

MAIL FRAUD/FALSE REPRESENTATION

HEARINGS

BEFORE THE

**SUBCOMMITTEE ON
POSTAL PERSONNEL AND MODERNIZATION**

OF THE

**COMMITTEE ON
POST OFFICE AND CIVIL SERVICE**

HOUSE OF REPRESENTATIVES

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

H.R. 3973

AMEND TITLE 39, UNITED STATES CODE, BY STRENGTHEN-
INVESTIGATORY AND ENFORCEMENT POWERS OF THE
SERVICE BY AUTHORIZING INSPECTION AUTHORITY AND BY
FOR CIVIL PENALTIES FOR VIOLATIONS OF ORDERS
SECTION 3005 OF SUCH TITLE (PERTAINING TO SCHEMES FOR
MONEY BY FALSE REPRESENTATIONS OR LOTTERIES),
OTHER PURPOSES

MAY 20, JUNE 3, JULY 15, 20, 22, 1982

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ACQUISITIONS
MAIL FRAUD/FALSE REPRESENTATION

Postal Service Amendments of 1981

THURSDAY, MAY 20, 1982

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON POSTAL PERSONNEL AND MODERNIZATION, COMMITTEE ON POST OFFICE AND CIVIL SERVICE,

Washington, D.C.

The subcommittee met, pursuant to recess, at 10:12 a.m., in room 311, Cannon House Office Building, Hon. Mickey Leland (chairman of the subcommittee) presiding.

Mr. LELAND. Good morning and welcome to this hearing of the House Subcommittee on Postal Personnel and Modernization. Today, we will consider H.R. 3973 and S. 1407 which are designed to strengthen the U.S. Postal Service's investigatory and enforcement powers.

Our hearing will consist of two panels. Our first panel will be comprised of distinguished legislators from both the Senate and the House of Representatives who will describe for us the legislation they have sponsored. We will hear first from Hon. Claude Pepper, chairman of the House Select Committee on Aging, the committee which has been largely responsible on the House side for uncovering many of the fraud schemes we will hear about today. Accompanying Chairman Pepper is the ranking Republican member of the Aging Committee, Hon. Matthew Rinaldo and the Democratic member of the Senate Government Operations Subcommittee on Civil Service, Senator David Pryor. Also on this panel are older Americans who will relate their personal experiences relating to mail fraud. They are Ms. Bayard Moore of McKeesport, Pa.; Mr. Earl Sultze, of Soquel, Calif.; and Mr. Sidney Marcus of Lusby, Md.

We welcome all of you and look forward to hearing your testimony. I want to welcome especially Senator Claude Pepper.

STATEMENT OF HON. CLAUDE PEPPER, A MEMBER OF CONGRESS FROM THE STATE OF FLORIDA

Mr. PEPPER. Thank you very much, Mr. Chairman. I am very much pleased to be able to be before your committee on behalf of this measure, H.R. 3973, and the companion bill, S. 1407.

We are fortunate today to have here with us the distinguished sponsor of the Senate bill who obtained the passage of that bill through the Senate last evening, Senator David Pryor of Arkansas, a longtime and great friend of mine.

Mr. Chairman, if I may before I speak further ask to have included in the record a statement by the ranking minority member of the House Select Committee on Aging, Hon. Matthew J. Rinaldo.

Mr. LELAND. Without objection.

Mr. PEPPER. May I also, Mr. Chairman, note that there are over 300 cosponsors, including the distinguished chairman, the able gentleman from Texas, Mr. Leland, who is presiding at this hearing on H.R. 3973.

Mr. Chairman, this bill, of course, is for the purpose of giving greater authority to the Postal Service to move against mail fraud. Elderly people particularly have been the victims of such fraud in the past.

In the Senate, not only was the distinguished Senator from Arkansas, Mr. Pryor, the principal sponsor of the bill there, but he was also supported by the able chairman of the Senate Aging Committee, Senator Heinz; the ranking minority member and former chairman of the Senate Aging Committee, Senator Chiles of Florida; and Senator Ted Stevens, chairman of the Subcommittee on Post Office and Civil Service.

We had numerous examples, Mr. Chairman, of the kinds of fraud which have been perpetrated against senior citizens who seem to be especially the targeted victims of perpetrators of these kinds of schemes. Most frauds involve the use of the mails in some way. I think of medicaid and medicare fraud, for example, where false billings are sent through the mails for example. I think of land frauds, where seniors relied upon representations made in advertisements and then mailed letters away to receive more information or to take advantage of the offer.

The Postal Service does an excellent job given the limited authority that they have. We have heard testimony from U.S. attorneys and State attorneys general to that effect. We have sent questionnaires to almost all law enforcement officials in the United States. However, the Postal Service lacks that rudimentary investigatory tool, the power of subpoena. It is hard to see how they could do any meaningful investigation without it. Therefore, what we want to do is to give the Chief Postal Inspector the same power of subpoena that we have given to the inspectors general that we have created in every other department of the Government to fight fraud.

We have heard from literally hundreds of senior citizens who have been victimized. Our questioning of law enforcement officials suggests that the problem is becoming more severe all the time.

Here are some examples, for example, Mr. Chairman, of the kind of fraud which has been perpetrated in these instances through the mail:

A 60-year-old disabled senior citizen planning for retirement lost \$30,000 in a work-at-home scheme in which the company told him they would pay him to grow earthworms.

Another senior, who tried to provide employment for his 42-year-old handicapped daughter, borrowed \$6,500 to invest in a plant-nursery franchise. The scheme was a fraud. He lost his money, and he is still paying off the second mortgage of \$153 a month that he took out in order to make the investment.

Another one is a retired nurse from Lubbock, Tex., who used all her savings to buy a jewelry distributorship through the mail. She lost \$3,475.

Another is Ms. Bayard Moore who is here today to tell you how she lost \$25,000 in a phony fast-food franchise known as Pie Tree.

Another is a Missouri senior who was so upset at losing more than \$50,000 in an elaborate securities fraud called Progressive Farmers Association that he committed suicide. With all of his savings gone, he did not think that he had anything else to live for, and he took his own life.

Another example, Mr. Earl Sultze from California, is here today to tell you how he lost \$5,000 in the vending machine ripoff.

Another, Mr. Sidney Marcus, who is here by me, is here to tell you how he lost \$58,000 in a phony commodities racket.

We have numerous hearings on insurance fraud perpetrated through the mail. In Boston, for example, a 75-year-old woman was sold \$40,000 in duplicative and therefore worthless insurance. A 94-year-old woman was sold maternity insurance. A woman from Illinois was sold 93 policies over a period of 5 years and had to mortgage her farm to pay for the \$50,000 in premiums.

We have heard from a district attorney about phony medical cures. In Philadelphia a man died, not from cancer, but from starvation as the result of a special wheat grass juice prescribed for him by a so-called cancer clinic. He kept taking that, and they told him not to take anything else, until he starved to death and died. These examples are illustrative, Mr. Chairman, not exhaustive. Therefore, it is a massive problem.

Now, what I would like to do, Mr. Chairman, if I may, is offer a list of statements from a given number of seniors all over the country.

I wish to tell the distinguished member of your full committee, the able member from Michigan, Mr. Ford, and we would like you to know that we are not inflexible in any sense of the word about the wording of this bill.

The able Senator from Arkansas, Mr. Pryor, made some excellent improvements in our bill in his companion bill which he got through the Senate last night. Therefore, we welcome any suggestions or improvements that your distinguished committee or subcommittee might make.

The last point is that there is another feature of this bill which is an attempt to deal with recidivists. It provides that when someone is found guilty of mail fraud and violates the order, the Postal Service could approach a U.S. district court and ask the court to impose fines up to \$10,000 upon that offending person. This applies not only to mail, but to situations where the same scheme is perpetrated through using the telephone, particularly the 800-free numbers instead of the mail. This provision applies only where it can be proven to a district court that there is a violation of an existing court order by means of any other instrumentality of interstate commerce other than the mail. In other words, it is intended to be comprehensive in punishing those who use any vehicle of interstate communication as a means of perpetrating fraud.

That is the essence of the matter, Mr. Chairman. Since I have to go to a Rules Committee meeting, unless you have some questions, I will thank you and excuse myself.

[The prepared statement of Mr. Pepper, along with the statement submitted for Mr. Rinaldo, follows.]

STATEMENT OF HONORABLE CLAUDE PEPPER
CHAIRMAN, HOUSE SELECT COMMITTEE ON AGING
BEFORE THE SUBCOMMITTEE ON POSTAL PERSONNEL
AND MODERNIZATION

May 20, 1982

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

I am pleased to be here this morning to testify in favor of H.R. 3973. I am happy to note that the Senate version, S. 1407, has been reported favorably to the Senate Government Affairs Committee. I want to commend the Senate sponsor of this legislation, Senator David Pryor, for his excellent work. His Committee has added a number of amendments which have improved our original legislation. I would hope that this Committee would seriously consider these amendments as well.

I want to express my gratitude to you, Mr. Chairman, for calling these hearings and for allowing us an opportunity to participate. We appreciate your cosponsoring our legislation. We are gratified that over 300 members of the House have joined us, including some 90 percent of the members of both of our Committees.

I would like to indicate at the outset, the tremendous respect that we have for your Committee. I want you to know that we will be glad to work with you toward an objective that we both share, that is, reduction of fraud perpetrated against the elderly and others through the mails. It may be that by working together we can come up with a stronger version of H.R. 3973 or that we can develop some other approach which accomplishes this same objective.

I would like to tell you how H.R. 3973 developed and why we believe the legislation is so important. In the past few years our Committee has held numerous hearings under the umbrella topic of frauds against the elderly. We brought before our Committee many, many older Americans who have been victimized by these vicious rackets. We have sent literally thousands of questionnaires to Federal and State law enforcement officials asking for their input. We have evaluated the performances of all these offices and even heard testimony from convicted con men and racketeers. After all of this work a truly desperate picture emerges. The extent of fraud perpetrated against the elderly and the unsuspecting can only be described as massive. We have issued half a dozen reports which deal with one or more aspects of the problem.

Our hearings have revealed that senior citizens are increasingly living in fear. These fears are real since 25 percent of our seniors have incomes placing them below the poverty line. In general those who retire can expect far less than half of the income they had while they were working. Recent publicity about possible cuts in Social Security has served to fuel these fears.

As a result senior citizens are increasingly paying \$25 to answer ads which say they can make money stuffing envelopes or by knitting baby booties. Mr. and Mrs. Ed Steinleitner testified before our Committee that they lost \$30,000 in a work-at-home scheme in which they were told that the company would pay them to grow earthworms.

Nita Brumley of Lubbock, Texas, is a nurse who retired from hospital work. She was looking for something she could do to earn a little income. She scraped together some \$3,475 for a jewelry distributorship. She was supposed to receive display cases and the jewelry to fill them in order to make sales. The problem is that she received nothing at all for her money.

Other seniors seek to invest in franchises which turn out to be fraudulent. I have asked Mrs. Bayard Moore from Pennsylvania to appear before you here today and tell you how she and her husband lost \$25,000 in a fast food franchise known as "Pie Tree."

Mr. and Mrs. Barney Dial who live outside of El Paso, Texas, took out a mortgage on their home to buy a plant-growing franchise. Their efforts to provide employment for Barney when he retired and to provide a means of support for their 42-year-old handicapped daughter went up in smoke. They paid \$6,500 for a greenhouse, plants and supplies, and the promise of the firm that it would buy back the plants they grew. The greenhouse they received leaked like a sieve and the company went out of business without buying a single plant. Mr. and Mrs. Dial are still paying off the mortgage at the rate of \$153 a month.

Those seniors with a little more money might invest in vending machines. Arthur Shaffer of Columbia, South Carolina, a retired Captain in the Army who served in World War II, Korea and Vietnam, had recently suffered a heart attack and was looking for some way to provide income to his family in the event of his death. He invested \$9,000 and received nothing.

You will hear from Mr. Earl Sultze who will tell you how he lost some \$5,000 in a similar vending machine rip-off. I might say that the actual machines he purchased were produced at our recent hearing. I had the opportunity to examine them and I can tell you they were cheap tin; several of them were unworkable and others would not even stand upright by themselves.

Those older Americans who are a little better off might try investing in the commodities market. Mr. D. H. Brinson, age 73, of Reidsville, North Carolina, thought he was investing his money with a reputable dealer. He didn't see any way that things could go wrong since he was investing in silver. The problem was he was dealing with con men and he lost over \$52,000. I have asked Mr. Sidney Marcus from nearby Maryland to tell you how he lost some \$58,000 in an investment in phony gold and silver contracts.

Our Committee has also examined abuses in the sale of health insurance to the aged. In Boston, the United States Attorney testified before our Committee about a case which involved literally hundreds of victims including one 94-year-old woman who was sold maternity insurance and a 75-year-old woman who was sold some \$40,000 in duplicative and therefore worthless insurance. The insurance agency went so far as to forge the signatures of the elderly on insurance contracts. The principals in the agency were recently convicted of mail fraud. The classic case was the woman we found in Illinois who had been victimized by several insurance agents. She purchased 93 policies in five years. She had to mortgage her farm and paid out in excess of \$50,000 for fraudulent insurance.

Our Committee received testimony from the District Attorney from Philadelphia concerning medical quackery and phony cancer cures. In one case a man with cancer died not from the cancer but from starvation as a result of the special wheat grass juice diet that was prescribed for him by a so-called cancer clinic.

We have heard testimony regarding home improvement schemes. A North Carolina promoter was recently convicted of traveling the East Coast and contracting to remodel kitchens. Instead he pocketed the money.

