~~SG R Subs.~~
Antitrust

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 19, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Resale Price Maintenance Letters

Some time ago we requested the Justice Department to prepare a response to a letter to the President from Congressman Goodling expressing concern about the Antitrust Division's stance on resale price maintenance. Justice has now provided a draft, for your signature. Justice provided the same draft to Legislative Affairs, in response to a request for a draft reply to a similar incoming letter from Congressman Annunzio. Legislative Affairs would like our approval of that draft reply.

I think both replies should be over Ken Duberstein's signature, since they are in response to legislative mail and not particularly within the expertise of our office. I have edited Justice's proposals, and have also prepared a transmittal memorandum to Duberstein.

I have changed Justice's proposed draft in two major ways: First, Justice proposed to send with its letter a copy of its brief filed before the Supreme Court in Monsanto v. Spray-Rite. I think it inadvisable for a reply from the White House to contain such material, or as a general matter to link our response on a general question to a specific, pending lawsuit. I have instead added a sentence on the pro-competitive aspects of resale price maintenance, taken from the brief, to the letter.

I have also deleted a reference to the Antitrust Division's bid-rigging prosecutions. This bit of touting is completely unrelated to the subject at hand.

Attachment

THE WHITE HOUSE

WASHINGTON

July 19, 1983

MEMORANDUM FOR KEN DUBERSTEIN
ASSISTANT TO THE PRESIDENT
FOR LEGISLATIVE AFFAIRS

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Resale Price Maintenance Letters

Some time ago Congressman Goodling and Congressman Annunzio wrote separate letters, to the President and to you, respectively, expressing concern over the Antitrust Division's views on resale price maintenance. The Department of Justice has now provided a draft reply to Goodling, for my signature, and has provided a draft reply to Annunzio to your office. Charlie Ponticelli of your office has asked for our views on the Annunzio reply. Since this is Congressional mail and not particularly within the area of expertise of the Counsel's Office, I think it would be appropriate for both replies to go out over your signature. Our office has, however, edited Justice's proposed replies as indicated on the attached drafts, and we have no objection to them as edited.

FFF:JGR:ph 7/19/83
cc: FFFielding
JGRoberts
Subject
Chron.

DRAFT

Honorable Bill Goodling
House of Representatives
Washington, D.C. 20515

Dear Congressman Goodling:

This is in response to your letter ~~of April 20, 1983~~ to the President expressing your concerns about the Department of Justice's views regarding resale price maintenance.

I understand that William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, wrote to you on this subject on October 27, 1982, in response to a letter you forwarded to the Department of Justice from Mr. Donald W. Harvey, Director of Governmental Affairs, McCrory Stores, York, Pennsylvania. ~~explaining the Division's basic enforcement approach~~. This letter briefly supplements that response.

The position taken by the Department of Justice with regard to resale price maintenance rests on two key considerations: its evaluation of whether or not (and, if so, under what circumstances) resale price maintenance has harmful economic consequences inconsistent with the aims and purposes of the antitrust laws, and the proper allocation of the Department's own enforcement resources.

Based on its analyses and studies, the Department's Antitrust Division has concluded that resale price maintenance agreements differ fundamentally in their economic consequences from price fixing agreements between competitors and other types of cartel arrangements, which in most instances serve no useful economic function whatever and are almost invariably harmful to the public interest. For this reason the courts properly hold price fixing between competitors and other cartel arrangements to be "per se" unlawful under the antitrust laws.

By contrast, resale price maintenance agreements can in a number of situations serve desirable economic ends consistent with the aims and purposes of the antitrust laws. The Department believes that resale price maintenance should not be treated as a "per se" violation of the antitrust laws but should be judged under the "rule of reason" standard applicable to most restrictive business arrangements, including other types of vertical restraints. The present court-developed rule that resale price maintenance is "per se" unlawful has the undesirable consequence that the courts cannot draw a distinction between those arrangements that serve an economically desirable purpose and those that do not: all are condemned alike.

In some contexts, resale price maintenance may be procompetitive and enhance consumer welfare by stimulating interbrand rivalry.

Another undesirable consequence of the "per se" rule as currently applied in resale price maintenance cases is that in many instances dealers whose distributorships have been terminated by a manufacturer, on grounds wholly unrelated to

resale price maintenance, have in court challenged the termination on the asserted ground that the true reason for the termination was the dealer's supposed failure to adhere to the manufacturer's suggested resale prices. In some instances, relying on this argument, dealers have challenged various conventional distribution arrangements, such as drop shipment programs, that by their terms did not deal with resale prices at all. Thus, the "per se" rule has been invoked to jeopardize the legality of business arrangements that in fact do not involve resale price maintenance. Adoption of the "rule of reason" standard would greatly limit such spurious challenges since the challenging party would be required to prove specifically the anticompetitive effects of the alleged restraints.

~~These points are spelled out in greater detail in a brief submitted by the Department of Justice a few weeks ago to the Supreme Court of the United States, in the case of Monsanto v. Spray-Rite, in which the Department urged the Court to adopt the "rule of reason" approach in adjudicating resale price maintenance cases. I enclose herewith a copy of the brief.~~

The second key consideration underlying the Department of Justice's position in this matter is the belief that the Department should concentrate its enforcement resources on challenging activities that have an unequivocally harmful effect on consumers and on the economy, and where enforcement

of the law by private action is often handicapped because the conspiring parties effectively conceal their wrongful conduct. Horizontal price fixing, bid rigging, and other cartel activities fall into this category.*/ ~~For the reasons stated in this letter and in the enclosed brief,~~ the Antitrust Division believes that resale price maintenance does not have an unequivocally harmful effect, but to the contrary can in many instances serve a desirable economic objective. Further, resale price maintenance agreements in general cannot be effectively concealed by the parties, so that in most cases persons adversely affected by such an agreement will be aware of its existence and can seek relief by bringing a private lawsuit, thereby diminishing the need for action by the Department of Justice.

We wish to make clear that the Antitrust Division rejects the view that resale price maintenance should always be deemed lawful. Its position is that the legality of resale price maintenance ought to be determined on the basis of whether or not that practice has, or threatens to have, significant

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*/ The role that the Antitrust Division's enforcement activities have played in directly benefitting the public through the elimination of unlawful bid rigging in the road construction industry, a sector of the economy in which the Antitrust Division has been quite active in recent years, is discussed in a recent article appearing in the Wall Street Journal, a copy of which is enclosed herewith.

anticompetitive effects in the context of the particular factual situation in which it is employed. The same legal principle is currently applied by the courts in adjudicating the lawfulness under the antitrust laws of other types of vertical restraints.

In his public statements Mr. Baxter has repeatedly confirmed the Division's policy on this subject. In line with that policy, the Antitrust Division has not declined to investigate alleged incidents of resale price maintenance where it appears that significant competitive harm may result. When such instances are brought to the attention of the Antitrust Division, it is prepared to review them for possible enforcement action.

We hope that this information~~, and the materials enclosed herewith,~~ will help ~~to~~ clarify the Administration's position on this matter and ~~to~~ dispell any misconceptions that may still exist. Please be assured that we are deeply committed to vigorous enforcement of the antitrust laws against all practices that are truly harmful to consumers.

With best wishes,

~~On behalf of the President, I thank you for writing~~.

Sincerely~~, yours,~~

~~Fred F. Fielding~~
~~Counsel to the President~~
Kenneth M. Duberstein
Assistant to the President

~~Enclosures~~

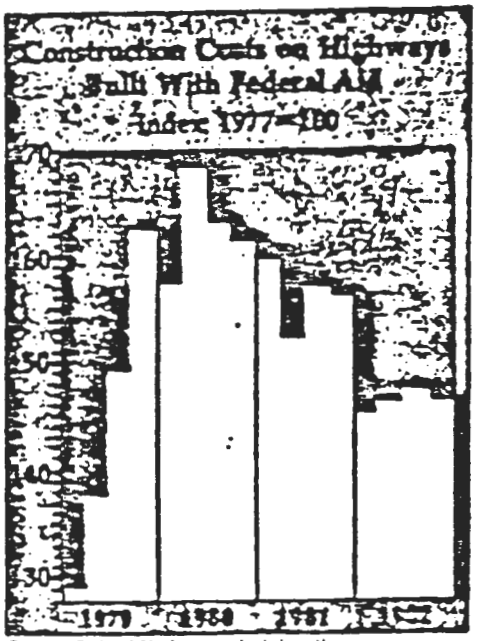
Building Costs On Highways Are Declining

By Albert R. Karr
And Robert E. Taylor
Staff Reporters of The Wall Street Journal

The low bid for an interstate highway interchange in the Atlanta area was $53.2 million recently, more than $10 million below the state engineer's estimate. In Utah, where contractor bids are coming in as low as 25% under estimates, the state has been able to undertake four projects for the price that three used to cost.

One big reason for the lower prices: Justice Department prosecutions of widespread bid-rigging by highway contractors. In addition, state budget problems have produced a prolonged slump in highway construction, and raw-material costs are down. Road-building expenses are expected to rise again soon, but they haven't turned up yet and at the moment costs are actually declining.

"Contractors are super-sensitive" to the prosecution threat, says Harvey Haack, a deputy transportation secretary in Pennsylvania. He says the winning bid on a recent $14 million earth-moving contract in Allegheny County, which includes Pittsburgh, was 30% below the $20 million engineering estimate.



Source: Federal Highway Administration

Since 1978, criminal grand juries in 21 states have investigated highway bid-fixing. Prosecutions in 15 of those states have produced indictments of more than 180 companies and 200 executives. Convictions have led to fines totaling $41 million and numerous jail sentences.

A 'Way of Life'

The Transportation Department's inspector general, who has aided the investigations, recently reported "a strong correlation" in contractor bidding patterns "between the success of our activity and the reduction in bid prices."

Richard Braun, a Justice Department attorney who prosecuted cases in five states, says bid-rigging was "pervasive" in each of them. The rigging involved "setting up" contracts, or conspiring to offer higher bids, so that an agreed-upon contractor would win the award with the lowest bid. Rigging typically inflated contracts 10%, but Mr. Braun says some contractors raked off much more.

