 11625.

area and not transported across state lines were not under the jurisdiction of the F. D. A. Dr. Smith's testimony further indicated that where drugs were bought by the government or agencies having methods of testing, there was no objection to the formulary system. In cases where formularies were set up to buy by generic name only to save money, or in formularies where generic-named drugs were used to fill prescriptions that called for brand-name, the representatives of the drug manufacturers were very positive in their opinions that this should never be allowed.

Testimony indicated that the National Pharmaceutical Council had worked extensively with the secretaries of the state pharmacy boards while advocating a program of not allowing prescriptions to be filled by any substitution. In effect, this stand very often put the drug manufacturers in a position where they appeared to be fighting the hospital formularies. Representatives of the drug manufacturers had sought to influence the state boards of pharmacy to pass legislation or regulations which would allow no brand substitution. Their success in this undertaking is indicated by the following exchange between Paul R. Dixon of the Subcommittee staff and Newell Stewart, executive vice president of the National Pharmaceutical Council:

MR. DIXON: You didn't consider what you were doing lobbying?

MR. STEWART: No, sir. We weren't appearing before any legislative body.

MR. DIXON: But, you talked to the key people, did you not?

MR. STEWART: Not in the legislature; no, sir.

MR. DIXON: But in the pharmacy boards?

MR. STEWART: Oh, yes.

MR. DIXON: That would make it a request of the legislative body, would it not?

MR. STEWART: The boards generally don't make requests of legislative bodies. That is generally done by the State associations. The boards of pharmacy are an instrumentality of the State.

MR. DIXON: But you talk to the State associations.

MR. STEWART: Certainly, yes.

MR. DIXON: When you wanted this legislation passed, you went to State associations and urged them to do it; is that correct?

MR. STEWART: That is right, and still do.

MR. DIXON: And you are still doing it. As I understand it, you have been successful in 44 States; is that correct?

MR. STEWART: Yes, sir. I think we have been quite successful in the operation.[15]

The National Pharmaceutical Council was composed of twenty-two drug manufacturers; nine of these appeared to testify during the four product hearings. Newell Stewart took the witness stand late in the morning of May 13, 1960. With the assistance of William Woods, Breck P. McAllister, Carl K. Raiser, and Wilbur Powers who accompanied Stewart, testimony was completed at 5:10 P.M. This

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[15] Hearings, Part 21, p. 11725.

is cited because the Pharmaceutical Manufacturers Association received somewhat different treatment (as compared to other witnesses) by being forced to testify at night and into the early morning hours.

Dr. Austin Smith, president of the Pharmaceutical Manufacturer's Association testified on February 23 and 24 and again on April 20, 1960 at the following times:

February 23: 9:30 A.M. - 10:45 A.M.
10:40 P.M. - 1:55 A.M.
February 24: 9:40 A.M. - 10:35 A.M.

April 20: 10:15 A.M. - 5:30 P.M.

These hours reflect part of the controversy which continued during the hearings between Senator Kefauver and Senator Dirksen who stated he could not be on the floor of the Senate during the civil rights debates and in the hearings at the same time. He made it quite clear he did not approve of night meetings of the Subcommittee. Senator Kefauver used his perogative as chairman to call a meeting 20 minutes after the recess of the Senate. Therefore on February 23 Dr. Smith was on the witness stand until 1:55 A.M. There was widespread criticism of night sessions by the minority members of the Subcommittee and others.[16]

Austin Smith brought to the Subcommittee voluminous material. Part 19 of the printed hearings consists of 331 pages plus appendix.

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[16] New York Times, March 29, 1960, p. 20.

Of these 331 pages, 162 pages were reports, charts, exhibits and other material presented by Smith. Since there was hardly a way, even indirectly, that Austin Smith could be accused of disobeying antitrust laws or establishing high drug prices, Senator Kefauver was unable to place him in the defensive position that some of the drug manufacturers had occupied. Perhaps Smith's immunity to this type of attack was the reason that Kefauver questioned Smith on an article he wrote for the Journal of the American Medical Association dated February 12, 1944--sixteen years previous to the drug hearings. At the time of publication of this article, Smith was working for the American Medical Association. The article contained statements which indicated Smith was in favor of the use of generic names rather than brand names. Smith attempted to explain that the drug industry had changed greatly in the sixteen years from 1944 to 1960. Kefauver suggested that when Smith had changed jobs and started working for the drug manufacturers he had changed his mind. To this Smith replied:

> I think Mr. Chairman, we might make one thing clear right now. For years, since I have been in professional practice, one type or another, my time and my knowledge have been purchasable, but I never have. When I was with the American Medical Association I practiced certain beliefs, and I still do. And those beliefs are that we should provide the best medical care we can at the most reasonable price we can. Today the beliefs still hold, and so far as I can see, from the industry standpoint, their objectives are in line with the objectives of the American Medical Association today . . . .[17]

[17] Hearings, Part 19, p. 10909.