Mrs. Mabel Nord of Licking, Missouri, testified how she and her husband invested and lost over \$20,000, virtually their entire life savings, in a Missouri-based farmers' cooperative which turned out to be an elaborate securities fraud. Some 6,000 people were taken for over \$12 million in worthless stocks, bonds and notes. Mrs. Nord said she was sure the devastating experience contributed to her husband's heart attack and death a few weeks prior to her appearance before our Committee. Others who were taken include Mr. Ray Montgomery of Greenfield, Missouri, a 73-year-old farmer who lost \$84,000, and Mr. Dallas Colvin of Iberia, Missouri, who is 58 but retired on disability because of a heart condition and lost \$50,000.

We have heard testimony about pension fraud and Medicare and Medicaid frauds. We have conducted hearings on fraud in nursing homes and boarding homes. We are investigating the diversion of social security and Supplementary Security Income checks from their rightful owners. Thousands of such thefts apparently occur every month. We have asked the U.S. Postal Service to increase its efforts in this area. We have asked the General Accounting Office to help us examine this issue and we will be having hearings on the subject in the near future.

In short, we are convinced that mail fraud is a massive problem and that the elderly constitute a disproportionate number of the victims of fraud. It is true that all fraud is not perpetrated through the mails but the greatest percentage of it does utilize the mails in some way.

We tried to examine the reasons why the elderly are especially vulnerable. We learned that few elderly report being defrauded because they are heartsick over their loss or just plain embarrassed. We learned that the elderly are easy prey because they grew up in a more trusting era. Second, many of them have a little money put by. Third, they are generally not accustomed to making large investments. Fourth, they have time on their hands and want to keep busy.

Fifth, they desire to leave a little something to their children and grandchildren.

The con men who testified before our Committee told us just how lucrative these schemes can be. One man was making \$1.5 million a year in a counterfeit coin scheme. He told us that there is so much money involved and the chances of being caught, prosecuted and put in jail are so slim that many con men look at jail as an acceptable professional risk.

All of this brings me to the Postal Service. We asked these convicted criminals which regulatory agencies they respected. They gave the Postal Service inspectors the highest marks. It was interesting that these criminals know the provisions of the law intimately. They also knew the limitations on the authority of the U.S. Postal Service. The convicted con men found it greatly amusing that the Congress has yet to invest the Postal Service with subpoena power. This, in short, is the reason we are here before you today.

While we have legislative suggestions applicable to the Federal Trade Commission and other regulatory agencies, we are convinced that more must be done immediately to help the Inspection Service. The problem we are dealing with has reached epidemic proportions. We cannot afford to wait any longer.

STATEMENT OF
 REP. MATTHEW J. RINALDO
 before
 THE SUBCOMMITTEE ON POSTAL PERSONNEL AND MODERNIZATION
 on
 HR 3973
 May 20, 1982

Mr. Chairman,

I want to commend you for holding this hearing today on the growing problem of postal fraud.

The incidence of mail fraud has jumped tremendously in recent years, and literally thousands of citizens have been victimized by fly-by-night schemes that have resulted in the loss of billions of dollars. Statistics show that over sixty percent of these victims are elderly -- one of the most vulnerable segments of our society.

Schemes directed against the elderly run the gamut from unfounded medical cures for cancer and arthritis to preparations to restore youth. Senior citizens are also the primary targets of work-at-home schemes and land fraud.

Mail order distributorship is one such scam that is frequently encountered. The elderly person is taunted with claims of large profits that can be gained by investing in a distributorship and "instruction manuals" that turn out to be nothing more than fancy names for chain letter frauds. The jewelry distributorship is especially notorious, where false promises of grossly high profits are the bait.

For the record, Mr. Chairman, I would like to cite just a few examples of the types of incidents that have occurred in my own state of New Jersey:

- * A retired military couple invested over \$4,000 in a distributorship selling photo plaques. They were told they would receive an exclusive distributorship and prompt delivery of materials. They received neither and have been unable to recover their investment.
- * Two sisters answered an advertisement for a career in permanent hair removal. They sent a \$500 refundable deposit for a training session and equipment. The training presentation was inadequate, the machine defective, and they are still trying to recover their \$500.
- * An operator defrauded over 425 purchasers of jewelry distributorships in 41 states for a total cost of over \$1.8 million.

The list goes on and on. Some of the witnesses with us here this morning will give you their own first-hand accounts of what it is like to be victims of these con men.

Chairman Pepper and I have introduced H.R. 3973 as a response to this increase in mail fraud. This legislation would provide increased protection for our nation's citizens by strengthening the authority of the U.S. Postal Service to crack down on frauds perpetrated through the mails. The bill would give the Chief Postal Inspector the same subpoena power that is currently possessed by all Inspectors General in government agencies. By granting this increased authority, we will be giving the Postal Service a necessary tool in its efforts to eliminate these frauds.

At the same time, our bill would authorize the Postal Service to initiate expedited proceedings to bar suspected individuals from continuing illegal activities. The bill also allows the imposition of civil penalties in the event the order is violated.

Mr. Chairman, the House Aging Committee has been looking extensively at the problem of frauds against the elderly for a long time, and the legislation before your subcommittee has the support of virtually our entire committee. In fact, there are now over 300 members of the House of Representatives who have co-sponsored this bill.

We believe it is an important measure, and I urge you to push forward with its consideration. Additionally, I would strongly urge your favorable consideration of the perfecting amendments adopted in the Senate.

Mr. LELAND. The Chair would like to thank the distinguished gentleman from Florida for bringing this matter before this subcommittee. I will defer any questions to a later date. I understand that the gentleman does have to leave. I hope that you are willing to come back at some future date.

Mr. PEPPER. Thank you, Mr. Chairman. We are honored today to have the distinguished Senator from Arkansas here. I wish in the warmest way for my Aging Committee and the House to commend him upon his excellent achievement in getting this bill enacted by the Senate. It will give us a cloak of protection so much needed for the 34 million elderly citizens of this country.

Ms. OAKAR. Mr. Chairman, may I make a remark?

Mr. LELAND. Senator Pepper, if you will, our distinguished colleague, Congresswoman Oakar, would like to make a comment.

Mr. PEPPER. Oh, yes.

Ms. OAKAR. Thank you, Mr. Chairman.

Mr. PEPPER. Excuse me. Ms. Oakar is one of the distinguished and effective members of the House Select Committee on Aging. I didn't notice that she had come in.

Ms. OAKAR. I just slipped in, Senator.

I just want the Chair to know how grateful I am for this hearing of the Post Office Committee. I serve on the Post Office Committee with my colleague from Texas. This is a very important issue, and I want to acknowledge the work that you, Senator, and the fine staff we have done on this issue. They have really gathered excellent material illustrating the problems so many elderly are facing with mail fraud. I just think that it is about time that we reported out a bill to deal with the issue.

As a member of the Post Office and Civil Service Committee I believe this hearing is invaluable.

Mr. PEPPER. Thank you. Thank you so much, Ms. Oakar.

Ms. OAKAR. Thank you.

Mr. LELAND. The Chair would like to now recognize the distinguished gentleman from Arkansas, Senator David Pryor.

STATEMENT OF HON. DAVID PRYOR, SENATOR FROM THE STATE
 OF ARKANSAS

Senator PRYOR. Thank you, Mr. Chairman. I want to express my gratitude to you, Mr. Chairman, for scheduling this hearing today and allowing me to participate in association with my longtime friend, Claude Pepper from Florida.

I must say that when I introduced S. 1407 in the Senate that 26 cosponsors eventually signed on this legislation. To any questions I had pertaining to this matter my answer would be very simple. I would say, "Claude Pepper is supporting this bill," and that was all that was necessary, to gain final approval of this measure at about 10 p.m. during the Senate session last evening.

We have had good hearings, Mr. Chairman, on this particular piece of legislation. We have brought postal inspectors in. We have brought people who have been defrauded. We have brought people from all over the United States who have been affected by this particular situation that has enveloped America relating to mail fraud.

Mail fraud, as we know, has grown to epidemic proportions in America. According to Kenneth Fletcher, who is the Chief Postal Inspector and who testified at the Senate hearings recently—false representation schemes using the mails involved hundreds of millions of dollars annually in consumer losses. Moreover, the Chief Postal Inspector cited fraudulent schemes which he had received in excess of 20,000 a day. He also gave the committee a few examples of these cases. As Senator Pepper has just mentioned some of these, I will mention only two or three more:

One, investigation of an individual who peddled phony aphrodisiacs by mail, using 55 pseudonyms and addresses over the years, making it almost impossible for the Postal Service to catch up with him.

Another item: a company operating out of Memphis, Tenn., which sent direct-mail advertisements to thousands of senior citizens nationwide, offering a product called Potency Plus to stop the process of aging, and to increase the lifespan of the user. About 7,000 people, Mr. Chairman, responded to this ad. They sent \$20 in for a 60-day supply of pills consisting of no more than vitamins C and E and a so-called miracle ingredient called Panax.

The third situation, Mr. Chairman, was a promotion claiming to "get rid of body pain without medicine." For \$14 plus \$1.50 postage and handling, 2,100 purchasers eventually received a board approximately 6 inches by 12 inches long with plastic cushions attached to one side. A person is supposed to place this device on the floor, sit on it, rock back and forth, and at the same time move the knees from side to side. This is, of course, to get rid of body pain without medicine.

Well, the sad thing, Mr. Chairman, which examples such as these make very clear, is that these people may not only lose their hard-earned money, but possibly their health since victims, relying on the promised miracle cures may fail to seek appropriate medical attention.

I might point out that since Chairman Pepper's Select Committee on Aging has held such thorough hearings on the subject, we went to the State of Arkansas for a hearing. As you might know, our State has a very high percentage of population over 60. We felt this would be a good forum for such a hearing, and, indeed, it was. We heard testimony from the Arkansas Press Association, from the Better Business Bureau, who share our concern and who support generally the concepts outlined in this legislation. The attorney general of Arkansas, Steve Clark, testified that "mail order and mail-solicitation related complaints consistently rank as the No. 1 complaint category in the consumer protection division" of his office. He told us of several fraudulent schemes which had been stopped. One of these was a Nigerian national who advertised in several publications using a Pine Bluff, Ark., post office box. The ads offered a work-at-home envelope-stuffing operation that said a person could earn 65 cents per stuffed envelope for a \$25 initial investment. However, for \$25, an individual would receive only a mimeographed instruction kit that would show him how to advertise for others to stuff envelopes. Approximately \$20,000 was obtained by this individual in only a few months.

Other examples cited by our attorney general involved bogus-billing operations, fraudulent schemes, and other ripoffs.

At the October Senate hearing, we also heard from a private citizen, Ms. Hazel Karraker of Little Rock, Ark., who lost \$4,000 to an individual who has swindled more than \$29,000 from individuals through false advertising for a bogus home repair scheme.

Mr. John Baker described at our hearing how he bought into a bogus jewelry distributorship which is today a very common scheme.

Mr. Chairman, in closing, I would just briefly wish to outline what this legislation does. It gives the Chief Postal Inspector written investigative demand authority with respect to enforcement of existing postal fraud statutes. This investigative demand authority is the same authority already granted to Inspectors General. The bill would give the Inspection Service the authority to tender a money order and immediately receive the suspicious product in order that their investigation may begin at once. The bill also provided for the levying of stiff civil penalties of up to \$10,000 per day for violation of orders to cease engaging in false representation schemes. Right now, even after a promoter has been ordered to cease, he can simply move on to a new location and the authorities have to start their case from scratch.

S. 1407 is cosponsored, as I have mentioned, by 26 other Senators and has been unanimously reported by the Senate Governmental Affairs Committee. As I mentioned, last night, it did pass the Senate and was sent to the House of Representatives.

Mr. Chairman, that completes my statement.

Mr. LELAND. The Chair would like to thank the gentleman and applaud him for the passage of this legislation.

I would like to ask the gentleman one question if I can. I am concerned that the exemption made for private couriers gets us into the matter of the private-express statute, Senator Pryor, which is a totally separate issue from the problems we are discussing today in that it may invite opponents of those statutes to attempt to weaken them by amending this bill. What are your thoughts on that?

Senator PRYOR. Mr. Chairman, we felt that S. 1407 should have this particular exemption because S. 1407 is intended to address mail fraud per se and to address the present weaknesses in the present statute that we have been operating under.

The exclusion from investigative-demand authority in matters pertaining to chapter 6 of title 39 and the provisions of title 18 which are part of the private express statute expresses the Senate Governmental Affairs Committee's determination, as embodied in our committee report, that appropriate authority does already exist for investigations under these particular provisions.

We felt that this amendment actually would not weaken our legislation. In fact, it would perhaps strengthen it and once again pinpoint the fact that this legislation was addressed specifically to mail fraud.

Mr. LELAND. I thank the gentleman. The Chair understands that the Senator has to leave. Before you leave, however, I would like to recognize the presence of the chairman of the full Committee on Post Office and Civil Service, and I would ask if my chairman

would like to ask any questions of the Senator or make a statement or both or whatever he wants to do.

Mr. FORD. Thank you very much, Mr. Chairman. I just want to thank you for proceeding in the midst of all the other problems we have to expeditiously hear to this legislation.

I am sorry that I missed our colleague, Senator Pepper, but I have discussed the legislation with him, and I am particularly pleased to be here to hear the testimony of our former colleague who is now in what we refer to respectfully as the other body.

David, it is a pleasure to have you here.

Senator PRYOR. Thank you.

Mr. FORD. I look forward to working with you on this legislation. I understand that you have carried it on the Senate side. Has it been acted on?

Senator PRYOR. It passed last night around 10 p.m., Congressman Ford.

Mr. FORD. Well, I have no doubt, nor does anyone else, that mail-order scams have been a problem since the earliest days of the Postal Service. They get more sophisticated, just like other kinds of scams do as time goes by. There can be no question, obviously, that the elderly who depend to a large extent on the use of mails for purchasing goods and services are likely to be well represented among its victims.