The practice was a "way of life" for years in Tennessee and other states, officials say. "The asphalt people just took it for granted. Most of them didn't even think it was breaking the law—it was more or less helping each other out," says Samuel Slate of Virginia's Highways and Transportation Department.

But the federal crackdown, called one of the biggest Justice Department enforcement campaigns ever, seems to have stopped much of the bid-fixing. As prosecutors used evidence against one contractor to force testimony against another, contractors fell like dominoes in one state after another. Conviction rates have topped 90%.

Construction Costs Decline

In Virginia, Mr. Slate says, contractors didn't want to go through this anymore. Adds the Justice Department's Mr. Braun: In states where judges have handed down substantial jail sentences, road-building firms "will be leery" of further rigging.

The big test will come as construction picks up. Price conspiring is more likely when a surplus of business reduces competition for contracts.

That won't happen immediately. Nationwide, construction prices for federally aided highways climbed 63% between 1977 and 1980, according to the Federal Highway Administration. By the 1982 fourth quarter, though, they had fallen nearly 13% from a high in spring 1980.

In Texas, fiscal 1979 contract awards for road-and-bridge projects were an average of $4.8 million, or 3%, above state engineering estimates. But in fiscal 1981, awards were $45.3 million, or 14%, below state estimates. John Kramer, the transportation secretary for Illinois, says that the state has had "the first sustained decline" in highway bids since the 1930s and that construction costs are continuing to decline. He says costs have dropped about 20% in the past 2½ years.

The price declines won't continue forever. Utah Gov. Scott Matheson expects increased road work to drive up bids by 5% to 10%. Other state officials also predict bids will rise as road and bridge building increases because of new money from federal and state gasoline-tax revenues. A five-cent federal tax rise takes effect April 1, and

Please Turn to Page 30, Column 3

Slump, Bid-Rigging Prosecutions Are Reducing Road-Building Costs

Continued From Page 25

many states are increasing their own levies. The new law means federal highway financing will climb from $7.66 billion in fiscal 1982 to $11 billion in fiscal 1983 and $13.87 billion by fiscal 1986.

Michigan plans to increase its road-contract awards to $315 million in fiscal 1983 from $146 million in fiscal 1982. For six months, Texas will triple its contract awards to $120 million a month.

Francis Francois, executive director of the America Association of State Highway and Transportation Officials, says he expects substantially higher construction costs this year. And Mr. Kramer of Illinois says, "We're predicating our future programs on construction prices beginning to turn up by midsummer," with a five-year annual inflation figure of 8% to 10%.

Still, even though states have begun to increase contracting, prices haven't rebounded yet. "With construction activity the way it has been, I don't think you're going to have rising prices for quite a while," says Arnold Kupferman of New York's Transportation Department. He says his agency is still getting eight to 10 bids for every project. In Illinois, seven firms bid on an average project, up from two in 1980.

In most states, a Federal Highway Administration official says, contractors are still "more interested in survival than profits." But Louie Pittman, president of Pittman Highway Contracting Co. of Conyers, Ga., says bids must rise before long or "there are going to be a lot of failures." He says last year was his company's worst in 15 years.

Meanwhile, some states have taken precautions to prevent a recurrence of bid rigging. Tennessee, for example, makes more precise estimates, has stopped publishing the estimates and shields the identity of potential bidders on specific projects. The state also uses a "trigger" to alert the transportation department to unusually high bids, says Robert Farris, Tennessee's transportation commissioner.

Furthermore, Mr. Farris says, contractors are saying to each other that now that they're getting another chance because of increased federal money, "for God's sake, let's do it right."

DRAFT

Honorable Frank Annunzio
House of Representatives
Washington, D.C. 20515

Dear ~~Congressman Annunzio~~ Frank:

This is in further response to your letter ~~of April 20, 1983 to Kenneth M. Duberstein, Assistant to the President for Legislative Affairs~~ relating the concerns expressed to you by Robert J. Cole, Assistant Corporate Counsel for Sportsmart, Inc., about the Department of Justice's views regarding resale price maintenance.

I understand that Thaddeus Garrett, Jr., a former Assistant to Vice President Bush, wrote to Mr. L.J. Hochberg, President of Sportsmart, Inc., on December 7, 1982, explaining the Division's basic enforcement approach. This letter briefly supplements that response.

The position taken by the Department of Justice with regard to resale price maintenance rests on two key considerations: its evaluation of whether ~~or not~~ (and, if so, under what circumstances) resale price maintenance has harmful economic consequences inconsistent with the aims and purposes of the antitrust laws, and the proper allocation of the Department's own enforcement resources.

Based on its analyses and studies, the Department's Antitrust Division has concluded that resale price maintenance agreements differ fundamentally in their economic consequences from price fixing agreements between competitors and other types of cartel arrangements, which in most instances serve no useful economic function whatever and are almost invariably harmful to the public interest. For this reason the courts properly hold price fixing between competitors and other cartel arrangements to be "per se" unlawful under the antitrust laws.

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anticompetitive effects in the context of the particular factual situation in which it is employed. The same legal principle is currently applied by the courts in adjudicating the lawfulness under the antitrust laws of other types of vertical restraints.

In his public statements, William F. Baxter, the Assistant Attorney General in charge of the Antitrust Division, has repeatedly confirmed the Division's policy on this subject. In line with that policy, the Antitrust Division has not declined to investigate alleged incidents of resale price maintenance where it appears that significant competitive harm may result. When such instances are brought to the attention of the Antitrust Division, it is prepared to review them for possible enforcement action.

We hope that this information ~~and the materials enclosed herewith~~ will help to clarify the Administration's position on this matter and to dispell any misconceptions that may still exist. Please be assured that we are deeply committed to vigorous enforcement of the antitrust laws against all practices that are truly harmful to consumers.

With best wishes,

~~On behalf of the President, I thank you for writing.~~

Sincerely, ~~yours,~~

~~Fred F. Fielding~~
~~Counsel to the President~~
Kenneth M. Duberstein
Assistant to the President

~~Enclosures~~

ANNUNZIO
DISTRICT, ILLINOIS

COMMITTEES:
BANKING, FINANCE AND URBAN AFFAIRS
SUBCOMMITTEES:
CHAIRMAN, CONSUMER AFFAIRS AND COINAGE
FINANCIAL INSTITUTIONS SUPERVISION, REGULATION AND INSURANCE

HOUSE ADMINISTRATION
SUBCOMMITTEES:
CHAIRMAN, ACCOUNTS

Congress of the United States
House of Representatives
Washington, D.C. 20515

DISTRICT OFFICE
SUITE 201
4747 WEST PETERSON AVENUE
CHICAGO, ILLINOIS 60646
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CHICAGO, ILLINOIS 60604
(312) 353-2525

WASHINGTON OFFICE
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RAYBURN OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 225-6661

April 20, 1983

37876

Mr. Kenneth M. Duberstein
Assistant to the President
for Legislative Affairs
The White House
Washington, D.C. 20500

Dear Ken:

Mr. Robert J. Cole, Assistant Corporate Counsel for Sportmart Inc., a business located in the 11th Congressional District of Illinois which I represent, recently contacted me to express his company's concern about the "developing trend on the part of manufacturers of a variety of mass merchandised products to keep products from 'price cutting' retailers," and to outline his company's "strong opposition to any retreat from the well settled principle that re-sale price maintenance constitutes a per se violation of Federal antitrust law."

Mr. Cole stated that his company had contacted the Department of Justice concerning these violations, and the Department has taken the position that there has been no infraction of the law, and therefore has not taken any action to stop this practice.

I would be most appreciative if you would give Mr. Cole's views your most thorough consideration, and also let me know on his behalf, what steps are being taken by the President to make sure that the Federal antitrust laws regarding resale price maintenance are being enforced by the Department of Justice.

Thank you for your cooperation and assistance in this matter.

Sincerely,

Frank

FRANK ANNUNZIO
Member of Congress

FA/dah

ID # 141461

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

John

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) 1 1

Name of Correspondent: Ed Schmults / Bill Goodling

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Draft response prepared by Antitrust Division / DOJ to letter to Hfielding from Rep. Goodling re: DOJ's position on resale price maintenance.

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
- Type of Response = Initials of Signer
- Code = "A"
- Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

June 27, 1983

MEMORANDUM

TO: Fred F. Fielding
Counsel to the President

FROM: Edward C. Schmults
Deputy Attorney General

Pursuant to your request, I am attaching a draft response prepared by the Antitrust Division to the letter you received from Rep. Goodling concerning the Department of Justice position on resale price maintenance.

Attachment

THE WHITE HOUSE

WASHINGTON

May 19, 1983

copy 2 back-up
case # 141461

MEMORANDUM FOR EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Letter from Congressman Goodling on Department of Justice Antitrust Enforcement

I would appreciate it if the Antitrust Division could prepare a draft response to the above-referenced letter, for my signature. Since this issue has surfaced before, I assume that division has the substance of a response readily available.

Many thanks.

FFF:JGR:aw 5/19/83

cc: FFFielding
JGRoberts
Subj.
Chron

DRAFT

Honorable Bill Goodling
House of Representatives
Washington, D.C. 20515

Dear Congressman Goodling:

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Counsel to the President

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And Robert E. Taylor
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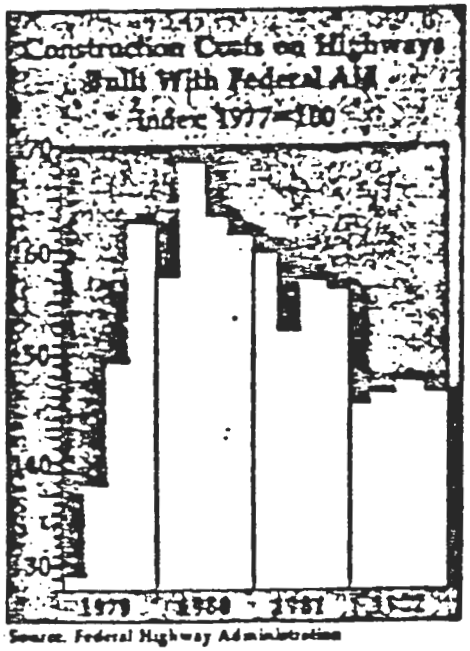

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A 'Way of Life'

The Transportation Department's inspector general, who has aided the investigations, recently reported "a strong correlation" in contractor bidding patterns "between the success of our activity and the reduction in bid prices."