In criticizing some material prepared for presentation by the staff of the Subcommittee, Smith stated:

> Frankly, gentlemen, I find it incredible that such material can be seriously presented to a subcommittee of the U. S. Senate as straightforward fact which you are expected to use in determining whether an industry is properly observing the antitrust and monopoly laws.[18]

When Seantor Kefauver alleged that the drug advertising of some of the membership of P. M. A. was misleading, his protagonist became John K. Worley, General Counsel of P. M. A.

> SENATOR KEFAUVER: Your statement of principles sounds good, but you do not apply them. You do not do anything about them. The best statement in the world is not going to help at all unless you do something about it. I cannot find that you have done anything about your statement.
>
> MR. WORLEY: Are you advocating that we take unlawful steps? If we are going to change our procedures, we would like to have some legislative support, to go out and police such unethical conduct as is mentioned here.[19]

Another of the Smith versus Kefauver verbal battles was over research expense and percentage of profit. There was also much discussion as to whether or not the drug industry was truly competitive. Finally Dr. Smith said:

> It seems to me that in their zeal to find fault with the drug industry some of our detractors are trying to have their cake and eat it too. . . . You cannot

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[18] Hearings, Part 19, 10839.

[19] Hearings, Part 19, Page 10923.

conclude that this is a highly competivive monopolistic industry.[20]

Dr. Smith presented a large amount of material to the Subcommittee, however, it could not be said that much information was added by his testimony. While he sat in the witness chair he lectured the Subcommittee and its chairman frequently and lost no opportunity to defend or to exault the Pharmaceutical Manufacturers Association.

Other witnesses appearing during these three hearings had various suggestions to put before the Subcommittee. Among these were the recommendations of Dr. James E. Bowers of Salt Lake City, Utah. He suggested that a drug control board be established, that the mailing of samples be stopped, that no lower rate be set for advertising mail than for any other mail, and that a way be found to reduce the sending of circulars in the mail.

Dr. Frank H. Meyers of the University of California recommended that the F. D. A. pass on the efficacy as well as the safety of a drug. It was generally conceded in other testimony that tests for efficacy would be very difficult and should be in the hands of impartial professionals rather than a government agency. A second recommendation made by Meyers was to place more scientific material on a new drug in the hands of doctors before a drug was marketed.

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[20] Hearings, Part 19, p. 10833.

Dr. Hans Popper of New York's Mount Sinai Hospital suggested that the F. D. A. be given more control over the release of drugs even after they were on the market as well as demand more elaborate laboratory techniques to attempt to foresee undesired side effects of drugs. Popper also suggested that new drugs not be allowed on the market until the Council on Drugs of the American Medical Association published its statement even though it would delay the marketing of a new drug from six months to two years.

Dr. Haskell J. Weinstein, director, Chest Hospital, City of Hope Medical Center, Duarte, California, thought the F. D. A. should determine efficacy of drugs before they were released, or if not the F. D. A. he suggested the National Institute of Health. He was of the opinion that patent laws should be revised to encourage more liberal licensing by patent holders. Making the trade name secondary to the generic name was also advocated by Dr. Weinstein.

Dr. Weinstein especially deplored the way drug manufacturers employed poor medical students as advertising men. He wanted the government to institute a program to help needy medical students with tuition money.

It could readily be observed that while many topics were drug related, witnesses spent much of the Subcommittee's time on topics far afield from prices in the drug industry.

## Chapter IV

## DR. HENRY WELCH AND THE FOOD AND DRUG ADMINISTRATION

If Senator Kefauver wanted to keep the news services and the public interested in an investigation of the drug industry, his timing would appear to have been excellent. Following the relatively quiet hearings in early May of 1960 on generic and brand names where the Subcommittee encountered much honest differing of professional opinion, Senator Kefauver began a probe of the activities of Dr. Henry Welch. Even Time magazine which apparently ignored most of the proceedings, placed a picture of Dr. Welch with a lengthly news article in its May 30, 1960 issue.[1]

Three witnesses gave sworn testimony because of the serious nature of the accusations against Dr. Welch, although they were the only sworn witnesses during the drug hearings. Their testimony appeared in the volume of hearings relative to Dr. Welch called Part 22 of the Administered Prices in the Drug Industry. The Appendix, or Part 23, which is the last volume of the published

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[1] "A Profitable Sideline," Time, Vol. 75 (May 20, 1960), p. 36.

series of the drug investigation, contains 1,395 pages, most of which is related to Dr. Welch's activities while holding a supervisory position with the Food and Drug Administration. Yet Dr. Welch never appeared before the Subcommittee.