I listen with great interest and sympathy, therefore, to the advocates of this legislation. I have to say to you, David, that you know this is not the first time we have looked at a worthy objective with respect to the use of the Postal Service as a policing agency.

One of the most distinguished members of this committee ever is the gentleman from Arizona who a number of years ago despaired of ever getting the State of Arizona to pass adequate laws to protect people who were investing in mail-order sales of real estate in that State where newspapers would carry an ad saying, "Write in and send us \$500 down and pay \$50 a year for the next 25 years, and when you retire, you will come to this veritable paradise in the middle of sunny Arizona." Retirees, hitting their golden age and ready to leave and start collecting their first social security check, arrived in Arizona to find that they had been paying for and had purchased indeed a piece of sand that was worthless and had no water, and so on.

In order to protect people, because the State was unable to act, Congressman Udall persuaded us to tinker with the powers of the Postal Service to control the content of what goes through the mail to protect people against that kind of thing.

I was moved to recall and go back and look and I see that our former colleague Jerry Waldie and I—with all due respect to Mr. Udall—wrote a dissenting opinion at the time that bill passed—it just sailed through here—saying that we are going to be sorry someday if we gave the post office that much more additional power.

Not in the nature of saying, "I told you so," but in the nature of having lived to see the problem develop, I now find myself as the chairman of the committee very much concerned when I look at this corporation that we created over there 10 years ago and see

that it is doing more work than the Justice Department in determining whether or not the law is broken in the use of the mails.

My own view is that we have—in the spirit of Benjamin Franklin who devised the system—a duty to carry anything in the mails that isn't going to explode or cause a fire. It is none of our business what people put in there. It is between the person who mails it and the person who receives it.

All of this, David, is by way of telling you that my reservations with respect to the way in which this legislation is structured is that I am fearful that we are expanding, again, the police-type activities of this Federal agency.

I think this is particularly more sensitive than it was when we considered it years ago because, if you would stop and think about it, what would be your reaction to giving the same kind of civil power to a large utility like AT&T? Because they happen to be the exclusive carrier of telephone messages, obviously, they should be the ones that ought to be able to cut in and catch obscene calls. Would you then go the next step and give that corporation that is not directly answerable to the people the authority to cut off calls and to proceed with actions on their own initiative against the customer?

Since we created the separate postal corporation, we really have a corporation here that is somewhat insulated from the direct action of the Congress and the White House. All too frequently, the Postal Service does everything possible to separate itself from the political process, and if they run away in one direction or another, it is difficult for us to get ahold of it.

It is no criticism of Postmaster General Bolger, but it is a coincidence worth noting that the top management of the postal corporation is very heavily impacted by people whose careers have been spent in the postal inspection service prior to their elevation to these managerial positions. That may explain the great emphasis that has been put on it.

I don't know if you are familiar with it, but we now have uniformed people. We have marked police cars with sirens and lights. We have weapon systems. We have dogs. All of this has grown as a part of this new Federal police force that does a whole variety of things for the Postal Service—all the way from looking for marijuana in packages to deciding whether a piece of material going through the mail is a violation of community standards of decency.

Therefore, while I as the chairman of the committee am very sympathetic to what you and Senator Pepper want to do, I hope that we can work together. I have asked the Attorney General, a series of specific questions about the legislation.

My problem is not with what the legislation wants to do. My problem is not with having to be convinced that something has to be done to protect these people.

Our staff has been working on this and responding to some of the concerns. I believe that it is possible for us to reach my concerns and still do what you want to do. I hope that we can work as we have so many times in the past together to come out with the result that you want and not put us in the position of sanctifying the growth of our in-house police department over there.

If you look at the number of orders that have been issued in recent years, you find that for some reason in the last couple or 3 years the action of the Postal Service in civil administrative actions has just sort of exploded. Some of this is in real estate. Some of it is in charitable solicitations. As a matter of fact, I have recently been informed that the Postal Service, if you can believe it, is operating on a selective basis a little system where they call people and tell them that if they answer a particular ad that is running in that area at that time, they will be violating the law. We are dangerously close to having some overzealous people playing adscam with book publishers. We have the publishing industry more than a little upset right now in terms of what the Postal Service is doing. We have a strange rule being applied, for example, that says that if you put a picture of a scantily clad female on the ad for the book, even though the book has nothing to do with that scantily clad female and says nothing that would offend the dignity of the community, if the content of the ad would be offensive to common decency—whatever that means in any given community—and then the book is sent through the mail by the publisher, the publisher becomes liable for action against them for sending the book in response to the communication initiated by the ad.

That is obviously not what we had in mind when we broadened this out to take care of Mr. Udall's problem. However, it is an indication of the kind of concern that we have from mailers. There are a number of mailer associations that are very much worried.

Finally, David, one of the things that just sort of jumped at us because outsiders came to us to complain is the question of provision in section 4 of S. 1407 specifying that resumption through use of any instrumentality of interstate commerce of any activity with respect to which a cease and desist order has been issued shall be considered a failure to comply with such order. When you couple that with the power that you give the Postal Service to have access to books, records, and documents, it has been suggested that privately owned carriers that are in competition with the post office could be subjected to an examination of their books and records by postal inspectors because they are in interstate commerce and because there is some suspected connection between somebody shifting from the Postal Service to them. In other words, the overnight delivery people and others are very much upset about the idea that postal inspectors can come in and look at their books. They are not at all sure that they can trust the Government to have the postal inspectors look at the books solely to determine if they are protecting a citizen or only to determine how competitive they are with our rates.

I very frankly think that we are past the point that we should be at with Uncle Sam's instrumentality, the Postal Service meddling in private business and meddling in private affairs. I want to protect these people without expanding that authority.

Thank you, Mr. Chairman.

Senator PRYOR. May I respond for just a moment, Mr. Chairman?

Mr. LELAND. Surely.

Senator PRYOR. I certainly do appreciate Chairman Ford's concerns about this matter. I can assure Congressman Ford and the members of this committee that in trying to fashion or shape this

legislation it was not my intention and certainly not of Chairman Pepper to give excessive authority to the Postal Service.

For example, we took into consideration, I think, the fact that for about 100 years the Postal Department or the Post Office Department has been charged with the responsibility of mail fraud. Yet, we have not given them the sufficient tools to follow through with the task which they were challenged to do. This is an attempt to find a balance there.

Mr. FORD. Dave, there is the nub of my concern. Should we continue to give the Postal Service an independent law-enforcement ability or should we refocus the Postal Service and say, "We have a Department of Justice in this country, and we have a Federal police force and a Federal prosecutorial force and a Federal judiciary that are designed to protect everyone's interest out there. What you should do is report this to them and let them handle it"?

What I am concerned about is that we are now in the business of prosecuting people for reading dirty books, and we are intercepting the books and looking at them, and we are becoming the investigator and the prosecutor. Indeed, if you look at the annual report from the Postal Service, they will proudly tell you how many people they nailed during the year right along with their increase in productivity. Something is being taken away from the money that we need to subsidize third-class nonprofits, for example.

Senator PRYOR. Mr. Chairman, so the record will reflect a response to the very valid concern of the distinguished chairman, Mr. Ford, during consideration of this legislation, we have attempted to address concerns such as this. As a safeguard, only the Federal district courts would have the authority to compel compliance once the Postal Service has instigated any proceedings. In other words, we are requiring a cooperative effort with the Postal Service and the Department of Justice and the district court system. I think that safeguard is—

Mr. FORD. If I might interrupt you there, staff is reminding me that we did discuss this between the time that the original bill was introduced and you took action. I want to compliment the Senator from Arkansas for having added that protection to the version that you passed in the Senate, because that answered one of the first concerns we had and answered it very well.

Senator PRYOR. Thank you, sir.

Mr. LELAND. The Chair would like to ask if the gentlewoman from Ohio would have any questions of the Senator. I know that the gentleman from New York does. The Senator is trying to leave.

Senator PRYOR. We are trying to balance the budget over in the Senate. I think you all are familiar with that exercise.

Ms. OAKAR. No, I have questions, but I certainly want to commend the Senator for his interest. I do think there is a real problem. How we achieve the means to the end is the issue, but there is no question that there is a problem with the fraud and abuse that exists in the mail, particularly, the fraud that exists with respect to preying on older Americans and their health needs.

One of the things that I find most reprehensible is that we have so many celebrities and people that the elderly seem to identify with endorsing some of these quackery kinds of objects. I feel that it is the cheapest way to make money. It is unbelievable. Some-

where along the line we have to put a stop to that kind of abuse, whether it is the Senator's way or my chairman's way. You know, one way or another, we have to achieve a means to the end because it is out there and it ought to be corrected.

Senator PRYOR. Well, I would like to just pledge my cooperation to the distinguished Congresswoman, to the chairman, and to the members of the committee. If there is a way that we can sit down, take a look at this bill, and come forward with legislation that will achieve those ends, I stand ready to cooperate and to look at the language and to try to fashion legislation that will be effective. That is the purpose and intent of this particular bill.

Ms. OAKAR. Thank you.

Mr. FORD. Would the gentlelady yield to me?

Ms. OAKAR. I would be happy to yield.

Mr. FORD. I would just like the record to show that the Senator and I go a long way back in this body and in his other incarnation in the State and since he has returned to the other body. I cannot recall, over all those years, any time when we have not been able to come together because, while not wanting to hurt him in any way in Arkansas, he and I think a lot more alike than people might expect for someone from Michigan and Arkansas.

Senator PRYOR. Thank you so much, Mr. Chairman.

Mr. LELAND. The Chair would like to now yield to the gentleman from New York.

Mr. GILMAN. I thank the chairman for yielding.

Mr. Chairman, I want to join you in welcoming our distinguished colleagues and panel testifying this morning in support of H.R. 3973, legislation to strengthen the Postal Service's authority to combat mail fraud. I commend the distinguished gentleman from Florida, Congressman Pepper, Congress recognized champion of our Nation's senior citizens, for introducing this measure, of which I am pleased to be a cosponsor. I congratulate also, our distinguished colleague, Senator Pryor of Arkansas, for taking the initiative to sponsor a similar bill in the Senate. I understand that measure was passed by the Senate last evening. I commend you also, Mr. Chairman, for providing our subcommittee with the opportunity to review appropriate proposals to strengthen the resources we can bring to bear against mail fraud.

Mr. Chairman, as the ranking Republican on our Subcommittee on Postal Personnel and Modernization, I have long recognized the need to improve efforts to combat mail fraud. In 1977, I introduced legislation which was designed also to help crackdown on fraudulent mail offerings. My concern in large measure, was generated by the fact that all too often the target of these schemes and misleading advertisements is our Nation's senior citizens. Indeed, Congressman Pepper indicated that a comprehensive series of hearings held before the Select Committee on Aging, which he chairs, revealed that over 60 percent of those victimized by mail order quackery artists peddling phony health remedies, land fraud, and work-at-home schemes were senior citizens.

H.R. 3973 would go a long way to stemming the rising tide of mail fraud, an epidemic which is estimated to involve hundreds of millions of dollars annually in consumer losses. This measure would: First, permit the Chief Postal Inspector to seek access, to

any books or records related to an investigation he undertakes; second, enable the Postal Service to more quickly obtain from an offeror, a suspicious product; and third, provide for civil penalties of up to \$10,000 per day for anyone who continues to engage in fraudulent schemes after a cease and desist order has been issued, in addition to any criminal penalties which may apply.

Mr. Chairman, while we recognize that the vast majority of our Nation's mail order marketing firms are legitimate and responsible operations, we cannot permit a comparatively small number of firms and individuals to engage boldly in crooked schemes to defraud the public. I am confident that these will be productive hearings, and I look forward to our subcommittee taking expeditious and favorable action on this measure.

I would like to address a question to the gentleman from Arkansas with regard to the measure. Have you received any comments from the business community at all?

Senator PRYOR. I know that the Arkansas Better Business Bureau has testified in favor of the concepts of this legislation. Before you arrived, I referred to the testimony of the attorney general's office of our State in support of this legislation and citing numerous abuses that have occurred in our own State.

I would have to frankly consult with staff to see if we have statements from other organizations in support of this legislation.

Mr. GILMAN. I would welcome your doing that.

Senator PRYOR. If I could have the privilege of submitting for the record those statements of support, if they exist, I will do so.

Mr. GILMAN. Mr. Chairman, with your permission I would like to request that those statements, if received, be made part of the record.

Would the gentleman from Arkansas tell us what means are presently available for recovering the kind of losses that we are talking about for these victimized postal patrons?

Senator PRYOR. The concern with the present law is that it is too little, too late, to effectively ascertain or chase down, or however you would like to say it, those people who are guilty of perpetrating these crimes.

As I cited earlier, once an individual—a vendor—is discovered of wrongdoing, once the Postal Service pursues that individual, all the vendor has to do is to change his address or change his place of operation. We feel that having the new jurisdiction, the new authority under this legislation, would assist in trying to get to the root of these matters before the crime has actually had its impact.

I think that is the main thrust of the legislation, to give additional authority to carry out those responsibilities that the Postal Service is charged with in the beginning.

Mr. GILMAN. Senator Pryor, am I correct that the Postal Service supports this measure?

Senator PRYOR. The Postal Service does support this measure.

Mr. GILMAN. And that the Office of Management and Budget has no objections to the measure?

Senator PRYOR. It is my opinion that OMB has no objections to it.

Mr. GILMAN. And the Congressional Budget Office also states that enactment of this measure would result in no significant cost to the Federal Government?

Senator PRYOR. That is correct.

Mr. GILMAN. Thank you. I thank the gentleman for appearing before the committee and for undertaking this important mission.

Senator PRYOR. Thank you. I thank all of you so much.

Mr. LELAND. The Chair would like to thank the Senator, also. Please hurry up and balance the budget for us.

Senator PRYOR. We will do it before noon if that is all right. [Laughter.]