Richard Braun, a Justice Department attorney who prosecuted cases in five states, says bid-rigging was "pervasive" in each of them. The rigging involved "setting up" contracts, or conspiring to offer higher bids, so that an agreed-upon contractor would win the award with the lowest bid. Rigging typically inflated contracts 10%, but Mr. Braun says some contractors raked off much more.

The practice was a "way of life" for years in Tennessee and other states, officials say. "The asphalt people just took it for granted. Most of them didn't even think it was breaking the law—it was more or less helping each other out," says Samuel Slate of Virginia's Highways and Transportation Department.

But the federal crackdown, called one of the biggest Justice Department enforcement campaigns ever, seems to have stopped much of the bid-fixing. As prosecutors used evidence against one contractor to force testimony against another, contractors fell like dominoes in one state after another. Conviction rates have topped 90%.

Construction Costs Decline

In Virginia, Mr. Slate says, contractors didn't want to go through this anymore. Adds the Justice Department's Mr. Braun: In states where judges have handed down substantial jail sentences, road-building firms "will be leery" of further rigging.

The big test will come as construction picks up. Price conspiring is more likely when a surplus of business reduces competition for contracts.

That won't happen immediately. Nationwide, construction prices for federally aided highways climbed 63% between 1977 and 1980, according to the Federal Highway Administration. By the 1982 fourth quarter, though, they had fallen nearly 13% from a high in spring 1980.

In Texas, fiscal 1979 contract awards for road-and-bridge projects were an average of $4.8 million, or 3%, above state engineering estimates. But in fiscal 1981, awards were $45.3 million, or 14%, below state estimates. John Kramer, the transportation secretary for Illinois, says that the state has had "the first sustained decline" in highway bids since the 1930s and that construction costs are continuing to decline. He says costs have dropped about 20% in the past 3½ years.

The price declines won't continue forever. Utah Gov. Scott Matheson expects increased road work to drive up bids by 5% to 10%. Other state officials also predict bids will rise as road and bridge building increases because of new money from federal and state gasoline-tax revenues. A five-cent federal tax rise takes effect April 1, and

Please Turn to Page 30, Column 3

Slump, Bid-Rigging Prosecutions Are Reducing Road-Building Costs

Continued From Page 25

many states are increasing their own levies. The new law means federal highway financing will climb from $7.66 billion in fiscal 1982 to $11 billion in fiscal 1983 and $13.87 billion by fiscal 1986.

Michigan plans to increase its road-contract awards to $315 million in fiscal 1983 from $146 million in fiscal 1982. For six months, Texas will triple its contract awards to $120 million a month.

Francis Francois, executive director of the America Association of State Highway and Transportation Officials, says he expects substantially higher construction costs this year. And Mr. Kramer of Illinois says, "We're predicating our future programs on construction prices beginning to turn up by midsummer," with a five-year annual inflation figure of 8% to 10%.

Still, even though states have begun to increase contracting, prices haven't rebounded yet. "With construction activity the way it has been, I don't think you're going to have rising prices for quite a while," says Arnold Kupferman of New York's Transportation Department. He says his agency is still getting eight to 10 bids for every project. In Illinois, seven firms bid on an average project, up from two in 1980.

In most states, a Federal Highway Administration official says, contractors are still "more interested in survival than profits." But Louie Pittman, president of Pittman Highway Contracting Co. of Conyers, Ga., says bids must rise before long or "there are going to be a lot of failures." He says last year was his company's worst in 15 years.

Meanwhile, some states have taken precautions to prevent a recurrence of bid rigging. Tennessee, for example, makes more precise estimates, has stopped publishing the estimates and shields the identity of potential bidders on specific projects. The state also uses a "trigger" to alert the transportation department to unusually high bids, says Robert Farris, Tennessee's transportation commissioner.

Furthermore, Mr. Farris says, contractors are saying to each other that now that they're getting another chance because of increased federal money, "for God's sake, let's do it right."

ID # 150869 CU
BE001

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

Sharrie

☐ O - OUTGOING
☐ H - INTERNAL
☐ I - INCOMING
Date Correspondence Received (YY/MM/DD) / /

Name of Correspondent: Charlie Pontecelli / FRANK ANNUNZIO

☐ **MI Mail Report** **User Codes:** (A) _____ (B) _____ (C) _____

Subject: Resale Price Maintenance
(Draft letter to Frank Annunzio)

ROUTE TO: / **ACTION** / **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWHO11	ORIGINATOR	831061 24	PVJ	_	/ /
	Referral Note:				
CWAT 18	D	831061 24	PVJ	S	831071 06 PVJ
	Referral Note:				
	_	/ /		_	/ /
	Referral Note:				
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	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: See 082730 CJ PVJ

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

DRAFT

Honorable Frank Annunzio
House of Representatives
Washington, D.C. 20515

Dear ~~Congressman Annunzio:~~ Frank:

This is in further response to your letter ~~of April 20, 1983 to Kenneth M. Duberstein, Assistant to the President for Legislative Affairs~~ relating the concerns expressed to you by Robert J. Cole, Assistant Corporate Counsel for Sportsmart, Inc., about the Department of Justice's views regarding resale price maintenance.

I understand that Thaddeus Garrett, Jr., a former Assistant to Vice President Bush, wrote to Mr. L.J. Hochberg, President of Sportsmart, Inc., on December 7, 1982, explaining the Division's basic enforcement approach. This letter briefly supplements that response.

The position taken by the Department of Justice with regard to resale price maintenance rests on two key considerations: its evaluation of whether or not (and, if so, under what circumstances) resale price maintenance has harmful economic consequences inconsistent with the aims and purposes of the antitrust laws, and the proper allocation of the Department's own enforcement resources.

Based on its analyses and studies, the Department's Antitrust Division has concluded that resale price maintenance agreements differ fundamentally in their economic consequences from price fixing agreements between competitors and other types of cartel arrangements, which in most instances serve no useful economic function whatever and are almost invariably harmful to the public interest. For this reason the courts properly hold price fixing between competitors and other cartel arrangements to be "per se" unlawful under the antitrust laws.

By contrast, resale price maintenance agreements can in a number of situations serve desirable economic ends consistent with the aims and purposes of the antitrust laws. The Department believes that resale price maintenance should not be treated as a "per se" violation of the antitrust laws but should be judged under the "rule of reason" standard applicable to most restrictive business arrangements, including other types of vertical restraints. The present court-developed rule that resale price maintenance is "per se" unlawful has the undesirable consequence that the courts cannot draw a distinction between those arrangements that serve an economically desirable purpose and those that do not: all are condemned alike.

Another undesirable consequence of the "per se" rule as currently applied in resale price maintenance cases is that in many instances dealers whose distributorships have been terminated by a manufacturer, on grounds wholly unrelated to

resale price maintenance, have in court challenged the termination on the asserted ground that the true reason for the termination was the dealer's supposed failure to adhere to the manufacturer's suggested resale prices. In some instances, relying on this argument, dealers have challenged various conventional distribution arrangements, such as drop shipment programs, that by their terms did not deal with resale prices at all. Thus, the "per se" rule has been invoked to jeopardize the legality of business arrangements that in fact do not involve resale price maintenance. Adoption of the "rule of reason" standard would greatly limit such spurious challenges since the challenging party would be required to prove specifically the anticompetitive effects of the alleged restraints.

These points are spelled out in greater detail in a brief submitted by the Department of Justice a few weeks ago to the Supreme Court of the United States, in the case of Monsanto v. Spray-Rite, in which the Department urged the Court to adopt the "rule of reason" approach in adjudicating resale price maintenance cases. I enclose herewith a copy of the brief.

The second key consideration underlying the Department of Justice's position in this matter is the belief that the Department should concentrate its enforcement resources on challenging activities that have an unequivocally harmful effect on consumers and on the economy, and where enforcement

of the law by private action is often handicapped because the conspiring parties effectively conceal their wrongful conduct. Horizontal price fixing, bid rigging, and other cartel activities fall into this category.*/ ~~For the reasons stated in this letter and in the enclosed brief,~~ the Antitrust Division believes that resale price maintenance does not have an unequivocally harmful effect, but, on the contrary, can in many instances serve a desirable economic objective. Further, resale price maintenance agreements in general cannot be effectively concealed by the parties, so that in most cases persons adversely affected by such an agreement will be aware of its existence and can seek relief by bringing a private lawsuit, thereby diminishing the need for action by the Department of Justice.

We wish to make clear that the Antitrust Division rejects the view that resale price maintenance should always be deemed lawful. Its position is that the legality of resale price maintenance ought to be determined on the basis of whether or not that practice has, or threatens to have, significant

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*/ The role that the Antitrust Division's enforcement activities have played in directly benefitting the public through the elimination of unlawful bid rigging in the road construction industry, a sector of the economy in which the Antitrust Division has been quite active in recent years, is discussed in a recent article appearing in the Wall Street Journal, a copy of which is enclosed herewith.

anticompetitive effects in the context of the particular factual situation in which it is employed. The same legal principle is currently applied by the courts in adjudicating the lawfulness under the antitrust laws of other types of vertical restraints.

In his public statements, William F. Baxter, the Assistant Attorney General in charge of the Antitrust Division, has repeatedly confirmed the Division's policy on this subject. In line with that policy, the Antitrust Division has not declined to investigate alleged incidents of resale price maintenance where it appears that significant competitive harm may result. When such instances are brought to the attention of the Antitrust Division, it is prepared to review them for possible enforcement action.

We hope that this information ~~and the materials enclosed herewith~~ will help to clarify the Administration's position on this matter and to dispell any misconceptions that may still exist. Please be assured that we are deeply committed to vigorous enforcement of the antitrust laws against all practices that are truly harmful to consumers.