Henry Welch had received a Ph.B. from Brown University in 1925 and a Ph.D. from the School of Medicine of Western Reserve University in 1930. After working for the Connecticut State Department of Health, he became the assistant chief of the division of bacteriology for the Food and Drug Administration. From 1938 to 1942 Dr. Welch served as chief of the microanalytical division and in 1942 became the director of the division of antibiotics, which position he held when the drug investigation began. In 1945 he had begun some writing and editing in addition to his government duties.[2]

At 10:15 A.M. on Tuesday, May 17, 1960 Senator Kefauver called the meeting of the Subcommittee to order and made a brief statement. He indicated his concern over an article published in the February 7, 1959 issue of the Saturday Review by Science Editor John Lear entitled "The Certification of Antibiotics." The article had stated that Dr. Henry Welch who was the Director of the Division of Antibiotics of the Food and Drug Administration was also the editor of

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[2] Who's Who in America, Vol. 30, 1958-1959, (The A. N. Marquis Company, Chicago, Illinois) p. 2931.

two medical journals which received substantial income from drug advertising and from sale of reprints of articles published in the journals. The reprints were usually bought by the drug industry who used thousands of copies for distribution. Mr. Lear had brought up the question of conflict of interest. In his article Mr. Lear also stated he had had an interview with Dr. Welch who sharply refused to reveal any information regarding his income from the journals. Welch had stated to Lear that he had obtained the approval of the Commissioner of the Food and Drug Administration and the executive officer of the Department of Health, Education and Welfare before engaging in his writing and editing activities.[3]

Since the Subcommittee was holding a drug investigation at the time Mr. Lear's article was published, Senator Kefauver and the staff were quite interested in the question of conflict of interest. In April, 1960 Dr. Welch was served with a subpoena which required him to produce relevant documents which were in his possession or under his control in any capacity other than as an employee of the government of the United States. Subpoenas were also served on MD Publications, Inc. which owned the two journals edited by Dr. Welch and on the owner of MD Publications, Inc. who was Dr. Felix Marti-Ibanez. Dr. Marti-Ibanez was also the co-owner with Henry Welch

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[3]John Lear, "The Certification of Antibiotics," Saturday Review, Vol. 42 (February 7, 1959), p. 36.

of Medical Encyclopedia, Inc. He was served with a subpoena requiring his testimony before the committee.

Both of these executives were too ill to appear. Two physicians had stated that Dr. Marti-Ibanez was afflicted with glaucoma and that emotional stress and tension had been known to aggravate glaucoma; they asked that he be excused. Counsel for Dr. Welch stated he suffered from a serious heart condition which might be aggravated if he were required to appear to testify.

In his opening remarks Senator Kefauver stated that Arthur S. Flemming, Secretary of Health, Education and Welfare had been asked to furnish documents for a period beginning in 1950 and ending in May of 1960 to show relevant information regarding the problems raised by Dr. Welch's outside activities.[4]

After the introduction and submission for the record of Lear's article and various other documents, Senator Kefauver noted that Dr. Henry Welch was represented at the hearings by Michael F. Markel and Dr. Marti-Ibanez was represented by H. Graham Morrison. The Chairman was then ready to proceed; however Senators Dirksen and Hruska raised vigorous objections. Senator Hruska stated:

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[4] Hearings, Part 22, pp. 11889-11892.

> Mr. Chairman, I would like for the record to show that for the first time this morning there has been handed to us by staff members a collection of exhibits, letters, correspondence, and other documents. They are in two parts. I imagine they measure about 3 inches in thickness.
>
> We are members of the same committee. I presume this material has been gathered and in the process of being gathered for a long time.[5]

Senator Hruska then spoke of the seriousness of testimony in a public hearing against Dr. Welch who was a government executive. He added:

> We are not a prosecuting body. I hope we are not a prosecuting body, although I have my doubts at times.[6]

Next Senator Dirksen reminded the committee that Dr. Welch had received permission from his superiors for editorial activities. Since that was ten years previous, he felt the committee could wait a little longer to be fully prepared. As usual Senator Kefauver was ready to overrule the minority, however at this point an off-the-record discussion took place, although this was somewhat unusual. One may infer that Senator Kefauver did not have the support of the majority behind him in this instance for he recessed the hearings

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[5] Hearings, Part 22, p. 11905.

[6] Hearings, Part 22, p. 11906.

at 11:35 A.M. to reconvene on the following morning.