I thank all of you. Thank you so much.

Mr. LELAND. The Chair would now like to recognize Ms. Bayard Moore from Pennsylvania.

**STATEMENT OF MS. BAYARD G. MOORE, MAIL FRAUD VICTIM
FROM PENNSYLVANIA**

Ms. MOORE. Thank you. Mr. Chairman and members of the committee, I am pleased to have the opportunity to tell you my story. I am Ms. Betty Moore. I live with my husband Bayard who is disabled in McKeesport, Pa.

In the summer of 1977, my husband and I read an ad in the business opportunities section of our local newspaper. The ad was a solicitation for investors interested in purchasing a franchise specializing in selling pies, tarts, and cookies.

We responded to the ad and met with the principals of the company. They made the franchise sound like a no-lose proposition. They assured us we had an opportunity of a lifetime and that our investment in their company would be an ideal way for us to prepare for our retirement years.

We checked with our attorney and the Better Business Bureau. He agreed that an investment in the pie franchise would be a sound decision. Therefore, in September of 1977, we mortgaged our home and purchased the franchise for \$25,000.

Our franchise agreement called for services to be performed by the franchisor, too numerous to completely itemize today. I shall just try to discuss a few of their more flagrant violations.

To begin with, the company projected an annual net profit of about \$26,000. To achieve that profit, about 100 pies had to be sold daily. After the original promotion and advertising had died, in fact, about 10 pies sold on a good day. The company promised an advertising budget of 2 percent of their gross income. At first the advertising was provided. After a few months, the advertising stopped completely. We contacted the media and sought to purchase advertising out of our own pockets. We were refused and were told that the company had not paid for past advertisements.

The company promised to train my husband and me. They never did.

What essentially killed our business was the poor quality of the pies the company provided. They became increasingly bad in texture and taste to the point where the company by letter, invited the franchise owners to find another supplier for pies and then closed their bakery. We attempted to confront the principals with

their many broken promises, but they simply refused to return our calls.

I could go on and on about broken promises, but you could only get the full picture by also talking to the 27 other pie franchises in our tristate area and dozens nationwide who invested in this scheme. Many of the pie franchise owners also were retiring and expecting to use the profits from their franchises to support themselves in their retirement years. All of us were forced to close many within months after opening, some without ever opening at all. We lost everything, our entire \$25,000. Moreover, we are left making loan payments of \$400 until 1988 because we mortgaged our home to make this investment. I know of another elderly couple in West Virginia who will be making mortgage payments for the next 8 years, and many others, too. I know of a couple in Florida who lost everything and were literally forced to live out of their car.

Mr. Chairman, I want you to know that the company sold as many franchises as they could in the first few months that we were in business. In fact, they used us as a good example of how good their business could be. Then they took the money and ran. We don't know how much money was lost, but I would guess it involved millions of dollars. Many couples invested \$50,000 for the exclusive right to bake and service other Pie Tree franchises in their area. One group of businessmen purchased the right to service the entire State of Florida. They received nothing for their money. They never even got to open for business.

We did ask for help from law enforcement officials in our area and in Washington, D.C. We learned that both of the principals in the company had in the past, been indicted for fraud, one of them twice, and that the latter had been proven guilty and served time. We also learned that the same two principals had moved south and were actively engaged in selling candy franchises to other unsuspecting victims.

We know we will not get our money back, but we do hope that our testimony will prevent others from throwing their lifesavings away. Thank you.

Mr. LELAND. Thank you very much, Ms. Moore. That is very disturbing testimony. Did I hear you say that you checked with the Better Business Bureau in your area?

Ms. MOORE. Yes; it was fairly new at that time. None of the businesses that were in the area had been in operation long enough to be in trouble because the franchisors were still trying to make everything look good and sending possible franchise buyers to a few of us locally who created a good opinion and who had nothing but good to say for the first few months.

Mr. LELAND. What course of action did you take after you realized this was a fraudulent act?

Ms. MOORE. Well, the first thing we all did—all these franchisees—was to form a group. We met monthly with all our complaints and we met with one of the lower officials of the Pie Tree Co. We never got anywhere. We tried to form our own advertising. We didn't do well with it at all. Then eventually when the Pie Tree declared bankruptcy, some tried to file a class action suit, but it was all so involved. Because they had no actual tools to prosecute

this type of fraud, it didn't get anywhere and these people wasted additional money on attorney fees and so on.

I guess we were very vocal in complaining to postal officials and so on. We also got nowhere.

Mr. LELAND. Thank you. Are there any other questions of Ms. Moore?

Mr. GILMAN. Thank you, Mr. Chairman.

Ms. Moore, when you complained to the postal officials, was there any investigation undertaken?

Ms. MOORE. Oh, yes, there was. They have a very good case against them. They called a good many of us into Pittsburgh to their offices there, and they kept in touch with us for a good while. However, there really wasn't anything that they could really do at that time.

Mr. GILMAN. There was no prosecution after the investigation?

Ms. MOORE. No. It just dropped there. They said that they would be in touch with us. We tried every year or so to get in touch with them, and it was just at a standstill.

Mr. GILMAN. How long ago was that investigation undertaken?

Ms. MOORE. I would say about 1978 or 1979.

Mr. GILMAN. And when was the last that you heard from the Postal Inspection Service?

Ms. MOORE. Oh, well, over a year ago.

Mr. GILMAN. And that was out of the Pittsburgh office?

Ms. MOORE. Yes.

Mr. GILMAN. Thank you.

Ms. OAKAR. I have no questions.

Mr. LELAND. The Chair would like to thank Ms. Moore very much for participating today. We certainly encourage all citizens, particularly those who have been victimized in this way, to participate in the legislative process so we can help others to avoid suffering the same kind of fate.

The Chair would now like to recognize Mr. Sidney Marcus from Maryland. Mr. Marcus?

STATEMENT OF SIDNEY O. MARCUS, JR., MAIL FRAUD VICTIM FROM MARYLAND

Mr. MARCUS. My name is Sidney O. Marcus, Jr. I am a retired oceanographer, age 64, and I live in Lusby, Md.

In November 1979, I read an ad in the Wall Street Journal by First Guaranty Metals Co. for the sale and purchase of precious metals. I telephoned a Boston salesman for the company. It was during this conversation that the salesman informed me that my only costs in buying and selling silver and gold would be commissions of 1½ percent for getting "in" and 1½ percent for getting "out" of the market and an interest charge at 1 percent above the prime for unpaid balances. In addition, he told me untruthfully that First Guaranty Metals maintained its own inventory of precious metals and transacted \$2 billion worth of business annually.

I phoned the Commodity Futures Trading Commission to inquire about the legitimacy of the company. The CFTC told me that First Guaranty Metals was known to them and that their parent company was registered with them. They could tell me nothing more.

With the assurance that First Guaranty Metals was a reputable company, I invested about \$9,000 for the purchase of silver and gold bullion.

On December 15, 1979, in another conversation with the Boston salesman, I was told that I could not establish First Guaranty's repurchase price, through whom I had to sell, because First Guaranty figured its own market prices, despite the fact that he maintained that the company traded on the Chicago market.

On December 21, 1979, I ordered the sale of 80 ounces of gold, from which I should have received \$10,000. The Boston salesman related that I should receive the cash in 5 working days. Not only did I not receive the \$10,000 due me within 5 days, but to this day I have never received any of it. After 5 days I threatened to go to the Commodity Futures Trading Commission, but the Boston salesman told me first to speak directly with the company's attorney in Florida. When I did, the lawyer told me that he did not understand why I had not received the money and to call him back in a couple of days. I called the lawyer back on December 31. He related that wildly fluctuating markets had delayed my cash payment and made me susceptible to a margin call. This seemed quite implausible to me because my current equity position of 32½ percent seemed an adequate cushion being more than 25 percent above the 7-percent limit for margin calls.

On January 15, 1980, my problem became compounded when I ordered the sale of 4,000 ounces of silver. My sales price was to be \$5 less than the price that First Guaranty established as its current sales price to prospective purchasers. Even at this reduced rate, I should have received \$15,000 making my equity approximately \$40,000, a 19-percent position and well above the required 7-percent margin limit.

Not only did the money fail to arrive once again in the 5-day working limit, but the Boston salesman also told me that I might receive less than the \$15,000 depending on how the Miami office figured it.

On January 22, I called the Miami lawyer and insisted that he adhere to the 5-day contractual limit, but he just put me off by saying that there was a backlog of paperwork. On January 24, another call to the Miami lawyer reproduced the same irrational and fraudulent response.

On January 30, I tried to liquidate my holdings, but I was told on the phone that the CFTC and the FEI had raided the office and closed it down.

I understand that on June 12, 1981, the CFTC obtained a permanent injunction against the officers of First Guaranty Metals and its parent company, Trending Cycles. The CFTC says that the firms ran an elaborate "boiler room" operation based in Miami and Boston and that the offices marketed so-called leverage and cash forward contracts through the use of long-distance telephone solicitations and the mail which were false, deceptive, and misleading. For example, CFTC said that the officers failed to inform customers that the firm sold commodities at one price and bought them back at a second price which was always lower than the original selling price. This is exactly what happened to me. The court appointed a receiver and sought to bring about the disgorgement of

unlawfully obtained profits. Some 800 other people were taken and total losses may approximate \$10 million. My personal loss was about \$58,000. If I had been dealing with a reputable firm, my profits could have been this amount or more.

I hope this committee will be able to enact H.R. 3973 to protect others from these types of abuses. Thank you.

Mr. LELAND. Thank you very much, Mr. Marcus. We appreciate your testimony.

Are there any questions from any of my colleagues?

Ms. OAKAR. Yes, Mr. Chairman.

Mr. LELAND. The Chair would like to recognize the gentlelady—

Mr. GILMAN. If the chairman would yield.

Mr. Marcus, did you take this up with the Postal Inspection officials?

Mr. MARCUS. No, sir. I went to the CFTC who instructed me on how to file a formal complaint which I did.

Mr. GILMAN. What has been the disposition of that complaint?

Mr. MARCUS. Well, it is still under litigation because there is another trial. I was a witness for them in the bankruptcy hearing in Miami, but there is a criminal case pending in Chicago. Nothing can be done until that is cleared up. That is still pending, sir.

Mr. GILMAN. And you haven't received any reimbursement?

Mr. MARCUS. None, whatsoever.

Mr. GILMAN. Thank you.

Mr. MARCUS. I would like to add this: I approached the people from the CFTC and said, "Now, you tell me that you had complaints against that company before I invested, but you wouldn't tell me about that when I asked before I invested. How come?"

They told me that unless something is proven, such as in a court of law, they cannot say anything. They would be liable to suit if they were not proven guilty.

Mr. GILMAN. You had made an inquiry of them before you invested your money?

Mr. MARCUS. Yes, sir. That was by telephone, so I don't have it in writing.

Mr. GILMAN. You received nothing in writing from them?

Mr. MARCUS. No.

Mr. GILMAN. Thank you.

Mr. LELAND. The Chair would like to recognize now the gentlewoman from Ohio.

Ms. OAKAR. Thank you, Mr. Chairman.

I have a very simple question. I think that the root of your problem was when you asked whether this was a reputable company and you were told that it was a reputable company. Is that correct?

Mr. MARCUS. That is correct. No, I was not told that it was a reputable company. I was not told that it was not a reputable company. They told me that the company itself was known to them and the parent company, Trending Cycles for Commodities was registered with the CFTC. That is all they could tell me. Although they knew of other things, they couldn't tell me because it had not been proven yet.

Ms. OAKAR. Did they warn you in any way that there were problems?

Mr. MARCUS. None. Not at all.

Ms. OAKAR. Did you ask them if there was any kind of a problem?

Mr. MARCUS. I did.

Ms. OAKAR. But they declined to comment on that.

Mr. MARCUS. That is correct.

Ms. OAKAR. When you got no satisfaction from them, did you go to your local organization? For example, in my city of Cleveland we have a consumer affairs department and a better business bureau. Did you try anything on a less bureaucratic level to assist you? There are some groups that do have, in fact, attorneys who will volunteer to represent you when they see that there is fraud involved.

Mr. MARCUS. Well, when the Commodity Futures Trading Commission moved against them, after they closed them down and I had lost my money, that was the only forum I could really work with because if I went to anybody else they would say that I would have to wait until this prior claim by CFTC was settled.

Ms. OAKAR. So they did not in any way assist you on a local level? I am just trying to establish whether local organizations that sometimes get Federal funds are effective or not.

Mr. MARCUS. I don't know. I had the word from the CFTC and the receiver—the court-appointed receiver—that actions were being taken. I was just afraid that if I moved in another angle on it, it might muddy up their waters.

Ms. OAKAR. I see, so you didn't really try on a local level?

Mr. MARCUS. No. I did not.

Ms. OAKAR. You put all your faith in the Commodity Futures Trading Commission?

Mr. MARCUS. That is right.

Ms. OAKAR. How do you feel they have fared?

Mr. MARCUS. It is hard to say. In the first place, they let me down by not telling me what they knew. They were afraid to tell me because it had not been proven in a court of law.

Ms. OAKAR. Can I just establish, did they tell you afterward that they really had this information?

Mr. MARCUS. Yes. I invested in November, and they told me they had received complaints against them in August prior.

Ms. OAKAR. But they did not volunteer that information when you questioned them?

Mr. MARCUS. No.

Ms. OAKAR. Initially?

Mr. MARCUS. They told me later that if they had given information out like that, they might be subject to court action if the charges proved false.

Ms. OAKAR. Let me ask you, if they had told you that "We really don't take a stand one way or another, but we had complaints about"—

Mr. MARCUS. I would have gone somewhere like Deak Perera instead. Yes.

Ms. OAKAR. You would have gone elsewhere or you would not have invested.