With best wishes,

~~On behalf of the President, I thank you for writing.~~

Sincerely, ~~yours.~~

~~Fred F. Fielding~~
~~Counsel to the President~~
Kenneth M. Duberstein
Assistant to the President

~~Enclosures~~

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

August 9, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS JGR

SUBJECT: Resale Price Maintenance Correspondence

B.M. Fauber, Chairman of the Board of K Mart Corporation, wrote the President on April 4 to complain about the Anti-trust Division's position that resale price maintenance should not be considered a per se violation of the antitrust laws. On April 19 the letter was referred to Commerce; on April 28 it was referred to Justice, with a cover note requesting a direct reply within nine days. Instead of replying, Justice waited until June 21 to send back to the White House a copy of the boilerplate resale price maintenance letter, for your signature. This letter was prepared some time ago in response to Congressional mail on the same subject. (You will recall that we revised those letters and forwarded them to Ken Duberstein for sending over his signature.) Over one month later, on July 25, the package was sent to our office.

I see no reason for our office to be sending out letters on substantive antitrust policy. As indicated in the original April 28 referral to Justice, a direct reply to Mr. Fauber should come from the responsible agency, in this instance Mr. Baxter's Antitrust Division or, if Justice considers it appropriate, higher officials at Justice. Of course, by now Mr. Fauber surely expects no reply at all to his letter of April 4. Presumably Justice (which held the letter for two months) and White House Correspondence (which held Justice's draft for another month) thought Mr. Fauber would change his mind as he matured. The proposed memorandum to Schmults (with copy to Sally Kelly) notes suggested revisions to the substance of the draft reply. You approved these changes in the draft of this form letter we forwarded to Ken Duberstein.

Attachment

THE WHITE HOUSE

WASHINGTON

August 9, 1983

MEMORANDUM FOR EDWARD C. SCHMULTS
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Correspondence from B.M. Fauber, Chairman of K Mart Corporation, Concerning Resale Price Maintenance

On April 4, 1983, B.M. Fauber, Chairman of the Board of K Mart Corporation, wrote the President to complain about the Administration's policy with respect to resale price maintenance. On April 28 this letter was referred to the Justice Department, the action requested being a direct reply within nine days. Two months later the Justice Department submitted a draft reply for my signature, and that draft has now found its way to my office.

Since the proposed reply discusses substantive issues of antitrust policy, it would seem appropriate for it to be sent over the signature of the officials responsible for that policy, as contemplated by the April 28 referral. (On previous occasions when we have used this draft, it was sent over Ken Duberstein's signature since Congressional correspondence was involved.) In reviewing the proposed reply, I question whether it is desirable to introduce pending Supreme Court litigation (the Monsanto v. Spray-Rite case) into a general discussion, and also whether discussion of the bid-rigging cases is at all relevant to Mr. Fauber's inquiry. Assuming Mr. Fauber has not lost his interest in this subject over the past several months, I am returning his letter to you for direct reply.

cc: Sally Kelley

FFF:JGR:aw 8/9/83

cc: FFFielding/JGRoberts/Subj./Chron

ID # 135587
BE001

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING
☐ H - INTERNAL
☒ I - INCOMING
Date Correspondence Received (YY/MM/DD) 831 04 07

JR

Name of Correspondent: B. M. Fuller

☒ **MI Mail Report** **User Codes: (A)** _____ **(B)** _____ **(C)** _____

Subject: Writer states that Federal Antitrust officials will do great harm to the economy, consumers and this industry if manufacturers have effective control over the price at which they sell merchandise to the public

ROUTE TO: Office/Agency (Staff Name)	ACTION Code	Tracking Date YY/MM/DD	DISPOSITION Type of Response	Code	Completion Date YY/MM/DD
P.K. Moss JMR	C	831 04 07 ORIGINATOR		C	831 07 25
✓ Commerce	A	831 04 19 Referral Note:	NAN	C	831 04 25
✓ DOJ	R	831 04 28 Referral Note:		C	831 06 12
FIELDINGS	R	831 07 25 Referral Note: see attached			/ /
CWAT 18	D	831 07 26 Referral Note:		S	831 08 06

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
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DISPOSITION CODES:
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C - Completed
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FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: JMR - Says Send to Fielding. For Fielding Action

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

U.S. Department of Justice
Office of the Deputy Attorney General
Executive Secretariat

Sally: ROM

Since Mr. Baxter has written to H. Mart previously, this letter from the Chairman of the Board would be in draft form.

Mary Lawton

6/21/82

DRAFT

Mr. B. M. Fauber
Chairman of the Board
K mart Corporation
International Headquarters
Troy, Michigan 48084

Dear Mr. Fauber:

This is in response to your letter of April 4, 1983 to the President expressing your concerns about the Department of Justice's views regarding resale price maintenance.

I understand that William F. Baxter, Assistant Attorney General in charge of the Antitrust Division, wrote to Mr. A. Robert Stevenson, Vice President, Government & Public Relations of K mart Corporation, on May 27, 1982, explaining the Division's basic enforcement approach. This letter briefly supplements that response.

The position taken by the Department of Justice with regard to resale price maintenance rests on two key considerations: its evaluation of whether or not (and, if so, under what circumstances) resale price maintenance has harmful economic consequences inconsistent with the aims and purposes of the antitrust laws, and the proper allocation of the Department's own enforcement resources.

Based on its analyses and studies, the Department's Antitrust Division has concluded that resale price maintenance agreements differ fundamentally in their economic consequences from price fixing agreements between competitors and other types of cartel arrangements, which in most instances serve no useful economic function whatever and are almost invariably harmful to the public interest. For this reason the courts properly hold price fixing between competitors and other cartel arrangements to be "per se" unlawful under the antitrust laws.

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Another undesirable consequence of the "per se" rule as currently applied in resale price maintenance cases is that in many instances dealers whose distributorships have been terminated by a manufacturer, on grounds wholly unrelated to

resale price maintenance, have in court challenged the termination on the asserted ground that the true reason for the termination was the dealer's supposed failure to adhere to the manufacturer's suggested resale prices. In some instances, relying on this argument, dealers have challenged various conventional distribution arrangements, such as drop shipment programs, that by their terms did not deal with resale prices at all. Thus, the "per se" rule has been invoked to jeopardize the legality of business arrangements that in fact do not involve resale price maintenance. Adoption of the "rule of reason" standard would greatly limit such spurious challenges since the challenging party would be required to prove specifically the anticompetitive effects of the alleged restraints.

These points are spelled out in greater detail in a brief submitted by the Department of Justice a few weeks ago to the Supreme Court of the United States, in the case of Monsanto v. Spray-Rite, in which the Department urged the Court to adopt the "rule of reason" approach in adjudicating resale price maintenance cases. I enclose herewith a copy of the brief.

The second key consideration underlying the Department of Justice's position in this matter is the belief that the Department should concentrate its enforcement resources on challenging activities that have an unequivocally harmful effect on consumers and on the economy, and where enforcement

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We wish to make clear that the Antitrust Division rejects the view that resale price maintenance should always be deemed lawful. Its position is that the legality of resale price maintenance ought to be determined on the basis of whether or not that practice has, or threatens to have, significant

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of the law by private action is often handicapped because the conspiring parties effectively conceal their wrongful conduct. Horizontal price fixing, bid rigging, and other cartel activities fall into this category.*/ For the reasons stated in this letter and in the enclosed brief, the Antitrust Division believes that resale price maintenance does not have an unequivocally harmful effect, but to the contrary can in many instances serve a desirable economic objective. Further, resale price maintenance agreements in general cannot be effectively concealed by the parties, so that in most cases persons adversely affected by such an agreement will be aware of its existence and can seek relief by bringing a private lawsuit, thereby diminishing the need for action by the Department of Justice.

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anticompetitive effects in the context of the particular factual situation in which it is employed. The same legal principle is currently applied by the courts in adjudicating the lawfulness under the antitrust laws of other types of vertical restraints.

In his public statements Mr. Baxter has repeatedly confirmed the Division's policy on this subject. In line with that policy, the Antitrust Division has not declined to investigate alleged incidents of resale price maintenance where it appears that significant competitive harm may result. When such instances are brought to the attention of the Antitrust Division, it is prepared to review them for possible enforcement action.

We hope that this information, and the materials enclosed herewith, will help to clarify the Administration's position on this matter and to dispell any misconceptions that may still exist. Please be assured that we are deeply committed to vigorous enforcement of the antitrust laws against all practices that are truly harmful to consumers.

On behalf of the President, I thank you for writing.

Sincerely yours,

Fred F. Fielding
Counsel to the President

Enclosures

3039

THE WHITE HOUSE OFFICE

REFERRAL

APRIL 28, 1983

TO: DEPARTMENT OF JUSTICE

ACTION REQUESTED:
DIRECT REPLY, FURNISH INFO COPY

DESCRIPTION OF INCOMING:

ID: 135587

MEDIA: LETTER, DATED APRIL 4, 1983

TO: PRESIDENT REAGAN

FROM: MR. B. M. FAUBER
CHAIRMAN OF THE BOARD
KMART CORPORATION
INTERNATIONAL HEADQUARTERS
TROY MI 48084

SUBJECT: WRITER STATES THAT FEDERAL ANTITRUST OFFICIALS WILL DO GREAT HARM TO THE ECONOMY, CONSUMERS AND THEIR INDUSTRY IF MANUFACTURERS HAVE EFFECTIVE CONTROL OVER THE PRICE AT WHICH THEY SELL MERCHANDISE TO THE PUBLIC

PROMPT ACTION IS ESSENTIAL -- IF REQUIRED ACTION HAS NOT BEEN TAKEN WITHIN 9 WORKING DAYS OF RECEIPT, PLEASE TELEPHONE THE UNDERSIGNED AT 456-7486.