Later comments from Senator Dirksen revealed he worked all the afternoon of May 17, 1960, a large part of the evening and arose at half past five the following morning to review the voluminous amount of material handed to him. He was, therefore, ready when Mr. Dixon began on the morning of May 18, 1960 to present the data collected on Dr. Welch. Senator Dirksen refused to accept Dixon's prepared procedure and, for once, forced the Staff Director to put the material in the chronological order which the Senator from Illinois thought was the only logical or ethical way to present the case.[7]

Two documents were of particular importance and much of the testimony on May 18, 1960 hinged on these. The first was a confidential memorandum dated July 24, 1956 from Henry Welch to Mr. Larrick. Mr. Larrick, the Commissioner of Food and Drugs, had been with F.D.A. for thirty-seven years, and was Dr. Welch's superior. The memorandum explained in detail all of Dr. Welch's outside business activities including his editorship of two medical journals. For his work Dr. Welch stated he received an honorarium.[8]

On May 14, 1960 the New York Times had stated:

> Last October 14 Secretary Arthur S. Flemming of the Health, Education and Welfare Department said

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[7] Hearings, Part 22, pp. 11923-11926.

[8] Hearings, Part 22, p. 11942.

> Dr. Welch's activities had been taken on with the approval of his supervisor and "I never heard anyone intimate to me that there was ever any actual conflict of interest."[9]

After a considerable discussion as to what the honorarium was, Senator Dirksen concluded that it was a gratuity which is expected but which the payer does not have to pay, but which is included in a tax return. Dr. Welch's attorney, Michael Markel, was allowed to make a statement:

> There is no legally enforcible obligation between Dr. Welch and the MD Publications, and I am terribly anxious that the record be clear on that.[10]

The second document was presented by Francis Engelstad, certified public accountant from the General Accounting Office, Washington, D. C., on loan to the staff of the Subcommittee. This was a chart showing the total earnings paid to or accrued to the credit of Dr. Welch from MD Publications, Inc. and from Medical Encyclopedia, Inc. from 1953 through March, 1960. The total was $287,142.40.

An abbreviated break-down of the figures revealed the following:

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[9] New York Times, May 14, 1960, p. 23.

[10] Hearings, Part 22, p. 11946.

MD Publications, 1953 through 1959

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|---|---|
| Sale of advertising | $309,898.00 |
| less discount | 44,317.00 |
| | 265,581.00 |
| Payments to Dr. Welch @7-1/2 percent | 20,294.43 |
| Sale of reprints @ 50 percent | 173,293.02 |
| Sale of extra pages @ 25 percent | 9,726.91 |
| Settlement on British edition of journal | 18,972.89 |
| Commission on bulk sales | 1,729.45 |
| | 224,016.70 |
| Received from Medical Encyclopedia | 36,750.00 |
| Add 1/2 of net worth of Medical Encyclopedia, Inc. belonging to Dr. Welch's 1/2 interest in the corporation | 26,375.70 |
| | $287,142.40[11] |

Subsequent testimony revealed that on October 12, 1959 Mr. Larrick reported to Secretary Flemming that Dr. Welch would resign his editorial positions, that Medical Publications, Inc. would discontinue publishing any other material for profit using information made available to the public by the government.[12]

It was obvious from later testimony that the amount of money received by Dr. Welch as his honorarium was surprising, very surprising, to Larrick and to Secretary Flemming. Dr. Welch was

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[11] Hearings, Part 22, p. 11947.

[12] Hearings, Part 23, Appendix, p. 12677.

tried and found guilty of receiving a large amount of money, the receipt of money having been approved by his superiors who thought he was receiving an honorarium; however they had not inquired as to the amount.

Since Dr. Welch did hold two jobs at the same time, did a conflict of interest actually exist? The Subcommittee staff attempted to prove a conflict of interest did, in fact, exist and centered their presentation on a particular piece of advertising for a particular company. This testimony was presented two weeks later.

On June 1, 1960 the three witnesses who had been subpoenaed and sworn in were as follows: (1) Dr. Gideon Machumi, formerly a medical copywriter in the advertising department of the Pfizer Corporation; (2) Warren Kiefer, public relations man for Pfizer International from 1954-1957; (3) Joseph R. Hixson, employed from April, 1956 to August 1956 as manager of pharmaceutical public relations for Pfizer Laboratories. Although Senator Hruska vigorously objected to the proceedings and to the swearing in of witnesses, he was totally ignored by Senator Kefauver who, having allowed Senator Hruska to speak, then said, "You may proceed, Mr. Dixon."[13]

As the story of the witnesses unfolded under questions and cross-

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[13] Hearings, Part 22, pp. 11965-11966.

questions, it was revealed that Dr. Welch had submitted a speech he planned to make at an annual drug symposium to Pfizer drug manufacturers for reading and suggestions. Persons employed by Pfizer had included a few words in the speech suggesting that our country was approaching a third era in antibiotic therapy. Pfizer had a new drug named Sigmamysin which they introduced immediately following the symposium using the phrase "a third era in antibiotic therapy" for promotional purposes.