Mr. MARCUS. That's right. Absolutely.

Ms. OAKAR. Does the Chair know of any law that says that they can't give out that kind of information? It seems to me that would have been the deterrent necessary.

Mr. LELAND. The Chair is not apprised.

Ms. OAKAR. Thank you.

Mr. LELAND. Thank you, Mr. Marcus.

Mr. MARCUS. You are welcome, sir.

Mr. LELAND. The Chair would now like to recognize Mr. Sultze of California.

STATEMENT OF EARL SULTZE, MAIL FRAUD VICTIM FROM CALIFORNIA

Mr. SULTZE. Mr. Chairman and members of the committee, my name is Earl Sultze. I live in Soquel, Calif. I am 71 years of age. I have been a double amputee since 1925, but have fought all my life to remain an independent and productive member of society. At the present time I run a saw, knife, and scissor sharpening business.

Shortly after moving to California in 1970, I was looking for some business that I could get into. I saw an ad in our local paper about the vending machine business which sounded good to me. I paid Robert Donovan, president of Certified Vending of San Mateo, Calif., \$4,998 for 10 "Chocolate Shoppe" vending machines and 10 cases of candy. The purchase agreement called for delivery within 120 days or the company would be liable for a full refund plus 6 percent interest. Shipment was not made and weeks stretched into months, so I hired an attorney.

My attorney found out that Donovan had been an associate of James Stewart Amber who was convicted of fraud in the sale of vending machines sometime in 1970. Before that, Donovan had been an insurance agent. My attorney learned that he was operating a half a dozen different enterprises of a questionable nature in 1975. We filed suit to get our money back, but Donovan filed bankruptcy on October 15, 1975, with \$700,000 in unsecured claims. We heard that in 1977 he opened essentially the same kind of business and that the Federal Government filed a \$26,900 tax lien against him in July 1978. In January 1979, he was finally indicted thanks to the good work of the Inspection Service of the Post Office Department.

Mr. Donovan was convicted on mail fraud and charges related to the fraudulent sales of vending machine distributorships. He was sentenced to 3 years in jail with 5 years probation provided that he make \$180,000 in restitution and that he make all of his company books available for inspection.

Court records indicate that from 1977 through 1978, operating as Sentinel Distributors, Inc., and Sentinel Vending Supply, Mr. Donovan and his associates had ripped off at least \$540,000. Of 82 vending machine sales which were documented by investigators, 47 people received nothing and the 35 who did receive the machines had difficulty keeping them operating or the locations promised by the company in its advertising and in the contract it signed with investors turned out to be worthless.

Interestingly, court records show that some of the original certified vending forms which Donovan had used in 1974 were used in the sales of vending machines by the successor, Sentinel Distributors.

It is some satisfaction to me that this man who cheated me 8 years ago has been convicted and at long last will serve some time in jail. I feel very sorry for the hundreds of others who have joined me as victims of these business and investment opportunity schemes.

Thank you for the opportunity to present this statement. I will never see my money again, but I hope that by coming here today I can help to get H.R. 3973 enacted so that other people who simply want to make an honest living will not be hurt by schemes like I was. Thank you.

Mr. LELAND. We certainly appreciate your coming forward. Your testimony has been very helpful. I hope that you will continue to do all you can to help inform us about these problems.

It is very important for us as a subcommittee and a committee of the House to determine exactly what the real problems are. We are most concerned about the problems that you have brought to our attention, and we hope to be able to remedy them.

I thank you again for coming and I hope to see you again.

Mr. SULTZE. Thank you again.

Ms. OAKAR. Mr. Chairman, while the next witnesses are coming up, I just want to make a comment. One of the things that you can never measure is the psychological trauma that people who have been bilked experience. All the anguish, the problems, and the fact that people are cheated diminish their own sense of health and self-worth. Monetary loss is only a part of the fraudulence.

Mr. LELAND. Absolutely. The Chair certainly concurs with the gentlewoman.

The Chair would now like to bring forward the second panel. Leading off for our second panel of witnesses will be Hon. Frank E. Moss, former Senator from the State of Utah and a pioneer in the whole area of fraud investigations in both the public and private sectors. Joining Senator Moss is David Affeldt, representing the American Association of Retired Persons/National Retired Teachers Association, the largest senior citizen organization in the United States. Lastly, we will hear from Ms. Sandra Bourbon, the chief investigator of the Department of Consumer Affairs for the State of Georgia, and John J. O'Brien III, an attorney from Philadelphia, who has handled a class-action suit for persons victimized by vending machine rackets solicited through the mails.

Again, thank you for coming and we look forward to hearing your testimony.

Leading off for our second panel of witnesses will be Hon. Frank Moss, and we certainly want to welcome you here, Senator. Thank you very much for coming.

STATEMENT OF HON. FRANK E. MOSS, A FORMER MEMBER OF CONGRESS FROM THE STATE OF UTAH

Mr. Moss. Thank you, Mr. Chairman. I am pleased to be here today to testify. I am like the old fire horse who smells the smoke

and has to go to the fire. I commend the chairman and this committee for the bills that are now before us in hearing and express my hope that they will be enacted into law. I understand that the Senate acted last night on a companion bill in the Senate. Hopefully, the Senate and House can come together and we can have bills to increase the authority of the U.S. Postal Service to deal with frauds perpetrated through the mails which is the thrust of these bills.

I would like to make the following points in my testimony this morning:

First, fraud is a massive problem today in our society. Literally billions of dollars are lost every year through an infinite number of con games and rackets. We have been hearing about some of those earlier in this hearing.

Two, the problem is getting more serious. Historically, when the economic situation deteriorates, we have a sharp increase in such frauds.

Third, the elderly and the poor number disproportionately among the victims of such frauds. Many of these ripoffs are targeted exclusively at the elderly.

Four, almost all of the frauds that we can talk about use the mails to a large extent. There are a large number of rackets which are promoted exclusively through the mails.

Five, the U.S. Postal Service and specifically its Inspection Service have done a great job of combatting these schemes given the limited resources and authority that they have. Postal inspectors in general are hard working and professional and have done an excellent job protecting the rights of individuals.

Six, in particular the Postal Service needs help in being able to deal with recidivists, the promoters who flaunt court rulings and continue to operate essentially the same scheme by means of credit cards and 800 telephone numbers. The provision in S. 1407 which would allow the Postal Service to petition U.S. district courts when there is a violation of an existing court order and allowing district courts to impose fines up to \$10,000 in such cases would go a long way in dealing with this problem. That is the one who shifts over and uses another means of doing essentially the same kind of fraud.

Seven, bills H.R. 3973 and its companion on the Senate side, S. 1407, are a conservative, modest but effective means to deal with a devastating problem. The public has made it very clear that they want an end to medicare and medicaid frauds and other kinds of ripoffs. The U.S. Postal Service could play an important role in this respect if the Congress would but give it the tools. It is unconscionable to me that the Congress has, in effect, asked the Postal Service to stem the avalanche of fraud and yet has failed to give that service even the most rudimentary of investigative tools and the power of subpoena.

I believe that I am qualified to speak on the merits of this bill. I am an attorney by profession. Early in my career I had the honor of being elected of the National District Attorneys Association. I served on the bench as a judge in the Utah court system prior to my election to the Senate in 1958. I was a Member of the Senate for 18 years. During my tenure, I was chairman of the Aeronautics

and Space Sciences Committee and a senior member of the Post Office and Civil Service Committee, the Commerce Committee, and the Aging Committee, also the Budget Committee. I served as chairman of one or more subcommittees on each of those full committees.

While I was in the Senate, I had ample opportunity to learn of the wide panoply of frauds which are perpetrated in this country. I was able to learn firsthand about the massive amount of money that is swindled and stolen and to see the resulting drain on the economy. I learned something of the involvement of organized crime in some lucrative schemes. Most of all, I was able to learn from graphic testimony the devastating effect of such frauds on their victims, many of whom are poor and elderly.

Our committee hearings over the years generated national attention and led to the enactment of legislative reforms. We held hearings on land fraud and heard tragic stories about senior citizens who lost their life savings purchasing land that did not exist or which was worthless. I conducted hearings on another scheme targeted almost exclusively at the elderly: Medical quackery. We found that thousands of people had been fleeced by promoters who promised phony cures for cancer or arthritis. The Arthritis Foundation currently estimates losses owing to arthritis quackery is \$1 billion a year. I conducted hearings which exposed promoters who sold phony franchises, distributorships, and other questionable business opportunities. I conducted hearings on insurance abuses, as well as mobile-home and hearing-aid sales. We looked at fraud in the funeral industry, in Government housing programs, and at fraud in programs such as medicare and medicaid. The point that I am making is that the list of ripoffs is seemingly endless, and I would add that most of these schemes utilize the mails to a large degree. Having devoted almost 50 years of my life in public service to dealing with this subject in one way or another, I believe I know as much about fraud as anyone. I want to assure you that the full dimensions of the fraud problem are massive.

In order to illustrate the point, I want to talk briefly about only one of the investigations which I conducted in 1976. We held a dozen hearings on medicare and medicaid fraud in that year. We began by looking into nursing-home problems where we found evidence of widescale abuse. We found people who were literally starved to death, who were deprived of essential medications and who died of gangrene which developed from unattended bedsores. Our committee, which was made up of 25 Members of the Senate, issued a 12-volume report which charged that 50 percent of the nursing homes in the United States were substandard with one or more life-threatening conditions. We quickly learned that there was a relationship between poor care and fraud. We had the U.S. General Accounting Office audit 30 homes characterized by poor care in six States. GAO found potential fraud and abuse, specifically theft of the patients' personal funds, in each of the 30 homes.

The more we looked, the worse it got. We learned that nursing-home owners had placed relatives or other ghosts on the payroll, and they collected medicaid reimbursement for phony invoices. We found that kickbacks between nursing homes and vendors were a common practice nationwide and that the average amount of the

kickback was 25 percent. The result was enactment of a statute making kickbacks a felony. We found nursing homes who charged for services that were not rendered and for physicians who made gang visits billing everyone in the home on the basis of a walk-through. We found nursing-home operators who charged medicaid, and hence the taxpayer, for such items as mink coats, luxury automobiles, airplanes, and you can go on, down to tuition for children to go to college. Literally billions of dollars were being lost through fraudulent billings, all of which were being sent through the U.S. mails.

In another investigation, we looked at clinical laboratories which test blood and other specimens. I will never forget visiting some of the laboratories which billed medicare for \$2 million each year. I was surprised to find that one of these consisted of only two 8-by-10 rooms. There was no lab equipment to speak of. The only personnel in evidence were busy filling out mountains of phony medicaid bills. We learned that all too often the labs performed the sink test. They poured the specimen down the sink and wrote the test numbers at random. I confronted the owner of one of these labs who admitted sending his wife's blood to test at a nearby hospital lab instead of doing it in his own facility. We found that the only competition among laboratories was to see which could give the greatest kickbacks. The kickbacks ranged from 30 percent to 55 percent of the total medicaid billings. Our investigation documented this problem in five States and was featured on CBS' "Sixty Minutes." In Illinois, we developed hard evidence that 11 of 12 labs who controlled 90 percent of the medicaid business in that State were engaging in such illegal activity and that fully 50 percent of the amount being paid for lab services was fraud.

In another aspect of the investigation, committee staff obtained medicaid cards through the U.S. attorney in New York and posed as medicaid patients to test the reported information about wide-scale fraud in the so-called medicaid mills which are found in our urban areas. The perfectly healthy State senate investigators were diagnosed having such ailments as heart trouble, tuberculosis, venereal disease, and fallen arches. At least these diagnoses appear in the billings as justification for payments. Once again, these billings are sent through the mails. Typically our investigators would be seen in a 3-minute visit by a physician who prescribed a fistful of prescriptions to be filled at the adjacent pharmacy. Meanwhile, other practitioners who shared this office space would also bill, claiming to have provided services. It would not be unusual for the podiatrist, the psychiatrist, and the dentist all to bill, claiming to have provided services. In other cases, we had clinics who would file billings on the same person on the same date which we found out came from Xeroxed cards which were exchanged among the mills.

It was during this investigation that I decided that I had to see this fraud for myself. I obtained a medicaid card from the U.S. attorney and went into three clinics in Harlem, the Bronx, and the Lower East Side of Manhattan. I got quite an education. I was able to experience firsthand the indignities and the lack of care that poor people must put up with. I was able to see for myself the full extent of the fraud which was committed by greedy businessmen

who in effect used and blackmailed foreign medical doctors to aid them in perpetrating this cruel racket. The doctors were essentially hired on commission. They were told that they could keep 30 percent of what they brought in from medicaid. The clinic owner kept the 70 percent. There was, therefore, an incentive for the doctors to see as many patients as they could and to bill the Government programs for as much as possible. Billing forms were prepared by clinic managers sometimes after the doctors had signed in blank. Fraudulent billings were added in many cases without the knowledge of a physician. A physician who might be disposed to speak out was kept in line by the threat of being turned over to the authorities for medicaid fraud. On the basis of our investigation, which focused on five States which accounted for more than 50 percent of the medicaid program, we concluded that 25 percent of the cost of the entire program was being lost to fraud.

I mention this investigation not because it resulted in the conviction of some 75 providers including the physicians who treated me. I mention it because the investigation resulted in the enactment of S. 1570 which I introduced in September of 1976. This created the office of Inspector General in the HEW, now the Department of Health and Human Services. The concept of Inspector General, which has now extended to every Government department, was modeled on the Chief Postal Inspector. The Chief Postal Inspector is the official charged by the Congress with the responsibility for protecting the mails against robbery and theft, from the consequences of sending nonmailable matters such as bombs through the mails, and for keeping the mails free from fraud and items sold by means of false representations. The IG in HHS has similar duties. He is the officer who is responsible for internal security, protecting the social security computers and checks from fraud and theft as well as investigating fraud against medicaid and other Government programs administered by the department.