RETURN CORRESPONDENCE, WORKSHEET AND COPY OF RESPONSE (OR DRAFT) TO:
AGENCY LIAISON, ROOM 91, THE WHITE HOUSE

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

334094

T H E W H I T E H O U S E O F F I C E

REFERRAL

APRIL 19, 1983

TO: DEPARTMENT OF COMMERCE

ACTION REQUESTED:
APPROPRIATE ACTION

DESCRIPTION OF INCOMING:

ID: 135587

MEDIA: LETTER, DATED APRIL 4, 1983

TO: PRESIDENT REAGAN

FROM: MR. B. M. FAUBER
CHAIRMAN OF THE BOARD
KMART CORPORATION
INTERNATIONAL HEADQUARTERS
TROY MI 48084

SUBJECT: WRITER STATES THAT FEDERAL ANTITRUST OFFICIALS WILL DO GREAT HARM TO THE ECONOMY, CONSUMERS AND THEIR INDUSTRY IF MANUFACTURERS HAVE EFFECTIVE CONTROL OVER THE PRICE AT WHICH THEY SELL MERCHANDISE TO THE PUBLIC

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RETURN CORRESPONDENCE, WORKSHEET AND COPY OF RESPONSE (OR DRAFT) TO:
AGENCY LIAISON, ROOM 91, THE WHITE HOUSE

SALLY KELLEY
DIRECTOR OF AGENCY LIAISON
PRESIDENTIAL CORRESPONDENCE

Kmart Corporation
International Headquarters
Troy, Michigan 48084

Office of
The Chairman of the Board

April 4, 1983

135587

President Ronald Reagan
The White House
1600 Pennsylvania Avenue, NW
Washington, D.C. 20500

Dear Mr. President:

Federal antitrust officials will do great harm to the economy, consumers and our industry if manufacturers have effective control over the price at which we sell merchandise to the public.

Your Administration in the past has been committed to free markets and against judicial activism. In 1975, you spoke (a copy of which is attached) against fair trade laws which were subsequently discredited by the Congress under the Ford Administration. Current actions by federal antitrust officials amount to a revisitation of this same old issue.

On February 12, 1982, I wrote you about my concern on Resale Price Maintenance (see attached). To date the Administration has not told federal antitrust officials that it supports keeping Resale Price Maintenance illegal per se.

As a retailer, we need to have the continued freedom to compete in bringing consumers the products they want at the prices they can afford.

Very truly yours,

B. M. Fauber

Encls.
cc: Mr. R. E. Dewar

Kmart Corporation
International Headquarters
Troy, Michigan 48084

Office of
The Chairman of the Board

February 12, 1982

President Ronald Reagan
The White House
1600 Pennsylvania Avenue, NW
Washington, D. C. 20500

Dear President Reagan:

Having been a retailer for more than 40 years, there are two fundamental conclusions that I have reached. The first is that the American consumer is infinitely capable of determining where they can receive the best value for their money for any product they wish to purchase. They equate best value as a combination of what they perceive to be the basic quality of the product, the reputation of the retail store providing the product and the price of the product. It has also been my observation that all other things being equal, the lower the price of the product the higher the number of purchases consumers will make.

The second conclusion is that, generally, manufacturers tend to believe that their products can be sold at higher retail prices than the consumer usually will find acceptable.

That is the real world. And in the real world, resale price maintenance is almost without exception an attempt by manufacturers to improve their profit margins; not by expanding output, but by charging the consumer higher prices and thereby enabling a trend to exact ever higher cost prices from retailers.

For your administration to suggest that there is a role for resale price maintenance in today's marketplace and to have your own Assistant Attorney General for Antitrust, Mr. William Baxter, refer to the $85 billion a year general merchandise discount retailing industry as "free riders" causes me the utmost concern.

Today, the American consumer more than ever is extremely price-sensitive, particularly when it comes to making purchase decisions for apparel, housewares, leisure-related items and the other kinds of products that make up the merchandise assortments of the U.S. discount department store industry.

They have necessarily had to make significant adjustments in the way they allocate their personal income dollars in the last several years. We estimate that between 1975 and 1985 the proportion of personal income that will be spent on shelter, energy and transportation will rise from 25% to 32% of the total, while expenditures for food, clothing and general household operations will by necessity be reduced from 40% to 35%. It is now estimated that after paying for food, housing, medical care, state and local taxes and other essentials, the average U.S. consumer has just $1.42 a day left for discretionary purchases.

Fourtunately for these American consumers, general merchandise retailers have been able to substantially moderate our need to increase prices as compared to the prices consumers pay for all items. The Consumer Price Index for all urban consumers went up more than 52% between 1975 and 1980, while general merchandise prices, as measured by the Department Store Inventory Price Index, increased only 25%. If retail price maintenance agreements had been allowed to flourish during this 1975 to 1980 period as they did in the 1930's, 1940's and 1950's, you can rest assured that there would have been very little differential between the price increases for general merchandise and the increase in price for all items and services measured by the CPI.

Potential Justice Department intervention through the Private Action Program that has been proposed to assist suppliers charged with vertical antitrust law violations is not a trifling matter. To the American consumer, it would be a matter of unparalleled injury.

Yours very truly,

B. M. FAUBER

bcc: Mr. R. E. Dewar
Mr. A. R. Stevenson
Mr. J. C. Tuttle

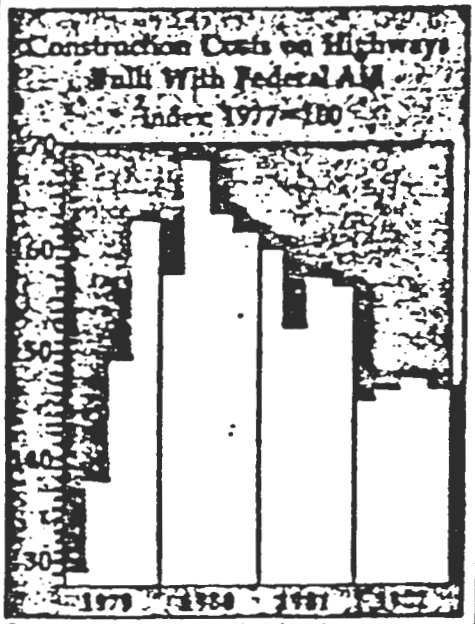
Building Costs On Highways Are Declining

By Albert R. Karr
And Robert E. Taylor
Staff Reporters of The Wall Street Journal

The low bid for an interstate highway interchange in the Atlanta area was $53.2 million recently, more than $10 million below the state engineer's estimate. In Utah, where contractor bids are coming in as low as 25% under estimates, the state has been able to undertake four projects for the price that three used to cost.

One big reason for the lower prices: Justice Department prosecutions of widespread bid-rigging by highway contractors. In addition, state budget problems have produced a prolonged slump in highway construction, and raw-material costs are down. Road-building expenses are expected to rise again soon, but they haven't turned up yet and at the moment costs are actually declining.

"Contractors are super-sensitive" to the prosecution threat, says Harvey Haack, a deputy transportation secretary in Pennsylvania. He says the winning bid on a recent $14 million earth-moving contract in Allegheny County, which includes Pittsburgh, was 30% below the $20 million engineering estimate.



Source: Federal Highway Administration

Since 1978, criminal grand juries in 21 states have investigated highway bid-fixing. Prosecutions in 15 of those states have produced indictments of more than 180 companies and 200 executives. Convictions have led to fines totaling $41 million and numerous jail sentences.

A 'Way of Life'

The Transportation Department's inspector general, who has aided the investigations, recently reported "a strong correlation" in contractor bidding patterns "between the success of our activity and the reduction in bid prices."

Richard Braun, a Justice Department attorney who prosecuted cases in five states, says bid-rigging was "pervasive" in each of them. The rigging involved "setting up" contracts, or conspiring to offer higher bids, so that an agreed-upon contractor would win the award with the lowest bid. Rigging typically inflated contracts 10%, but Mr. Braun says some contractors raked off much more.

The practice was a "way of life" for years in Tennessee and other states, officials say. "The asphalt people just took it for granted. Most of them didn't even think it was breaking the law—it was more or less helping each other out," says Samuel Slate of Virginia's Highways and Transportation Department.

But the federal crackdown, called one of the biggest Justice Department enforcement campaigns ever, seems to have stopped much of the bid-fixing. As prosecutors used evidence against one contractor to force testimony against another, contractors fell like dominoes in one state after another. Conviction rates have topped 90%.

Construction Costs Decline

In Virginia, Mr. Slate says, contractors didn't want to go through this anymore. Adds the Justice Department's Mr. Braun: In states where judges have handed down substantial jail sentences, road-building firms "will be leery" of further rigging.

The big test will come as construction picks up. Price conspiring is more likely when a surplus of business reduces competition for contracts.

That won't happen immediately. Nationwide, construction prices for federally aided highways climbed 63% between 1977 and 1980, according to the Federal Highway Administration. By the 1982 fourth quarter, though, they had fallen nearly 13% from a high in spring 1980.

In Texas, fiscal 1979 contract awards for road-and-bridge projects were an average of $4.8 million, or 3%, above state engineering estimates. But in fiscal 1981, awards were $45.3 million, or 14%, below state estimates. John Kramer, the transportation secretary for Illinois, says that the state has had "the first sustained decline" in highway bids since the 1930s and that construction costs are continuing to decline. He says costs have dropped about 20% in the past 2½ years.

The price declines won't continue forever. Utah Gov. Scott Matheson expects increased road work to drive up bids by 5% to 10%. Other state officials also predict bids will rise as road and bridge building increases because of new money from federal and state gasoline-tax revenues. A five-cent federal tax rise takes effect April 1, and

Please Turn to Page 30, Column 3

Slump, Bid-Rigging Prosecutions Are Reducing Road-Building Costs

Continued From Page 25

many states are increasing their own levies. The new law means federal highway financing will climb from $7.66 billion in fiscal 1982 to $11 billion in fiscal 1983 and $13.87 billion by fiscal 1986.

Michigan plans to increase its road-contract awards to $315 million in fiscal 1983 from $146 million in fiscal 1982. For six months, Texas will triple its contract awards to $120 million a month.

Francis Francois, executive director of the America Association of State Highway and Transportation Officials, says he expects substantially higher construction costs this year. And Mr. Kramer of Illinois says, "We're predicating our future programs on construction prices beginning to turn up by midsummer," with a five-year annual inflation figure of 8% to 10%.

Still, even though states have begun to increase contracting, prices haven't rebounded yet. "With construction activity the way it has been, I don't think you're going to have rising prices for quite a while," says Arnold Kupferman of New York's Transportation Department. He says his agency is still getting eight to 10 bids for every project. In Illinois, seven firms bid on an average project, up from two in 1980.

In most states, a Federal Highway Administration official says, contractors are still "more interested in survival than profits." But Louie Pittman, president of Pittman Highway Contracting Co. of Conyers, Ga., says bids must rise before long or "there are going to be a lot of failures." He says last year was his company's worst in 15 years.