No one was able to prove that Dr. Welch knew of the promotion or that he knew Pfizer would use words from his speech for advertising purposes. It could be inferred he was using his job with the government to promote certain drugs and promote advertising in medical journals in which he had a financial interest. The inference was equally plain that Senators Dirksen and Hruska considered the matter outside the jurisdiction of the Subcommittee on Antitrust and Monopoly.

The next day the Subcommittee under Senator Kefauver's leadership again found itself on page one of many of the newspapers of the nation. Dr. Barbara Moulton, whose medical background was extensive and impressive, had spent five years as a member of the staff of the Bureau of Medicine of the F.D.A., first in the New Drug Branch and then in the Drugs and Devices Branch. She had resigned on February 16, 1960 stating she was not in sympathy with the

policies of the Bureau. It was Dr. Moulton's indictment of her previous employer which was startling. Others had said the F.D.A. was not discharging its responsibilities properly in several ways, however Dr. Moulton made the following statement:

> I believe also that hundreds of people, not merely in this country, suffer daily, and many die because the Food and Drug Administration has failed utterly in its solemn task of enforcing those sections of the law dealing with the safety and misbranding of drugs, particularly prescription drugs.[14]

Dr. Moulton, after further testimony, presented her recommendations: (1) a law for the efficacy as well as the safety of drugs be enacted, (2) therapeutic devices should come under the provisions of the law, (3) household chemicals should be required to be adequately tested and labeled, (4) a law requiring preliminary approval of pharmacologic data before clinical testing could be started. On this matter Dr. Moulton said, "It is perfectly legal to conduct experiments directly on human beings without previous testing on animals."[15] Fifth, drug manufacturers should be licensed, (6) one agency should have enforcement power to solve the split between the F.D.A., the F.T.C. and the Post Office Department, (7) a legal limit should be

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[14] Hearings, Part 22, pp. 12019-12021.

[15] Hearings, Part 22, p. 12041.

set on advertising expense for a prescription drug, (8) remove medical discussions on drug labeling from courts of law to medical tribunals. With regard to this last proposal, Dr. Moulton remarked:

> Medicine and law do not mix well. In medicine there are few blacks and whites, nor can one demand proof beyond a reasonable shadow of doubt. Furthermore neither diseases or their treatment remain static. The best medical treatment in one decade may represent malpractice in the next.[16]

Dr. Ernest O. King followed Dr. Moulton to the witness stand. He had been part of the F.D.A. staff from 1939 to 1957 and recalled the tragedy of over 100 deaths from a sulfanilamide drug which had caused the passage of the Food, Drug and Cosmetic Act of 1938. In sharp contrast to the testimony of the previous witness, Dr. King praised the work of the F.D.A. and indicated he believed a group of medical men dedicated to the public good had been doing a fine job. He recommended a larger staff and better compensation to keep well qualified personnel. He did agree with Dr. Moulton's idea of putting government enforcement under one agency; however, he thought Congress could not place a limit on drug advertising unless Congress felt it could place a limit on any or all advertising.[17]

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[16] Hearings, Part 22, p. 12043.

[17] Hearings, Part 22, pp. 12079-12085.

Finally, on June 3 and June 6, 1960, George P. Larrick who had been head of F.D.A. for thirty-seven years, and Arthur S. Flemming, Secretary of Health, Education and Welfare, were asked for their testimony.

Secretary Flemming had the difficult task of coming before the Subcommittee following the revelations of Dr. Welch's private income and the scathing denunciation by Dr. Moulton. His first words were to assure the Subcommittee something was being done. He informed them that he had appointed an outstanding committee of scientists to review the policies, procedures, and decisions of the division of which Dr. Welch formerly had been the director, as well as those of the New Drug Division where Dr. Moulton had served. He promised the report of the scientific committee would be available to Senator Kefauver's committee.[18]

Secretary Flemming stated that on October 14, 1959 he had directed Dr. Welch to resign his editorial positions and that the publishing house in which Dr. Welch had a financial interest would discontinue certain publications. Dr. Welch assured his superior, Mr. Larrick, he had complied with the directions as of January, 1960. On May 11, 1960, Henry Welch filed his application for retirement on grounds of disability due to a cardiac condition. On

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[18] Hearings, Part 22, pp. 12079-12085.