It was in 1976 that I became aware of the excellent work of the U.S. Postal Service and the shortcoming of their authority. I remember discussing the subject with U.S. attorney Robert Fiske of the southern district of New York and his chief assistant, George Wilson. They told me that the Postal Service inspectors were the most professional of all the investigators with whom they had to work. They told me that they worked hard and understood the complicated nature of fraud schemes. As one who had been honored by the local chapter of the Civil Liberties Union, I was pleased to hear that they have been careful to protect the rights of individuals. They also told me how much more the inspection service could do if they did not have both hands tied, and I asked for details.

I was told that under present law, the inspection service cannot move against fraud either civilly or criminally. A criminal investigation must be conducted under the aegis of the U.S. attorney's office, who must be convinced that there is a case and that the case is of significant magnitude that prosecution will be undertaken. Unhappily, only the largest of fraud schemes ever reach that level. Only after convincing the U.S. attorney's office that the case meets these criteria, can the service proceed. In short, the Inspection Service is in a catch-22 situation. They can only proceed if they

convince the U.S. attorney that they have a case, and they can only establish that they have a case if they first do an investigation which, of course, is not possible until they convince the U.S. attorney to let them do so.

In civil cases where false representations are made in advertising relating to matters sold through the mails, the Inspection Service has no way of obtaining access to the product described in the ad short of a test purchase. The service promoters understand this; therefore, they wait 3 months and fill all orders at once as they are going out of business. This means that by the time the Inspection Service gets the product, there is no recourse.

I was informed that the simple answer to both problems was to give the Chief Postal Investigator subpoena authority. I picked up this suggestion in my legislation to create to the office of Inspector General in the Department of Health and Human Services. Moreover, I had drafted legislation along the lines of S. 1407 which would have given subpoena authority to the Chief Postal Inspector. I also included language making this office accountable to the Congress with quarterly reports describing investigations, referrals for prosecution, and use of subpoenas. It was one of the few regrets that I have in looking back that I was not able to see this provision enacted into law before I left the Senate.

You may be asking if the extent of the fraud in medicaid and other areas is still as great as it was when we conducted our investigation. You need only consult the hearings of the House Aging Committee which are replete with information that new fraud schemes have been developed as a means around many of the reforms which we enacted. Medicaid fraud continues to be a huge problem. In fact, the FBI recently testified that medicaid fraud is pervasive. They said that the conclusions of our 1976 report continue to be valid today. If anything, they assert that the extent of the fraud has increased since then.

Therefore, you Members of the Congress on this committee have a unique opportunity to attack this problem in a major way. This simple bill which gives the Chief Postal Inspector authority to issue investigative demands is the single most important step that can be taken to stem the roaring riptide of fraud. The other provision of the bill aimed at recidivists is also an excellent idea.

In the case where an individual violates an existing judicial order by perpetrating the same scheme through a different instrumentality of interstate commerce, the Postal Service could ask the U.S. district court which issued the initial order to issue fines up to \$10,000 for each violation of the existing order. This is only designed to deal with the promoter who seeks to avoid a judicial order in mail fraud by starting the same scheme using 800 telephone numbers. This provision would go a long way toward prohibiting this kind of activity.

I commend all of those who are cosponsoring this legislation. I am told that more than 300 other Members of the House have joined. By the enactment of this legislation, you can do more good for America than you can possibly realize. This legislation is long overdue. It is vital if we are to stem the avalanche of fraud being perpetrated in Government programs and other varieties of mail

fraud targeted at the poor, the elderly, and the unsuspecting. I urge you to enact this bill at once.

I thank you.

Mr. LELAND. Thank you very much, Senator, for your expert testimony. It provides insight, both from your perspective as a former elected official and from your expertise on these matters.

One of the arguments that I have heard for this legislation is that it gives the Postal Inspection Service no more authority than Inspectors General have in other agencies. Do you believe that by upgrading the status of the Inspection Service to that of an Inspector General's Office, we could give them the authority that they need to fight these frauds?

Mr. Moss. I would agree with that if we could simply create the Inspector General in the Postal Service. I do think that he ought to report quarterly, as all other Inspectors General do, on the investigations that they have entered into in that quarter, subpoenas issued, and other details so that the Congress can be fully informed. Worry about whether there was any abuse of power could be very quickly discovered in those quarterly reports.

Mr. LELAND. I am sure that you heard Chairman Ford's reservations about some of the matters contained within the bill. The suggestion that you are making now somewhat might remedy some of those problems. I have some reservations also.

Mr. Moss. Well, yes, I listened to Mr. Ford's discussion. It seemed to me that there were several things that he objected to. One of the things that he worried about was the issuance of the subpoena. Any person who thinks that they are getting an illegal or improper subpoena can ignore it and go to the district court. The Federal district court has to decide whether or not that subpoena was properly issued, whether there was probable cause, whether it was specific enough, and all the other details. Therefore, every citizen has the protection of the courts, just as he has in any other legal proceeding if he believes that the subpoena is improperly issued by the postal inspector.

Mr. LELAND. The gentleman from New York. Thank you, Senator.

Mr. GILMAN. Thank you, Mr. Chairman.

I want to commend the Senator for his sound testimony and for all of the good work he has done in the past in investigating many of these abuses. I remember sitting in on some prior testimony where he reviewed what he had done regarding laboratory-fraudulent schemes and some other areas where fraud was involved. You have certainly made a great contribution in delving into these abuses.

In looking over our proposed bill, do you see any areas where we could strengthen the bill, Senator Moss? Do you see any area that needs a little tightening?

Mr. Moss. Well, I have no doubt that it ought to be very carefully considered on a line-by-line basis. Now, that the Senate has acted, that can come in the conference. I think that the bill is adequate now. As I suggested, you might make it mandatory to have this quarterly report by the postal inspector, the same which is required of the IG's now.

I would say that we ought to make the postal inspector essentially the same as all these other IG's that we have created.

Mr. GILMAN. Do you mean by giving them a little more independence of authority?

Mr. MOSS. Give them independence of authority and the tools to act, to start an investigation when he determines that there is some violation going on and not cripple him by being required to go and convince the U.S. attorney that he ought to have some investigation because time slipping by is very important.

I think that some of the people who have testified here before indicated that they knew after they were into it a while that they were being taken, but they couldn't get action soon enough to head it off. That is what I would like to see the inspector have the power to do. Since the mails are used in nearly every kind of fraud scheme at some point, I think it is a critical point to use.

Mr. GILMAN. Chairman Ford seemed to indicate that we could very well do the same thing by eliciting the support of the FBI or some of the other existing investigatory agencies. What are your thoughts about that suggestion?

Mr. MOSS. Well, I think that, of course, the courts and the U.S. attorneys are already burdened very heavily with the volume of business. The FBI is also. By giving some of that authority in the limited area of mail fraud, it seems to me that we can get greater concentration there than just throwing it into the pile with everything else that the U.S. attorneys have.

I sympathize with the U.S. attorneys. I was a prosecuting attorney myself. You can be absolutely buried in complaints coming in, and you pretty soon have to sort them out and give priorities in order to get anything done.

I think this is sort of pinpointing into the mail fraud area, and it ought to be done by a service that has a long and good record behind it already.

Mr. GILMAN. Senator Moss, I take it that you give a good grade to the Postal Service Inspectors for the work that they have been doing. Have you found that to be a general perception among agencies that have had to deal with the postal inspectors? Are they doing good work generally?

Mr. MOSS. Yes. They have a generally good record, and they have really a long history of good investigative technique, of follow through, and fairness. I threw in a line there speaking of their fairness because I feel that the individual is never being put upon unduly or unfairly.

Mr. GILMAN. Again, I thank you, Senator Moss, for your supportive comments regarding this proposal. I hope that we can see the early enactment of this measure.

Mr. MOSS. Thank you.

Mr. LELAND. Thank you, again, Senator.

The Chair would now like to recognize our colleague, Don Albosta, who has just joined us, for a statement.

STATEMENT OF HON. DON ALBOSTA, A MEMBER OF CONGRESS
FROM THE STATE OF MICHIGAN

Mr. ALBOSTA. Thank you, Mr. Chairman. I am pleased to be here before this Subcommittee on Postal Personnel and Modernization.

As you have been hearing today, this legislation, of which I am one of the 300 cosponsors, is aimed at strengthening the U.S. Postal Service's power to deal with mail frauds that victimize the elderly and others.

Mail frauds and schemes against the elderly have become one of the most common crimes against our senior citizens. By allowing the postal inspectors to proceed with investigations, we can put a stop to these crimes that prey upon our older Americans particularly.

In my home district in Michigan, we have seen evidence of mail frauds including phony arthritis cures, work-at-home schemes, and commodity and security scams. These kinds of mail fraud schemes can no longer be tolerated.

As a member of the Select Committee on Aging and of the Subcommittee on Rural Elderly, I have a special duty to share my concerns about this issue with my fellow members of the Post Office and Civil Service Committee.

Rural areas depend heavily upon mail orders, and my district is a rural one. But whether urban or rural, elderly or young, rich or poor, we will all be better off with a stronger system for protecting postal patrons from fraud and false promises.

While we want to protect innocent consumers, we should also make sure that the powers we provide are not so broad that they will be abused. Chairman Ford has made several important observations on this, and the Senate has passed an amended bill that addresses some similar reservations.

We should look carefully at these powers, but move as quickly as possible to provide the authority that is needed where it is needed. I urge the committee to deal with this issue now and not delay. These hearings are a very fine first step, Mr. Chairman. I appreciate the opportunity to be before you today.

Mr. LELAND. The Chair thanks the gentleman from Michigan for his statement. The Chair would also like to, for the record, submit the statement of the Honorable Ed Derwinski from Illinois who could not be here today.

[The statement referred to follows:]

STATEMENT OF HON. EDWARD J. DERWINSKI

As a cosponsor of H.R. 3973, I strongly endorse H.R. 3973, a measure which will materially assist the efforts of the Postal Service to protect consumers from deceptive advertising. We all have heard or read about situations where individuals have placed their trust in advertising claims, only to be victimized by unscrupulous promoters. In a great many instances, the victims are the aged and infirm, whose lack of mobility forces them to rely on firms that do business through the mails. Although the vast majority of these firms are legitimate, the fact remains that we are confronted with an enormous problem involving schemes using the mail to obtain money by false representation.

H.R. 3973 would permit postal inspectors to tender in person the purchase price of an article advertised for sale through the mail. In the past, shady operators, knowing that the postal inspectors make test purchases by mail, would hold all orders received for their products and when a sufficient number had been amassed would fill them all at once and close up shop, leaving a cold trail. More often than not they

would be back in business under a different name and at a different address promoting their unscrupulous schemes. The bill also would amend the False Representation Act to permit the Postal Service to assess civil penalties for willful violations of existing false representation orders after affording the subject of those orders an opportunity to be heard on the record. The bill also would give the Postal Inspector subpoena authority with respect to those suspected of mail fraud.

The enforcement authority granted by this bill is in no way different from that now exercised by Inspectors General and other government officials, and the procedures provided for in the bill comply in every respect with due process protections.

This legislation is supported by the Postal Service and the Office of Management and Budget. I also want to point out, for the benefit of all of my budget conscious colleagues, enactment of this legislation will result in no significant cost to the federal government.

The bill is legislation which is in the public interest. I hope this Committee and the House act on it expeditiously.

Mr. LELAND. The Chair will now recognize Mr. David Affeldt.

STATEMENT OF DAVID AFFELDT, AMERICAN ASSOCIATION OF RETIRED PERSONS AND THE NATIONAL RETIRED TEACHERS ASSOCIATION

Mr. AFFELDT. Thank you very much, Mr. Chairman and members of the subcommittee. The National Retired Teachers Association and the American Association of Retired Persons very much appreciate the opportunity to testify at your hearing on legislation to give the Chief Postal Inspector subpoena power to crack down on mail frauds.

Older Americans are tempting prey for the perpetrators of these scams. This point has been made emphatically during hearings conducted by the House Committee on Aging on "Frauds Against the Elderly." Our associations have also received a vast amount of mail from elderly victims who have been swindled by fast-talking con artists.

It is against this backdrop that Congressman Pepper developed H.R. 3973, which is designed to protect consumers from mail frauds. Each year the American public loses hundreds of millions of dollars through mail frauds and misrepresentations of products, services, and investments. In 1979, Postmaster General William Bolger said that Americans were swindled out of \$0.5 billion a year for the 5 preceding years through a wide variety of mail-order schemes. This figure is quite likely a very conservative estimate. The evidence is clear, though, that mail frauds are widespread and appear to be a growing problem.

Older Americans are among the chief victims. They are especially vulnerable and susceptible to this white-collar crime for the following reasons:

First, a greater proportion of the elderly are more lonely and isolated than is the case for younger persons. More than one-half of all women 65 years or older are widowed. Con artists will often-times exploit their loneliness or bereavement after the loss of a loved one. These schemes can take many forms: Lifetime dance lessons, computerized dating, and lonely hearts clubs, but they usually cost the elderly dearly, as Congresswoman Oakar pointed out, not only monetarily but also psychologically.

Second, limited income in retirement may make older Americans vulnerable to get-rich-quick schemes such as bogus-land deals,

worthless work-at-home schemes, fraudulent offerings in precious metals, and phony distributorships.

Third, failing health and fear of dying may make the elderly inviting targets for medical-quackery cures and modern "medicine man" techniques.

Fourth, older persons have a tendency to be more trusting than people under 65. They were raised at a time when crime was not as serious a problem as it is now and in a less complex and more trusting society.