Meanwhile, some states have taken precautions to prevent a recurrence of bid rigging. Tennessee, for example, makes more precise estimates, has stopped publishing the estimates and shields the identity of potential bidders on specific projects. The state also uses a "trigger" to alert the transportation department to unusually high bids, says Robert Farris, Tennessee's transportation commissioner.

Furthermore, Mr. Farris says, contractors are saying to each other that now that they're getting another chance because of increased federal money, "for God's sake, let's do it right."

has moved; evidently she must be finding things a little difficult in the new place, what with her two children and elderly mother. I ask that they should give her their care; please ask some one of them to tell me of how she is settling down there.

Next day: am going on. What shall I tell you about myself? As I have already written you, my way of life is somewhat different now. Which has its disadvantages—or else they would not put people here. But there are some positive aspects. The chief one is a possibility to read much, and I am fully using it. Of late I have incidentally received a number of books through the "Book by Mail" service, so I have enough reading matter, I am also studying the language, though my progress is as modest as it used to be. But my word stock is nevertheless growing. It may be a good idea to learn with greater intensity now—all of a sudden we may be released, and I am still unable to talk properly. But that is something we can survive all right. I don't mind.

At the same time I am ready (as I was before) to be kept here to the end. But let us trust the better thing will come, and then whatever will be, will be.

As for my health, it is generally fine. Suffice it to say I have never been laid with high fever all these years. Some trifling things may sometimes happen—but then they can happen to anyone and under very different conditions, too, there is no insurance against that. Otherwise all is quite normal, when I come you will see with your own eyes.

I have several times asked Pinya about how he feels, but he writes nothing about that. Mama, please let me know about it.

In my June letter to Sara I asked her a lot of questions, but no answers have come back to any one of them. She may not deserve the reprosch, and in her letter (No. 26, confiscated) she may have answered the questions. However that may be, I have not heard her answers to a number of questions that interest me. Let me repeat some. How many settlements are there in the Golans, and how many have sprung up after October? What is the population of the area? How is the construction of the new town going on? And where is it situated? The same about the Rafiakh area? But it must be easier for her to look into my earlier letter, after all.

I have re-read the letter and noticed I am repeating myself towards the end. It means I'd better wind up. It has suddenly become very late these latest days, winter has set in: it has been overdue from the local viewpoint: it is the second part of October. . . . Once again, Mama, please send me stereo—and picture postcards too. How is Dad's health? Is he happy about the change of the residence? . . .

My best wishes to our friends, and in the first place to those who keep writing, who still remember me, too. Mummy dear, don't worry for me. I am being in a "chamber" ("cell"?) room right now, and that seems to be the reason why the letter is what it is. But, generally speaking, everything is O.K. and even better. I am eager to believe this will be all over soon. Mummy dear, have the best of treatment, get well and keep writing.

Au revoir—Kiss—Yours,

ARIE.

FAIR TRADE LAWS DUE FOR HARD LOOK

HON. STEVEN D. SYMMS

OF IDAHO

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 23, 1975

Mr. SYMMS. Mr. Speaker, former Gov. Ronald Reagan of California is now writing a column that is syndicated by the Copley News Service. I am very pleased to see Governor Reagan continuing to express his view that the answers to today's problems will be found by reducing government rather than by increasing it.

Ronald Reagon is one of the few leaders in the country that still champions individual freedom and the free market economy—something that once was the cornerstone of the Republican Party.

Following is one of his latest commentaries that points out how government regulations hurt not help the consumer in America. I am pleased to commend the following article to my colleagues in Congress:

SO-CALLED "FAIR TRADE" LAWS OVERDUE FOR HARD LOOK

(By Ronald Reagan)

One of the old-time ventriloquist tricks in vaudeville was done by the fellow who would sing a chorus of "Yankee Doodle Dandy" while drinking a glass of water.

Another version is even trickier: a business or industry argues for free enterprise on the one hand—free, that is, from government regulation—at the same time it asks government to make laws setting minimum prices on the product it sells. This trick is called "fair trade."

Though such laws date back to the turn of the century, federal courts knocked them out in 1911.

They came back 20 years later when California retail druggists were worried about price wars and sought minimum-price legislation to prevent them. Soon after, 43 other states enacted so-called "fair trade" laws.

More recently there have been indications that this trick may be going the way of the vaudeville act. It is estimated that only about 20 large companies use the laws extensively today. Several states have done away with them entirely.

Just the same, 14 states, representing nearly half the nation's retail sales, still have tough, enforceable fair trade laws. This means that a retailer who wants to sell a fair trade item below the minimum price may risk heavy fines or even a jail sentence for cutting his price to the consumer.

Big discount chains usually won't sign fair trade agreements, but small retailers may fear being cut off from supplies of popular brands if they don't observe the fair trade agreements they are asked to sign.

It used to be argued that fair trade laws helped small retailers, such as the corner grocer, from being severely undercut by big chains with superior buying power. It's more likely that independent neighborhood retailers are surviving today because they are convenient than because of a few cents difference in a price on a brand of liquor or lipstick or water glasses.

Pro-fair trade forces argue that the higher margins provided the retailer by fair trade laws result in more retailers carrying the line, and with a broader selection at that.

That may be true, but in an age when advertising has effectively presold so many brand names, is the retailer really providing any extra useful service to the consumer in exchange for that higher margin? It's nice to know that he carries a broad selection, but without fair trade, wouldn't an enterprising merchant carry as broad a line of, say cosmetics as his customers demand?

Former Atty. Gen. William Saxbe said in a recent speech to a grocery manufacturing group, "Whatever feeble justification may have once existed for fair trade, there is today no reason to place such heavy burdens on the consuming public."

Lately, there has been a lot of talk about taking a "hard look" at government regulation in order to weed out those regulations which stifle competition. Good. Let's include the fair trade laws in that review.

Once you invite government to regulate you, in order to protect your economic interests, you're asking for a lot more regulation down the line.

We live in a time when the barnacles of government regulation have added measurably to the cost of goods we buy. Let's rethink the fair trade laws altogether. Eliminate them and some prices should begin going down as a result. That may not "lick" inflation, but it would help.

STATEMENT OF PURPOSE OF THE NATIONAL YOUTH PRO-LIFE COALITION

HON. HAMILTON FISH, JR.

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Thursday, January 23, 1975

Mr. FISH. Mr. Speaker, the National Youth Pro-Life Coalition is an organization of students and other young Americans who are deeply troubled by what they perceive as the willingness of our society to adopt "expedient rather than just solutions to complex human problems." The following statement is an adapted version of an article about the coalition by Dr. Thomas Hilgers, a cofounder and member of the Advisory Board, from the November 1974 issue of Linacre Quarterly:

STATEMENT

A little more than two years ago, 60 young people from nearly 23 states met in Chicago, Illinois, with a common interest in human life. The abortion issue was the main item of concern at the first conference, but it didn't take long to recognize that those in attendance had a great concern for human life at all stages of development and in all strata of social existence. From the first meeting, the first national youth pro-life organization was conceived. At that time, this organization, the National Youth Pro-Life Coalition (NYPLC), adopted three fundamental tenets to its existence; it would be non-violent in its activities; it would espouse that human life was a continuum from conception to natural death; it would promote the concept that "there is no human life not worth living" (taken from the writings of Dr. Viktor Frankl, an Austrian psychiatrist who spent three years in the Auschwitz death camp).

The concern of the NYPLC, which now has chartered groups and affiliate members throughout the United States, lies in the issue of life itself. Dismayed by the inconsistent way human life is valued in our society, the Coalition speaks out for consistency. The membership is aware of the prevailing attitude among young people, especially on college campuses, that ties anti-war pro-civil rights, and pro-abortion feelings all into a tightly knit, supposedly "liberal" bag. Equally discouraging has been the anti-abortion, pro-war, pro-capital punishment attitudes of yet another segment of the population.

In the "respect for life" movement, the Coalition believes that only a real revolution in the vaue and dignity of every human life will produce constructive social and human reform. If human life is to be respected, then all human life is to be respected and arbitrarily eliminating anyone from this respect produces inconsistencies which undermine the basic ground-structure from which true reform emanates.

Recognizing that humanity encounters enormous problems, many of which do not

THE WHITE HOUSE
WASHINGTON

file: resale price maintenance ± bill

Date 11.28.85

Suspense Date _____

MEMORANDUM FOR: John

FROM: **DIANNA G. HOLLAND**

ACTION

_____ Approved

_____ Please handle/review

_____ For your information

_____ For your recommendation

_____ For the files

_____ Please see me

_____ Please prepare response for _____ signature

_____ As we discussed

_____ Return to me for filing

COMMENT

_____

_____

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THE WHITE HOUSE

Office of the Press Secretary

EMBARGOED FOR RELEASE AT 11:30 AM EST November 28, 1983

STATEMENT BY THE PRESIDENT

I am today signing H.R. 3222. I am doing so, however, with strong reservations about the constitutional implications of section 510 of this bill. Section 510 purports to prohibit the expenditure of appropriated funds on "any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws . . . ." I do not understand Congress to have intended by this provision to limit or direct prosecutorial discretion, or otherwise to restrict the government's ability to enforce the antitrust laws within the framework of existing case law. Thus, despite the breadth of its language, pursuant to the advice of the Attorney General, I interpret section 510 narrowly to apply only to attempts to seek a reversal of the holdings of a certain line of previously decided cases. Even as narrowly construed, however, the provision potentially imposes an unconstitutional burden on Executive officials charged with enforcing the Federal antitrust laws. Therefore, I believe it is my constitutional responsibility to apply section 510 in any particular situation consistently with the President's power and duty to take care that the laws be faithfully executed.

Another provision of concern is the section which purports to mandate continued funding for current grantees of the Legal Services Corporation at essentially the same level of funding as in fiscal year 1983, unless action is taken prior to January 1, 1984, by directors of the Corporation who have been confirmed by the Senate. To the extent that this provision may be intended to disable persons appointed under the Constitution's provision governing presidential appointments during congressional recesses from performing functions that directors who have been confirmed by the Senate are authorized to perform, it raises troubling constitutional issues with respect to my recess appointments power. The Attorney General has been looking into this matter at my request and will advise me on how to interpret this potentially restrictive condition.