May 18, 1960 the drug hearings had revealed income data on Dr. Welch. Secretary Flemming stated that Dr. Welch's actions could not be justified on the basis of prior approvals as he had stated in the fall of 1959. Therefore, Secretary Flemming and Commissioner Larrick demanded Dr. Welch's immediate resignation; he resigned on May 19, 1960.

Secretary Flemming assured the Subcommittee appropriate steps were being taken to prevent future activities that would involve a conflict of interest or remuneration beyond that authorized by law.[19] Further testimony from Secretary Flemming was of a general nature and indicated the need for legislation granting broader authority for inspection of drug manufacturing plants and testing laboratories, better reporting of effects of a new drug, more personnel in the F.D.A., certification of all antibiotics and clarification of enforcement procedures between F.D.A. and F.T.C.

George P. Larrick had begun his career as a Food and Drug inspector in 1923 in Memphis, Tennessee and had been appointed Commissioner of Food and Drug in 1954. His prepared statement was fifty-seven pages in length and informed the committee of the work of the F.D.A. in the ethical drug area.

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[19] Hearings, Part 22, p. 12088.

On June 6, 1960 Senator Kefauver again had Secretary Flemming and Commissioner Larrick on the wtiness stand, but this time he wanted to know very specifically how Dr. Welch could have carried on such extensive outside activities over a period of many years without more knowledge of his activities by his superiors. This line of attack was not appreciated and voices tended to be raised as the hearings proceeded. There was only one explanation and whether Senator Kefauver liked it or not, and whatever he alleged about the F.D.A., the explanation had to be accepted that Henry Welch had been a trusted employee in a top position for twenty-two years. At no time was there any suspicion that what he was doing constituted a conflict of interest, nor was he suspected of receiving payment except of a negligable amount. Only in the future could Secretary Flemming and Commissioner Larrick apply the lessons learned from the past of Dr. Henry Welch.

## Chapter V

## SUMMARY AND CONCLUSIONS

The Senate of the United States was presented with a 261 page report containing three reports from the Subcommittee on Antitrust and Monopoly stating its conclusions on the drug hearings. The majority report found (1) that the drug manufacturers were setting prices at excessive levels, (2) that new legislation was needed to amend antitrust laws and patent laws to increase competition, (3) that the Food, Drug and Cosmetic Act needed to be amended in a number of ways further to protect the public. Senator Dirksen and Senator Hruska wrote a rebuttal "calling the Democrat's views a monstrosity."[1]

Senator Alexander Wiley, (Republican, Wisconsin) wrote his own report and requested his views be printed in the Congressional Record. Part of his conclusion was as follows:

> After more than two years of investigation and hearings, the Senate Antitrust and Monopoly Subcommittee has produced its report on the drug industry. . . . It is noteworthy that while the report analyzes most carefully the various aspects and practices of pharmaceutical

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[1] New York Times, June 28, 1961, p. 19.

> research, production, promotion, and sales--it nowhere concludes that these practices are in any way in violation of either the letter or the spirit of our antitrust and monopoly laws. . . .
>
> The essence of the main complaint against the drug industry was the fact of the industry's success.[2]

Senator Wiley urged careful consideration of any government action, yet he made it a part of the record to state free enterprise does not mean selfishness and "economic freedom is justified only as a tool for improving the interests of the public at large."[3]

On April 12, 1961 Senator Kefauver introduced a drug bill, called S. 1552, which was simultaneously introduced by the Hon. Emanuel Cellar, (Democrat, New York) in the House of Representatives. Among the large number of proposals were the following: (1) restore free competition in drug patents, remove various licensing agreements and private arrangements, (2) stop patents on drugs that are only combinations of existing drugs and stop patents on molecular or other modifications of an existing drug, (3) change exclusive use of a patent from 17 years to 3 years (4) require all drug manufacturers to be licensed by the federal government to meet certain standards, and to be subject to inspection, (5) labeling should show license

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[2] U.S. Cong. Rec., 87th Congress, 1st Session, Vol. 107, Part 16, p. 21100.

[3] U.S. Cong. Rec., 87th Congress, 1st Session, Vol. 107, Part 16, p. 21101.

number of manufacturer, generic name of drug and date when the drug no longer could be expected to produce the intended result (6) more information to be furnished to doctors on drugs, especially new drugs (7) extension of regulations on certain antibiotics to all antibiotics, (8) establish a simplified system of giving drugs official names which would not interfere with trade names, (9) require F.D.A. to pass on efficacy as well as safety of drugs.[4]

S. 1552, called the Drug Industry Antitrust Act, was the subject for hearings during 1961 and early 1962. Seven volumes were published covering five hearings as follows:

Part 1 - A.M.A. and Medical Authorities
Part 2 - A.M.A. and Medical Authorities, Appendix
Part 3 - Patent Provisions
Part 4 - Pharmaceutical Manufacturers Association
Part 5 - Government Agencies and Organizations
Part 6 - Advertising Provisions
Part 7 - Advertising Provisions, Appendix[5]

Between September of 1960 when the Administered Price hearings of the drug industry ended, and October 13, 1962 when a compromise version of the drug industry antitrust bill finally received President Kennedy's signature, the drug industry and related problems brought

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[4]U.S. Cong. Rec., 87th Congress, 1st Session, Vol. 107, Part 5, pp. 5638-5642.