The comprehensive study of the House Committee on Aging provides very clear and convincing evidence that the elderly have been singled out by con artists conducting fraudulent mail schemes. About 60 percent of all medical quackery perpetrated through the mails is focused on older Americans. Work-at-home schemes and land fraud scams are directed to a very large degree at the aged. Overall, people 65 or older account for 11 percent of our total population, but they file 30 percent of all fraud complaints received by State offices of consumer affairs.

A clear-cut need exists to modernize existing machinery to combat white-collar mail fraud especially in an era of computer technology. Our associations believe that the Postal Service has done a commendable job, given its limited resources. However, the harsh reality is that the Chief Postal Inspector must now operate under cumbersome and slow procedures which can allow the fly-by-night con artist to escape before law-enforcement officials arrive on the scene.

At present, the Postal Service can be manacled because it cannot examine an allegedly fraudulent product or document until it is too late. The Postal Service generally must either send away for an item in question or otherwise arrange for a purchase. Then the product or document must be examined to determine whether there is a prima facie case for a criminal or civil action. This, of course, takes time, and sometimes a considerable amount of time. It may be enough to let the con artist slip in and slip out unscathed.

We believe that the power to subpoena would enable the Postal Service to move swiftly so that more mail fraud schemes can be stopped before unwitting persons are victimized.

The associations further believe that this is an altogether fitting and proper power for the Chief Postal Inspector. As has been pointed out during the hearing, Inspectors General for other Federal agencies already have this authority. It is a necessary power to protect consumers from being bilked by unscrupulous persons out to make a fast dollar.

Our examination of H.R. 3973 reveals that the bill is a well-balanced approach to provide fundamental tools for the Postal Service to ferret out con artists. Yet, it achieves this objective without subverting protections and other procedural safeguards under our Constitution. Appropriate protections are also incorporated in the bill to protect legitimate mail order businesses from being harassed. I think that it is important to emphasize that the vast majority of mail order businesses are reputable operations. These honest businesses should not in any way be tarnished by the misdeeds of the few who play it fast and loose.

We do, however, recommend that the subcommittee ask an appropriate legal authority knowledgeable about procedural due process to review the bill carefully to make absolutely certain that it passes constitutional muster. I think that Congressman Ford raised some valid points. Our associations want to stop fraudulent schemes quickly and decisively but consistent with the bill of rights and other constitutional safeguards.

We believe that the bill's civil penalties are sufficiently stiff to deter would-be violators from pursuing illegal conduct. At the same time, the courts are given enough flexibility to determine the amount of civil penalties for those who flaunt the law.

H.R. 3973, though, can in our judgment be improved by including authority to expand educational efforts to alert older Americans and others about mail-fraud schemes. Our associations have found that well-educated and well-informed consumers are less likely to be deceived by fast talking hucksters. They are also more apt to spot and report swindlers.

Older Americans and other consumers should be better educated and better armed to combat the con men who use the mails. Make no mistake about it: Mail fraud is a vicious and lucrative racket that must be dealt with squarely, swiftly, and forcefully.

Community involvement in our opinion is absolutely essential if we are to come to grips with this mushrooming problem. Law enforcement officials and monitoring agencies must have appropriate tools, of course, but they will not be able to stamp out white-collar fraud alone. They need cooperation from a better informed and more vigilant American public.

The associations believe that language should be written in the bill or the committee report to direct the Postal Service to expand educational efforts to stop consumer fraud. Our criminal justice services program has been in the forefront in working with the Postal Service and other Federal agencies to implement this objective during the past decade. We have prepared and distributed several publications, one of which is "How To Spot a Con Artist," and others.

These publications are written in easy-to-read language and provide practical advice for elderly consumers. However, there is a great need to make this information more readily available. The information can be disseminated through publications, public-information spots on the air waves, and other appropriate means. In short, it can be done without being costly.

The associations stand ready, willing, and able to work with the Postal Service to expand educational activities to protect consumers from mail fraud.

In conclusion, the fear of criminal victimization is one of the most serious concerns of older Americans, whether it involved crimes against the person or white-collar fraud. In fact, the fear of crime was listed as the No. 1 concern of the elderly in a 1974 poll by Louis Harris for the National Council on the Aging. It is near the top now, also.

H.R. 3973 represents a constructive and well-balanced approach to arm the Chief Postal Inspector with an essential weapon to halt the growing mail fraud schemes.

The associations support the bill fully, but believe that it can be improved by including authority to increase existing educational efforts to alert consumers about fraudulent schemes.

We congratulate the subcommittee for holding prompt hearings on this legislation and Representative Pepper for his leadership in developing this bill.

For these reasons, we urge the subcommittee to act promptly and favorably on H.R. 3973.

Thank you.

Mr. LELAND. The Chair would like to commend you on a very effective testimony. The Chair would now like to recognize the gentleman from New York.

Mr. GILMAN. Thank you, Mr. Chairman. I regret that I am going to have to go to another meeting. I certainly want to commend the participants in this panel for appearing before us.

Mr. LELAND. Mr. Affeldt, thank you very much for your representation of the organizations that have been so effectively dealing over the years with the problems of senior citizens of our country. I have had occasion in the past when I served in the State legislature for 6 years to work with your organization in the area of generic substitution of product selection. Finally, this last year, the State legislature of Texas in its wisdom—probably because I was gone from there—passed a generic substitution bill finally, the so-called Leland bill.

I am particularly pleased that you would come forward and give such substantive testimony.

Mr. AFFELDT. Thank you very much. It has been a pleasure working with you, too, over the years.

Mr. LELAND. Thank you.

The Chair would now like to recognize Ms. Sandra Bourbon from Georgia who is the chief investigator in the Department of Consumer Affairs for the State of Georgia.

**STATEMENT OF SANDRA BOURBON, CHIEF INVESTIGATOR,
DEPARTMENT OF CONSUMER AFFAIRS, STATE OF GEORGIA**

Ms. BOURBON. Mr. Chairman and members of the committee, my name is Sandra Bourbon, and I am responsible for the registration of companies offering business opportunities, as well as the investigation of business opportunity fraud in the State of Georgia. When Georgia legislators passed the Business Opportunity Law in 1980, they did so in response to the hundreds of victims who had been defrauded in business opportunity schemes such as dealerships, distributorships, et cetera. We all believed that a State law requiring registration and disclosure information would give us the ammunition we needed to reduce the incidence of business opportunity fraud in Georgia. The law gives us subpoena power and provides a criminal penalty of 5 years in prison and/or a \$50,000 fine.

It is hard to estimate the effect that this law has had in stemming fraud, but we do know of several instances when crooks have been pressured to move out or stay out of Georgia due to our efforts.

In implementing the law, we at first believed that the Georgia law itself would be a deterrent, but the hardcore crooks have thus

far sneered at our attempts to regulate them through letters, informal hearings, and civil suits. We have found that criminal action is far more effective.

Three days ago, after an undercover investigation, we had a salesman arrested for violating the Georgia business opportunity law. A postal inspector in Philadelphia had numerous complaints against the principals of the company, and we decided to send the company notice that we mean to enforce the law. Curiously, the salesman was an attorney, a graduate of a prestigious law school, who should have known better. Regarding the business-opportunity laws, he said, "The Government looks around and finds some little flaw in society, and makes a major issue of it." He is right in saying that governmental agencies are making a major issue of business-opportunity fraud, but we are not finding a little flaw in society; we are finding a proliferation of this type of white-collar crime that strains every resource of every governmental agency involved. When a fraudulent company closes, four offspring take its place. Employees working for criminals start their own fraudulent businesses and provide training for others.

One con man, Claude Blanc, was recently sentenced to 16 years to serve on a gem fraud case investigated by the FBI. As there were no victims, the scheme having been discovered during the course of another investigation, Blanc thought that he would never serve time. However, 2 days prior to sentencing, he was indicted on 26 counts of mail fraud. The testimony of the postal inspector along with others in the sentencing hearing on the gem fraud convinced the judge to send him away. Postal inspectors, FBI agents, and I have coordinated on all aspects of the Blanc cases with astonishing results, and we have not finished with Mr. Blanc.

A cohort of Blanc, Jerry Melton, was recently convicted of bankruptcy fraud and gem fraud, both FBI cases, and pled guilty to charges of mail fraud and tax evasion. Melton received 5½ years to serve with additional sentencing later this month. Again, the FBI and the U.S. Postal Service coordinated closely in the investigation of these cases.

I might add that these cases are oftentimes investigated by both agencies—both FBI and the Postal—until the U.S. attorney decides which agency should have the final jurisdiction in the case. In other words, these are the exact same cases. It is determined at some point that it will either be fraud by wire or mail fraud.

These investigations are time consuming and costly. All of us working together need every investigative and legislative assistance possible. Any delay in any investigation and prosecution of fraud, for whatever reason, could result in a greater number of victims and dollars lost.

We in Georgia support the efforts to strengthen the authority of the U.S. Postal Service through subpoena power and cease and desist orders.

Thank you for allowing me the opportunity to testify today. I would be pleased to answer any questions from the committee.

Mr. LELAND. Thank you very much, Ms. Bourbon.

Ms. BOURBON. Thank you.

Mr. LELAND. Let me ask you one question. As I heard the testimony from the victims of the alleged fraudulent acts, I wondered

and I failed to ask the question if in fact they had any agency within their respective States to deal with these special problems and had they appealed to them. I understand that is more or less the kind of agency that you represent.

Do you know how many agencies like yours exist around the country?

Ms. BOURBON. It depends on the type of fraud that you are talking about. My specific area of jurisdiction is business opportunity fraud. I would say that the great percentage of the States now have some type of business opportunity laws on the books, or they have franchise laws which can be rather broadly construed to cover business opportunity frauds: distributorships, dealerships, and that type of thing.

Many of the States are passing legislation during the last couple of years because we all recognize that we have the same problem. The reason that we passed these laws was not because we felt that the Postal Service and the FBI were ineffective. It is just that many of these cases are not prosecuted until the fraud has been perpetrated for perhaps 4 or 5 years. We just wanted a foot in the door to be able to harass these fraudulent businesses to the point that perhaps we could hold down the number of complaints and the amount of money that is lost.

Mr. LELAND. What about consumer protection agencies within the States which, I guess, are parallel to your responsibility?

Ms. BOURBON. Yes. I work for the office of consumer affairs, and I think almost every State with the exception of one has some counterpart: An office of consumer affairs or consumer protection. However, some States are more aggressive, naturally, than others. Some have a larger budget and a larger staff to pursue fraud cases. Some have very restrictive regulations on how they will handle the complaints that they receive.

Mr. LELAND. I recall that in the State of Texas during the time that I was there, again, we passed an authorization for the attorney general's office, as a matter of fact, to institute a division dealing with consumer affairs. It has been very active, and it has very much dealt with matters such as these that have come before us today.

Ms. BOURBON. Yes; that is correct.

Mr. LELAND. Thank you very much for your very effective testimony.

Ms. BOURBON. Thank you.

Mr. LELAND. The Chair would like to now recognize Mr. O'Brien from Pennsylvania.

STATEMENT OF JOHN J. O'BRIEN, LEGAL COUNSEL FOR VICTIMS
IN CLASS ACTION VENDING MACHINE SUIT, PHILADELPHIA, PA.

Mr. O'BRIEN. Thank you very much, sir. My name is John O'Brien, and I am an attorney engaged in the practice of law in the city of Philadelphia for the firm O'Brien & O'Brien.

For over 3 years, I have represented numerous individuals who have lost considerable sums of money and who have been subjected to considerable distress, embarrassment, and frustration as a result

of the conduct of corporations purportedly engaged in the sale of vending-machine distributorships.

In connection with my activity in representing these victims of these frauds, I have conducted fairly extensive investigations to determine the manner in which the fraud is perpetrated.

For this committee's review, I have brought certain documents which were used by these corporations in perpetrating the fraud. For example, I have pitch books, letters to the consumer, promotional material, instructions to the salesmen, and reference sheets.

In addition, delay is a very important factor in the perpetration of this fraud in these cases. The offending corporation will advise the buyer that it will be several weeks before the vending machines and the product will be delivered to the individual's home. However, several months pass before the articles even arrive. In many cases, the representations are never fulfilled. For example, the machines do not arrive, the product does not arrive, the locator who, it is represented to an individual, will put the machine in a prime location often never shows up to locate the machines. In some cases, nothing arrives, and in many cases, telephone calls are totally ignored.

First of all, the victim will respond to a newspaper ad offering grand profits to the consumer through vending machine sales. I have determined that these ads have appeared in at least 20 States.

An interesting point is that the most notorious corporation, International Entertainment Corp., out of Valley Forge, Pa., a suburb of Philadelphia, appeared to have never sold any distributorship to a citizen in Pennsylvania.

The schemes are identical in each case. The victim will call the number which appears in the ad. He will then be given an appointment in a local motel with the salesman. I will present the pitch to you in a few minutes, sir. Once the victim is convinced to buy the program, he or she is requested to give the salesman a check for \$1,500 and to sign a contract for the distributorship. Within a few weeks, the victim receives a letter congratulating him on being awarded the distributorship in the area and telling him to send the balance—a cashier's check, I might add—of the \$7,000 that is involved. Further, he is also advised that he must put an order in for the product that is to be used in this machine before a locator will be present to locate his machine. If he doesn't buy the product, the locator doesn't come, and he is in effect stuck with the machines.

Then a number of other problems develop. For example, a woman found that the machines would not stand upright on the base. She wrote and complained about that, and she was advised that if you put 200 pounds in the base of the machine, of sand or rocks then the machine will stand up. The problem with that was the woman was 65 years of age, and she had purchased 10 machines; therefore, she had to purchase a ton of sand.

Further, the locator never arrived, and for over a year the machines remained in her apartment. She once described them as soldiers reminding her of her mistakes standing at attention in her bedroom. Finally, she was able to sell the machines and the sand at a considerable cost to her. By the way, the company never responded to her complaints.