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# # # # # # #

THE WALL STREET JOURNAL.

resale price maintenance

DATE: 11-29-83

PAGE: 60

White House Indicates It Won't Challenge Price-Fixing Rulings

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON—President Reagan, signing a spending bill, indicated his administration will obey a provision barring attempts to overturn rulings that make it illegal under any circumstances for a company to fix resale prices of its products.

The prohibition against challenging the judicial precedents was attached to a bill funding the departments of State, Justice and Commerce. Before yesterday, administration officials had avoided saying whether they would be bound by the restriction.

The Justice Department already has filed a brief with the Supreme Court arguing that fixing resale prices sometimes helps, rather than hinders, competition. It argues that price fixing should be held legal or illegal depending on the circumstances. This is an argument even the defendant, Monsanto Co., hasn't made in the case before the high court.

Oral arguments in the case are scheduled for Monday. It is understood that William Baxter, who heads the Justice Department's Antitrust Division, intends to offer arguments on two narrow aspects of the case, but that he won't raise his opposition to the 72-year-old case law holding resale price fixing flatly illegal. It isn't clear whether Mr. Baxter will respond to questions from the justices on this point.

The Washington Post

resale price maintenance

DATE: 12/1/83

PAGE: A-2

Won't Argue Antitrust Law Change

White House Backs Off Price Case

By Fred Barbash
Washington Post Staff Writer

The Reagan administration, bowing to a congressional mandate it believes may be unconstitutional, has decided not to argue before the Supreme Court next week for far-reaching changes in the nation's antitrust law.

William F. Baxter, chief of the Justice Department's antitrust division, was scheduled to argue before the court Monday that it should re-evaluate its 72-year-old landmark decision that resale price maintenance—restraints by manufacturers on prices charged by distributors—is per se illegal.

But a recent rider to an appropriations bill passed by Congress effectively barred the administration from pressing the issue. A Justice Department spokesman said yesterday Baxter will still participate in oral arguments in the case, Monsanto Co. vs. Spray-Rite Service Corp., as a "friend of the court," but will only touch on other issues in the case, avoiding the more controversial contention he wanted to make.

The case stems from a $10.5 million treble-damage award to Spray-Rite Service Corp., which claimed that Monsanto terminated it as an authorized distributor in 1968 in part because it priced Monsanto products too low. The termination followed complaints to Monsanto from competing distributors.

The legislative rider was the result of continuing objections from many members of Congress to the administration's antitrust enforcement policies. Sponsored by Sen. Warren Rudman (R-N.H.), it provided that no funds may be used for activities designed "to overturn or alter the per se prohibition on resale price maintenance in effect under the nation's antitrust laws."

Court observers could not recall a similar situation or a similar rider so broadly restricting the power of the Justice Department to litigate issues, though attempts have been made in the past to use this technique to keep the government out of school busing cases.

Solicitor General Rex E. Lee informed the Supreme Court in a letter Monday that Baxter would not argue the issue. But he noted that President Reagan, when he signed the appropriations measure, said that it "potentially imposes an unconstitutional burden on executive officials charged with enforcing the federal antitrust laws." The president reserved the right to contest the rider.

Lee's letter indicated that the government would not provoke a confrontation over it in the Monsanto case.

The decision will not deprive the justices of Baxter's views on resale price maintenance, however, because the government has already submitted a brief outlining them. The rider, to the Justice Department's appropriations act, came too late to prevent that.

The rider reflected strong concern in Congress over the administration's policies on vertical price fixing—which can prevent distributors from giving price discounts to consumers on products. A committee report accompanying the rider said "the Supreme Court has ruled this type of price fixing is illegal, yet the antitrust division has adopted a policy of refusing to prosecute violations."

In addition, the division, in its brief in the Monsanto case, pushed for a wholesale change in the law. Under the "per se" approach, coerced price restrictions or restrictive agreements between a manufacturer and distributors are considered inherently anticompetitive and automatically illegal. The administration believes that such situations may be legally justifiable if they are found not to have anticompetitive impact.

CHRISTIAN SCIENCE MONITOR

DATE: 11-30-83

PAGE: 6

Justice Department, Congress spar over future of no-frills pricing

By Peter Grier
Staff writer of The Christian Science Monitor

Washington

The stores are often located in old warehouses on the edge of town. They specialize in cameras, or carpets, or clothing. Their ads are blunt (WAREHOUSE SALE! PRICES SLASHED! MIDNIGHT MADNESS!) and they sell products for less, less, less than traditional retail outlets.

Over the last decade, these discount stores have been among the fastest-growing sectors of American business. But now, in a little-noticed move, the Justice Department is pushing a change in law that could end the price advantage of many discounters.

William F. Baxter, assistant attorney general for antitrust, says he believes that manufacturers should sometimes be able to dictate a minimum retail price for their product. Currently, such price-fixing is automatically an antitrust violation.

Congress doesn't agree with Mr. Baxter, and has voted to prohibit the Justice Department from trying to relax retail-price laws.

Discount stores, which thrive on low overhead and high turnover, have existed since at least the early years of this century. They began to flourish after 1975, when Congress completely outlawed the ability of manufacturers to dictate the price customers could be charged for products.

Not everyone, however, thinks it's a great thing that American consumers can save by shopping at stores that offer few frills. Many economists and regulators complain about the "free-rider" phenomenon, in which customers shop an expensive outlet for advice, then buy from a discounter.

For example, an expensive downtown tennis store here has a back room with a ball machine where customers can try out rackets. During a recent afternoon a congressional aide spent an hour there with a salesman, hitting balls, before deciding on a racket called "The Bronze Ace."

Then she thanked the salesman, walked out the door, and saved $20 by actually buying her "Ace" at a discount store in the suburbs.

Such actions hurt specialized retailers and disrupt manufacturers' marketing plans, say proponents of the mandatory retail price.

Assistant Attorney General Baxter, a former Stanford professor with a scholastic approach to law enforcement, feels this way. He takes the view that set retail prices could actually stimulate competition between companies, since they would increase manufacturers' control over product distribution.

So Baxter wants the Supreme Court to relax the prohibition against retail price maintenance. Specifically, he says judges should study the economic effect of such arrangements, to see if they are pro-competitive, instead of automatically ruling them illegal.

A case dealing with the subject, Monsanto vs. Sprayrite, will be argued before the court on Dec. 5. Baxter had planned to take the stand then, and present his position.

Justice Department officials argue that they're pushing for a relatively technical change in the law.

"We're not talking about as radical a departure as some people believe," says Mark Sheehan, a Justice Department spokesman.

But critics (who include many members of Congress) say the move would make a big difference to the average consumer, by curbing competition at the retail level and raising the price of many popular products.

"Justice really is taking quite an unrealistic position," says Lawrence Sullivan, a law professor at the University of California at Berkeley who has studied the subject for a business coalition opposed to the move.

The Justice Department, Mr. Sullivan says, believes discount-house price-slashing can keep the marketplace from operating at full economic efficiency. But the purpose of the antitrust laws, he argues, is not just to promote efficiency, but to encourage competition at all levels, from manufacturer to retail outlet, and to ensure that the consumer is treated fairly.

If Baxter's views prevail, companies with many competitors and products that are relatively sophisticated — cameras, personal computers, stereos — would probably be allowed to set retail prices, says Sullivan and congressional aides who study the subject.

Some manufacturers would set high prices. Some would stay low, to catch the discount crowd. The practical effect to consumers would be a much smaller variety at your local discount store, these critics say.

But Congress, in any case, is trying to keep all this from happening. The bill authorizing Justice funds for 1984 contained a provision that said no money could be spent to change retail price law. Justice officials say they aren't sure if this provision will prevent Baxter from arguing his beliefs before the Supreme Court in December.

"Lots of members [of Congress] feel discounting is very important," says one congressional staff member. If there is any relaxation in price law, predicts this aide, Congress would simply vote to undo the change.

The New York Times

Baxter Presents Views In Key Antitrust Case

By ROBERT D. HERSHEY Jr.

Special to The New York Times

WASHINGTON, Dec. 5 — The Supreme Court heard arguments today in what could prove to be the most important antitrust case in recent years — a routine private price-fixing dispute that has been elevated by Justice Department intervention into a possible judicial landmark.

The Court, in a decision expected next spring, could decide to overturn 72 years of legal history under which it is automatically illegal for manufacturers to specify the prices at which distributors must sell their products.

The Justice Department's antitrust chief, Assistant Attorney General William F. Baxter, and other Justice Department officials have submitted a friend of the court brief arguing that such vertical price-fixing, otherwise known as resale price maintenance, should be permitted when the facts of a particular case show that it promotes competition.

Consumer groups and discount stores have strenuously opposed any relaxation of the prohibition.

In his appearance today, his first before the Court, Mr. Baxter passed up an opportunity to expound on his view that the prohibition of such price-fixing should be subject to exceptions.

In doing so, he appeared to comply with a Congressional directive, in the 1984 Justice Department appropriation, that no public money be spent trying to persuade the Court to overturn its 1911 Dr. Miles Medical Company decision establishing inherent illegality for vertical price-fixing.

President Reagan signed this appropriations bill into law while expressing doubts about the provision's constitutionality.

Mr. Baxter's presentation, which aroused intense interest, consisted essentially of a declaration of conflict between the Dr. Miles case and the Court's 1977 G.T.E. Sylvania Inc. decision holding that vertical restrictions that do not involve price, such as territorial agreements, were not to be automatically illegal.

He recommended that the Court "build a fence" between the two decisions so that both could remain in force.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 22, 1983

FOR: FRED F. FIELDING

FROM: SHERRIE M. COOKSEY SMC

SUBJECT: OLC Opinion on the Scope of the Limitation Imposed on the Justice Department by the Appropriation Act Provision relating to P[redacted]

Ted Olson sent you an informational copy of his opinion to William Baxter setting forth OLC's interpretation of the provision of the 1984 DOJ appropriations bill which attempted to limit the Department's discretion on vertical price fixing agreements (resale price maintenance). The purpose of Olson's memorandum was to provide Baxter guidance on the effect of the appropriations provision on the Department's oral arguments before the Supreme Court in Monsanto Co. v. Spray Rite Service Corporation. Those arguments were held on December 5, 1983.