[5]Hearings before the Subcommittee on Antitrust and Monopoly of the Committee of the Judiciary, United States Senate, First Session, Eighty-Seventh Congress, Pursuant to S. Res. 52 on S. 1552.

to public attention by the hearings reached out into the country in many ways.

Earl W. Kintner, Chairman of the F.T.C., spoke in January of 1961 to a meeting of the Pharmaceutical Advertising Club. He warned that advertising must "avoid misleading implications just as it must avoid explicit falsehoods. Its truth must be as capable of perception by the credulous as it is by the sophisticated."[6]

The F.D.A. established new regulations, and though there was loud complaint from the drug industry, it complied. Among the regulations were the following: (1) full disclosure not only of a drug's uses but also of its possible side effects. Labels were to list use and possible misuse and disclose inactive ingredients and their proportions (2) circulars sent to doctors describing new drugs must contain the drug's hazards, side effects, and precautions (3) a rule compelling drug manufacturers to put control numbers on labels so that a shipment could be traced in case of contamination.[7]

The American Medical Association announced the beginning of a Drug Information Program which would provide a systematic evaluation of new drugs to provide physicians with complete information as soon as a new drug was available for use. The A.M.A. would also publish

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[6]New York Times, January 13, 1961, p. 46.

[7]New York Times, April 16, 1961, Sec. 3, p. 15.

a new source--an annual volume to include authoritative summary reports on drugs and their usage.[8]

New Jersey Governor Robert B. Meyner stated the laws on food and drugs were obsolete and requested a revision of the state's laws and a licensing of all drug manufacturers and wholesalers operating in New Jersey. These laws were later enacted.[9]

In the summer of 1961 the North California Pharmaceutical Association was found guilty in the San Francisco federal court of violating the Sherman Anti-Trust Act by conspiring to fix the retail prices of drugs. This criminal case was the first of its kind brought by the federal government.[10]

The drug industry could rally behind Republicans Dirksen and Hruska to fight the proposed legislation. It also found a champion in Vice President Richard M. Nixon who was guest speaker at a convention of the Pharmaceutical Advertising Clubs of New York, Chicago and Montreal. Nixon defended the pharmaceutical industry and the medical profession. His speech was especially critical of Kefauver's drug bill. He labeled it a punitive measure that would

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[8]New York Times, June 11, 1961, p. 69.

[9]New York Times, January 9, 1961, p. 27 and June 3, 1961, p. 25.

[10]New York Times, June 17, 1961, p. 10.

give too much power to the Secretary of Health, Education and Welfare. He also used it to attack the Kennedy administration as an administration seeking to impose more and more government control on industry.[11]

In a news conference on April 13, 1961 President Kennedy was asked his position on the legislation proposed by Senator Kefauver and Representative Cellar. He said he would be glad to look into the matter, that he might be able to take some executive action, and that the Federal Trade Commission would concern itself with the problem. He stated that Paul Rand Dixon, who had been the counsel for Kefauver's committee, was the new chairman of the F.T.C.[12]

Senator Kefauver's remarks to the Senate on January 31, 1961 indicated further results of the hearings:

> I believe as a direct result of our hearings pharmaceutical companies have reduced their prices as much as 15 percent across the board, which in one year would amount to $45 million.
>
> We find also that states, counties, hospitals, and various other agencies are using formulas [formularies] in the purchase of drugs under generic names as a result of the evidence brought out by the committee, which they say will save them very substantital amounts of money.[13]

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[11] New York Times, June 28, 1961, p. 2.

[12] New York Times, April 13, 1961, p. 18.

[13] U.S. Cong. Rec., 87th Congress, 1st Session, Vol. 107, Part 2, p. 1540.

At the time of these remarks the Senate was in the process of approving an appropriation for continued investigation into Administered Prices. Senator Albert Gore (Democrat, Tennessee) complimented Kefauver on his service to his country as chairman of the committee. Senator Kefauver replied:

> I am certainly grateful to my colleague from Tennessee, and I wish to say that with the buffeting which the chairman and members of this committee must take and the large amount of criticism and pressure as the target of a great many lobbies, and being called ugly names on occasions, it certainly is encouraging to have a few words on the other side. I thank my colleague.[14]

Kefauver would endure more buffeting before S. 1552 was passed. Drew Pearson and Jack Anderson told it this way:

> The big drug companies, if they didn't retain Dirksen's law firm, raised thousands of dollars for his reelection campaign in 1962. While he counted the contributions, he moved into the forefront of the drive to stop Senator Estes Kefauver from tightening Federal regulation of the drug industry. Dirksen permitted drug lobbyists to use his office, write his speeches and prepare his legislation on the subject. Indeed he went so far as to let the drug industry's attorneys represent him in actual Senate negotiations. In 1962 he sent two lawyers for the industry--Lloyd Cutler and Marshall Hornblower--to represent him at a secret legislative meeting in the office

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[14] Congressional Record, 87th Congress, 1st Session, Vol. 107, Part 2, p. 1541.

> of Judiciary Chairman James Eastland (Democrat, Mississippi). Kefauver, the moving spirit behind the drug reform, was not invited. Hornblower and Cutler brought into the meeting with them a draft of a compromise bill that Dirksen later offered, verbatim, as his own.[15]

Senator Kefauver had been a successful lawyer, a graduate of Yale University Law School, before entering Congress. After being seasoned by previous hearings he would know exactly what he was doing in any investigation and why. As in any well prepared case, there surely were few, if any, surprises for the Chairman as testimony was given in the drug hearings. The timing and the manner of presentation of information indicated planning and purpose to make it newsworthy and perhaps sensational. Those who accused Senator Kefauver of seeking publicity knew whereof they spoke. There could be little doubt as the hearings are studied and compared with the press coverage that there were other ways of handling the investigation in a quieter manner. Nevertheless it would appear that it might have been to his personal advantage to have engendered less antagonism.

The Republican minority would be expected to disagree, yet the thundering of Senator Dirksen and Senator Hruska did not appear to be as much Republican thunder as honest disagreement with the methods

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[15]Drew Pearson and Jack Anderson, The Case Against Congress (Simon and Schuster, New York, N. Y., 1968), Chapter 4, Part 2, "Everett Dirksen: The Voice of Righteousness," p. 113.

of much of the proceedings. The drug manufacturers would be expected to regard an investigation with as much distaste as any citizen regards an investigation, yet Senator Kefauver's attacks and insinuations turned their distaste to active dislike and open antagonism.

The drug bill was the last major legislative fight Kefauver waged. On August 10, 1963, less than a year after the passage of the drug bill, Senator Kefauver died. It is doubtful that the drug investigation had any significant influence on his political career. In 1960 while the drug hearings were in progress, the people of Tennessee re-elected him for a third term. There is no way to predict what his political future might have been.

Does the government govern by investigation? To some extent it does; to some extent it must. Yet Congress has few limits. Abe Fortas, a distinguished Washington lawyer with broad experience in regard to Congressional investigations, said:

> There is no standard of judgment, no rules, no traditions of procedure or judicial demeanor, no statue of limitations, no appeal, no boundaries of relevance, and no finality. In short, anything goes; and everything frequently does--and often on television.[16]

Harper's Magazine published an article entitled "In Defense of Congressional Investigations." With reference to the drug

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[16]Abe Fortas, "Outside the Law," The Atlantic Monthly, Vol. 192 (August 23, 1953), p. 43.

investigation it stated:

> It is not necessary to assume that Kefauver has exaggerated nothing in all these matters. Nor is it necessary to suppose that "the interests" have been so evil as his committee has sometimes suggested. The point is this: Nothing would have been done about these prices, in drugs especially, but for the Congressional power to investigate.[17]

Whatever the opposition, whatever the criticism, whatever the political disadvantages or advantages, Senator Kefauver had moved vigorously. He knew his limitations but he used the power of the Subcommittee to bring out the facts. This in itself would arouse the public to take care of those who could not take care of themselves, because there were people too poor to pay and too helpless to speak out and be heard. Relentlessly he pursued a single goal--find a way to bring down the prices of drugs. The publicity, the subsequent actions of drug manufacturers and government agencies and the enactment of the drug bill indicate he achieved a large measure of success. Let it be said of Estes Kefauver: he was a tribune of the people.

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[17] William S. White, "In Defense of Congressional Investigations," Harper's Magazine, Vol. 220 (April, 1960), p. 73.

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Part 17 - Administered Prices in the Drug Industry (Tranquilizers - Appendix)
Part 18 - Administered Prices in the Drug Industry (General: Physicians and Other Professional Authorities)
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(The Food and Drug Administration: Dr. Henry Welch)
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(The Food and Drug Administration: Dr. Henry Welch-
Appendix)
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