Recommendation: No action is necessary at this time, as the legality of resale price maintenance agreements will now be decided by the Supreme Court.

cc: John G. Roberts, Jr. ←

ID # 191444 CU

FIDD4

WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

Sherrie

☐ O - OUTGOING
☐ H - INTERNAL
☒ I - INCOMING
Date Correspondence Received (YY/MM/DD) 83/12/12

Name of Correspondent: Theodore B Olson

☐ MI Mail Report User Codes: (A) _____ (B) _____ (C) _____

Subject: Memorandum for William F. Baxter re: Scope of Limitation Imposed by Appropriations Act Provision Relating to Resale Price Maintenance

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CWHOU		ORIGINATOR	83/12/12	TR		
CWDT17		Referral Note: A/D	83/12/TR			583/12/23 TR
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		Referral Note:				
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ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:
Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments: _____

Keep this worksheet attached to the original incoming letter.
Send all routing updates to Central Reference (Room 75, OEOB).
Always return completed correspondence record to Central Files.
Refer questions about the correspondence tracking system to Central Reference, ext. 2590.

5/81

U.S. Department of Justice
Office of Legal Counsel

Office of the
Assistant Attorney General

DEC 9 1983

MEMORANDUM TO FRED F. FIELDING
COUNSEL TO THE PRESIDENT

For your information, I am enclosing a copy of our interpretation of the provision in the DOJ fiscal year 1984 appropriation purporting to restrict the Department's discretion with respect to vertical price fixing agreements.

Theodore B. Olson
Assistant Attorney General
Office of Legal Counsel

Enclosure

U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

2 DEC 1983

MEMORANDUM FOR WILLIAM F. BAXTER
Assistant Attorney General
Antitrust Division

RE: Scope of Limitation Imposed by Appropriations Act Provision Relating to Resale Price Maintenance

You have asked our guidance on how you should interpret a provision in the Department's recently enacted appropriation act for fiscal 1984 1/ which affects the Antitrust Division's programs. The provision in question appears in § 510 of the act, and prohibits the expenditure of appropriated funds on "any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws . . . ." 2/ You are particularly interested in advice concerning the effect of this provision on the Department's scheduled participation on December 5, 1983 in oral argument before the United States

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1/ The Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1984, Pub. L. No. 98-166, 97 Stat. 1071, was signed into law by the President on November 28, 1983.

2/ Section 510 reads in full as follows:

> None of the funds appropriated in title I and title II of this Act [for the Department of Justice and the Federal Trade Commission] may be used for any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws: Provided, That nothing in this provision shall pronibit any employee of [the Department of Justice or the Federal Trade Commission] from presenting testimony on this matter before appropriate committees of the House and Senate.

Supreme Court in Monsanto Co. v. Spray-Rite Service Corp., No. 82-914, in which the Department has filed an amicus curiae brief arguing, inter alia, that resale price maintenance should not be deemed per se unlawful.

The precise scope of the limitation sought to be imposed by § 510 is difficult to ascertain from its text. It would appear, however, to be directed only at activities of certain Executive agencies, the "purpose" of which is to "overturn or alter" the court-fashioned rule against resale price maintenance. 3/ Furthermore, it appears to impose no affirmative obligations on the Executive, but rather simply to prohibit a certain type of activity which the Executive presumably would otherwise be authorized to undertake.

The legislative history of § 510 indicates that its purpose was a narrow one: according to the Conference Report, it was not intended to limit the authority of the federal courts in any way, but was intended only to prohibit activities by certain agencies within the Executive Branch which were "designed to weaken the existing prohibition on resale price maintenance." It was not, however, intended to "restrict [the Executive's] authority to argue before the Federal courts," within the framework of "existing case law." H.R. Rep. No. 98-478, 98th Cong. 1st Sess. 46 (1983). This language in the Conference Report indicates that the provision was intended to require no more than that the Executive not seek

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3/ The "per se prohibition on resale price maintenance in effect under Federal antitrust laws" is a reference to the Supreme Court's holding in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-09 (1911), that unlawful concerted action must be presumed from any and all agreements establishing vertical price restrictions. The Court has also determined, however, that this per se rule should not be extended to non-price vertical restrictions. See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (non-price restraints subject to analysis under rule of reason), overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

a reversal of a specific line of previously decided cases. 4/ Therefore, it would clearly not preclude attempts by the Executive to confine the applicability of that existing case law, or limit its extension.

Our narrow construction of the limitation imposed by § 510 is supported not only by the language in the Conference Report, but also by the rule that a statute should if possible be construed so as to avoid constitutional infirmity. A law which purported to direct the exercise of prosecutorial discretion, to interfere in the day-to-day management of an Executive agency, or otherwise to burden Executive officials in fulfilling their constitutional obligation faithfully to execute the law, would raise serious separation of powers questions.

Even as narrowly interpreted in the foregoing paragraphs, § 510 might in certain circumstances impose a constitutionally questionable limit or burden on Executive officials. And, indeed, we believe there may be circumstances in which even a spirit of comity with the legislature would not allow responsible Executive officials to refrain from taking actions which would arguably come within the prohibition of the provision, if, in their considered view, such actions were necessary to fulfill their constitutional obligation to execute the law. In these circumstances, where Congress has attempted to hamper execution of the law but has declined or failed to enact substantive legislation changing the law, we believe that the constitutional obligation to execute the law can and should be placed above the admittedly ambiguous

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4/ Seemingly consistent with our reading of the legislative history is a letter Senator Rudman sent to the President on November 29, 1983 commenting upon the President's signing statement accompanying H.R. 3222 (see n.6, infra):

> As the author of that section, I can confirm your interpretation. Section 510 simply bars any attempt by Department of Justice or Federal Trade Commission officials to overturn the longstanding per se rule against resale price maintenance.

limitations imposed by § 510. 5/ The Executive should not and, in our opinion, cannot be bound by § 510 in situations in which it would unconstitutionally restrict the Executive's power and responsibility to execute the law. 6/ You should

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5/ We note that Congress has available to it a more direct and presumably effective way of giving its blessing to the Supreme Court's holding in Dr. Miles Medical Co. v. John D. Park & Sons Co., supra: incorporation into the antitrust statutes themselves. As it is, the anomolous result of the provision in question is that only the enforcement agencies and not the courts nor private litigants are inhibited by § 510. The latter can proceed freely to debate the continued vitality or wisdom of the per se rule under the existing antitrust laws while law enforcement officials must restrict the expression of their views.

6/ In signing the act into law on November 28, 1983, the President expressed his concerns about the scope of this provision in the follow terms:

> I am today signing H.R. 3222. I am doing so, however, with strong reservations about the constitutional implications of section 510 of this bill. Section 510 purports to prohibit the expenditure of appropriated funds on "any activity, the purpose of which is to overturn or alter the per se prohibition on resale price maintenance in effect under Federal antitrust laws . . . ." I do not understand Congress to have intended by this provision to limit or direct prosecutorial discretion, or otherwise to restrict the government's ability to enforce the antitrust laws within the framework of existing case law. Thus, despite the breadth of its language, pursuant to the advice of the Attorney General, I interpret section 510 narrowly to apply only to attempts to seek a reversal of the holdings of previously decided cases. Even as narrowly construed, however, the provision potentially

(Continued)

approach any situation in which § 510 may be applicable with these general standards in mind and, when necessary, seek our assistance in dealing with specific cases.

We turn now to your more specific question concerning the applicability of § 510 to the Department's participation in oral argument in Monsanto v. Spray-Rite. Because the Department's discretion to appear before the Federal courts and to make arguments based upon existing case law is not affected by the provision, we do not believe that § 510 would bar the Department from participating in oral argument before the Supreme Court. It would, however, appear to require the Department to confine its presentation to the arguments, set forth in parts I. and II.A of its brief, against holding the per se rule applicable on the facts of that particular case.

In deference to the Legislature, and in order to avoid having to resolve the difficult constitutional issues raised by the effect of the restriction at this time, you may decide that you can comfortably confine the government's presentation at oral argument in the manner suggested in the preceding paragraph. You might conclude, for example, that you need not present the argument against the validity of the per se rule itself, as set forth in part II.B of the Department's brief, in order to fulfill the Executive's constitutional responsibilities, on the basis that your views are fully articulated in the brief. Under these circumstances, planning your argument to include only parts I. and II.A of the brief would be an appropriate strategy. Despite your pursuing the foregoing strategy, the Court may seek to question you regarding part II.B of your brief. You will have to decide whether to respond to such questions based upon the guidance provided in this memorandum and in light of the factual circumstances, including but not limited to the precise wording and thrust of each such question, as well as the specific context in which it is asked during the argument.

6/ (Continued from p. 4)

> imposes an unconstitutional burden on Executive officials charged with enforcing the Federal antitrust laws. Therefore, I believe it is my constitutional responsibility to apply section 510 in any particular situation consistently with the President's power and duty to take care that the laws be faithfully executed.

We do not have enough specific information about other programs and activities of the Antitrust Division to be able to advise you fully whether and how the provision might be applicable to them. We would, however, be pleased to consult with you further in this regard.

Ralph W. Tarr
Acting Assistant Attorney General
Office of Legal Counsel

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

December 22, 1983

FOR: FRED F. FIELDING

FROM: SHERRIE M. COOKSEY SMC

SUBJECT: OLC Opinion on the Scope of the Limitation Imposed on the Justice Department by the Appropriation Act Provision relating to Resale Price Maintenance

Ted Olson sent you an informational copy of his opinion to William Baxter setting forth OLC's interpretation of the provision of the 1984 DOJ appropriations bill which attempted to limit the Department's discretion on vertical price fixing agreements (resale price maintenance). The purpose of Olson's memorandum was to provide Baxter guidance on the effect of the appropriations provision on the Department's oral arguments before the Supreme Court in Monsanto Co. v. Spray Rite Service Corporation. Those arguments were held on December 5, 1983.

Recommendation: No action is necessary at this time, as the legality of resale price maintenance agreements will now be decided by the Supreme Court. ✓

but then? :).

cc: John G. Roberts, Jr.

If the Supreme Ct decides in Baxter's favor, the Justice Dept will have an interesting problem on how to deal with that appropriations language (e.g., will it be allowed to cite the Supreme Ct's decision? But, to quote Peter, we can "Burn that bridge when we get to it."

SMC 12/28