In another instance, an individual in Missouri was given the phone number for this Pennsylvania corporation which happened to have an Illinois area code. He called the number, and he was given a taped message to call a number in southern California. This is just an example of how quickly these companies move.

Often legal action is fruitless. These companies don't have offices in the States where the individuals live, and it is hard to get jurisdiction over them. Further, their losses—\$7,000 is a lot of money to many people, but in this case, the legal fee is just too expensive to pursue.

I might add that this International Entertainment Corp. of King of Prussia, Pa., it was learned through a Federal criminal action under mail fraud, had victimized over 1,000 people. They believe they took over \$6 million from these people. From correspondence, I have learned that there are perhaps 30 more of these companies around the country.

I suggest, gentlemen, that the subpoena power that is requested here will help combat this conduct.

With your permission, I would like to show you one of the pitch books.

This is an office building in the suburbs of Philadelphia. This is the International Entertainment Corp. underneath. Their offices are in a suite in the corner. This is their corporate headquarters. The brochure contains income opportunities within the ventures, letters showing how much money can be made, small business bibliography explaining what equipment automatic merchandising is, newspaper articles, total volume of vending products.

Mr. LELAND. Will you suspend for just a minute? Will you go back to the newspaper articles? Are those valid newspaper articles?

Mr. O'BRIEN. I beg your pardon, sir?

Mr. LELAND. Are they valid?

Mr. O'BRIEN. Oh, yes, but the impression is that if you invest in the vending machines, you will do as well as this individual did.

Mr. LELAND. I see. It is not necessarily referring to the specific company.

Mr. O'BRIEN. Oh, no. This is not the same machine that was sold to the victim that I mentioned.

Mr. LELAND. I understand.

Mr. O'BRIEN. There is material given to the salesman to read to the victim. I will just read a paragraph. "Let's assume that for some unknown reason, even though the people are there, that 10 machines only vend 15 times a day." They suggest that normally it would be 30 times. "Even allowing for a small volume of business, your can obtain a profit of \$585 a month or \$7,020 per year from your investment. A good investment? Yes. A return of over 100 percent of your initial investment. Now, you can understand why so many people like yourself are attracted to this profitable business."

Now, here is a little item here that the salesman is supposed to read to Mr. and Mrs. Smith. "Mrs. Blank"—you could put Smith in if you want—"I have been very candid with both of you, and I would appreciate it if you would now reciprocate that courtesy. Even though I know you are somewhat prejudiced in his favor, do you honestly believe that your husband is capable of handling this business as I have laid it out?" Then he is advised—there is a little

note that he is given here—to put the wife in the position of being between herself and her husband. This is most important part of the close, put the wife in her proper place, in the middle, and proceed with the same attitude to develop the second step of the close.”

I apologize to my female colleagues.

[Laughter.]

Mr. O'BRIEN. The idea is to encourage the sale, of course.

Here is another paragraph from the application.

“Occasionally, you will hear”—this is directed to the salesman regarding what he will hear from the victim—“I am not filling out anything until I know who you are and what this is all about.” Tell him this as you close your brochure, ‘You have ample opportunity to check us out. You have a number of other people to see, and strict company policy precludes continuing any interview without a complete application. Write us again if you are still interested at a later date.’ You will be amazed at how quickly he reacts and retracts the statement and begins to fill out the application.”

I might add regarding references, that in some cases the companies that they are told to call are the same with different names. I have included the copies of the references.

Mr. LELAND. Are you also including copies of the other pieces?

Mr. O'BRIEN. Oh, yes. I will let you have these.

Mr. LELAND. The Chair would appreciate that.

Mr. O'BRIEN. There are a lot more that I have left out which are really enlightening.

Mr. LELAND. Thank you.

Mr. O'BRIEN. Included among the exhibits—

Mr. LELAND. The Chair will find that not only interesting but also entertaining, I am sure.

Mr. O'BRIEN. Thank you, sir. I have gotten a hold of some of the machines myself, and I have determined some interesting facts. One of the patent numbers of the machines was assigned to the Wrigley Corp. of Chicago.

Mr. LELAND. Wrigley?

Mr. O'BRIEN. Yes, sir. The candy company. I will give you the patent number. Patent No. 3,948,381, April 1976, and the inventor is Harry Galin, Willow Grove, Pa., a suburb of Philadelphia; assignee: William Wrigley, Jr., Co., Chicago, Ill. I know why that was assigned, but because I am conducting the investigation I cannot tell you why. Someone, in a phone call, told me why. I don't have the documentation yet to explain it.

Mr. LELAND. The Chair has instructed the staff to also look into that matter.

Mr. O'BRIEN. There are two patents to the machine. The second patent is numbered 3,982,621; inventor: Harry Galin; assignee: Universal Vendors, Fort Wayne, Wash. You will see that Universal Vendors—may I approach the chairman—sells the “profit machine.” That is the patented machine. They represent that the machine is designed specifically for Hershey bars, Wrigley gum—well, I shouldn't say that. I should say that each particular model is designed particularly for Hershey, Wrigley, Nabisco cookies, and Fruit-of-the-Loom panty hose. It appears that each model is simply given a different number.

Mr. LELAND. Yes.

Mr. O'BRIEN. Here is another little interesting item.

Mr. LELAND. Have the companies that you have mentioned been involved in any kind of investigation on these matters at all?

Mr. O'BRIEN. I have asked the Justice Department about that, and they can't say.

Mr. LELAND. They can't say or they won't say?

Mr. O'BRIEN. They will not comment.

Mr. LELAND. All right.

Mr. O'BRIEN. Here is another example of the misuse of names: “Fruit of the Loom,” something similar to it, “America's most powerful name in softgoods.” This is a “profit machine” that distributes Fruit-of-the-Loom panty hose.

I have also included letters from customers telling people—for example, a woman wrote explaining why it will not stand, and she was told: “By the way, just put 200 pounds of sand in it.”

I have a lot more, gentlemen. If you have any questions, I will be glad to answer them.

[The documentation and information which Mr. O'Brien furnished the subcommittee in support of his testimony was retained in the official hearing file.]

Mr. LELAND. Thank you very much for an illustrative presentation. I appreciate it. The Chair would like to thank all of you for participating today. I would like to especially acknowledge the sensitive issue of the constitutional questions raised by Mr. Affeldt. I certainly appreciate your concern. I think that is the overriding concern that Chairman Ford has. If, in fact, we can remedy that problem, I would suggest that we can move more swiftly with this piece of legislation.

The Chair would like to thank Senator Moss, especially, for coming before us to continue to be a public servant. Thank you very much.

[Whereupon, at 12:31 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

MAIL FRAUD/FALSE REPRESENTATION

THURSDAY, JUNE 3, 1982

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON POSTAL
PERSONNEL AND MODERNIZATION, COMMITTEE ON POST
OFFICE AND CIVIL SERVICE,

Washington, D.C.

The subcommittee met, pursuant to call, at 10:25 a.m., in room 311, Cannon House Office Building, Hon. Mickey Leland (chairman of the subcommittee) presiding.

Mr. LELAND. Good morning, and welcome to this second hearing on H.R. 3973, by Congressman Claude Pepper, and its Senate companion, S. 1407 by Senator David Pryor.

These bills are designed to strengthen the investigatory and enforcement powers of the Postal Inspection Service. At our first hearing on May 20, 1982, Senator Pepper and Senator Pryor told us about many of the fraudulent schemes that are being perpetrated today, especially against senior citizens.

We were also told that the Postal Inspection Service does not have sufficient authority to effectively combat these frauds, and that even after a promoter has been ordered to cease, he can move on to a new location and the authorities have to begin a new case.

We also heard from several victims of these frauds who told us about their personal experiences, and from former Senator Frank Moss and representatives of retired persons.

I share the concern expressed about the increase of mail fraud in recent years and about the devastating effects it has had on many of our citizens, especially the elderly. These kinds of crimes are among the most shameful and despicable that exist in our society. They rob people not only of their money, but often their health, dignity, self-respect and peace of mind. I agree that it is time for the Congress to address these problems and do all we can to correct them.

However, in dealing with these types of crimes, we have to walk a very fine line between pursuing and punishing the criminal and violating the first amendment rights and civil liberties of citizens who are honestly involved in the mail order business.

I am apprehensive about several aspects of the legislation that has been proposed because of the extent of the additional powers that would be given to the Postal Service, which is almost totally independent of congressional or executive supervision. I have committed to Senator Pepper and Senator Pryor that I will work closely with them to find a way to provide authorities with sufficient

tools to fight and prevent mail fraud and still satisfy the concerns I have expressed. I am confident that we can do so.

Today we will hear from several witnesses who will provide us with more information on the problem of mail fraud, but also about the legislation itself. We hope to gain some insight on whether or not the provisions of the legislation are the appropriate ways to deal with the problems.

I would like to say to all of our witnesses today that we will include your entire prepared statements in the official record. If you can, we would appreciate it if you would summarize what your statements, however, that is up to you, of course.

Our first witness will be the Honorable Janet Steiger, Chairperson of the Postal Rate Commission. Chairman Steiger, will you please proceed, and thank you very much for coming to this hearing.

STATEMENT OF HON. JANET STEIGER, CHAIRMAN, POSTAL RATE COMMISSION; ACCOMPANIED BY SIMEON BRIGHT, COMMISSIONER; HENRY FOLSOM, COMMISSIONER; JOHN CRUTCHER, COMMISSIONER; AND DAVID STOVER, ESQ., GENERAL COUNSEL

Ms. STEIGER. Good morning, Mr. Chairman.

It is a particular pleasure to be with you this morning. It allows the veteran members of this Commission—and "Simen" Bright is with me this morning—the opportunity to formally introduce you to two new Commission members on the Postal Rate Commission. Commissioner Henry Folsom and Commissioner John Crutcher come to the Rate Commission, Mr. Chairman, from distinguished careers in both the private sector and in public service, and the quality of their appointments is, we feel, a credit to the administration. In their short term we have quickly come to value their common sense, their quick intellects, and their vast experience. We are happy to introduce to you two Commissioners whose contribution will, we know, be in the public interest and in the interest of the entire postal community.

I am delighted to summarize the Commission testimony this morning. We know you have a very heavy schedule.

Let me start by saying we at the Postal Rate Commission are not experts in all phases of this consumer protection measure, Mr. Chairman. It does not fall within our official scope. But on the basis of our general knowledge of the postal scene, we are sure that the Postal Service's support for this legislation represents a careful and a reasoned judgment that it is needed.

In one area where our official duties do give us claim to speak from experience—that is the area involving the obtaining of information for administrative procedures—we do think the bill represents a significant improvement over current practice.

In brief, section 2, new section 413 of S. 1407—and we take this bill as our text, Mr. Chairman, on the assumption that, as amended, it will be the vehicle you will base your considerations on—S. 1407 would create in the Postal Service a power to issue reasonable demands for the access to books, records, and other objects it believes relate to a matter it is investigating under section 404(a)(7).

Now, the lack of such authority, it seems to us, must be a fairly serious obstacle to the Service in carrying out its statutory duty to "investigate postal offenses and civil matters relating to the Postal Service." Senator Pepper, for instance, who introduced H.R. 3973, noted the time sensitivity problem with these issues a few weeks ago, and you have also alluded to them.

In addition to this problem, there must be many cases where the simple fact that vital information is in the sole possession of some outside party means that the Service simply cannot proceed with its case, or perhaps, more importantly, know whether it has a case.

Now, as agency members who must decide matters on an evidentiary record, and who do so under considerable time pressure, we do know how frustrating such obstacles can be. This legislation attacks those problems using a well-tried remedy, and we don't see any reason why it shouldn't work here as it has elsewhere.

For example, the mechanism in section 413 is not dissimilar to that recently set up for the Federal Trade Commission. The FTC can also serve "civil investigative demands," as the act calls them, on any person it believes possesses documents or information "relevant to unfair or deceptive acts or practices in or affecting commerce." Likewise, under the Antitrust Civil Process Act, the Attorney General can issue such demands in aid of an antitrust investigation. So there is ample precedent, Mr. Chairman, for the power S. 1407 would bestow on the Postal Service.

Of course, one cannot simply assert these days that a new regulatory or investigative power is needed and expect to escape argument and controversy. This is probably all to the good. We have become used to asking immediately whether the new authority imposes burdens disproportionate to the good it is expected to do. We think S. 1407, at least in the area in which we are experts, seems to be thoroughly equipped with safeguards for the party served with a Postal Service investigative demand.

In addition to the customer requirement of specificity in describing what is to be inspected, and the time and place for inspection, the bill flatly forbids the Service to "impose an unreasonable burden upon the party to whom the demand is issued." The recipient of a demand, if he believes it is unreasonable, is guaranteed a day in court by subsection (b).

I think we must assume that if a party believes the demand to be unreasonably burdensome he can assert that defense when the Postal Service sues to enforce its demand, an enforcement which can only be granted by a Federal district court.

I note also that the Senate report on S. 1407 states the expectation of the committee that the Service will properly restrict the authority to issue inspection orders and will see that the orders themselves advise the respondent as to his rights.

It is worth noting, I think, Mr. Chairman, that the FTC procedure mentioned above was designed to limit, not to expand, the FTC's precomplaint investigative powers. The Senate report on that measure made it clear that the investigative demand procedures were intended to limit the practice of the Commission of giving a vague description of the general subject matter and to provide a standard by which relevance could be determined.

We think by adopting a generally similar procedure S. 1407 would, in effect, create for the Postal Service an investigative power of a type designed to do the necessary job without invading private rights needlessly and without allowing "fishing expeditions." It seems to us that adopting a procedure similar to that which Congress deliberately chose as a due balance between public protection and private rights, so far as the FTC was concerned, represents a reasonable guarantee that the Postal Service is not being empowered to impose unreasonable burdens on the business community.

As I noted, of course, Senator Pepper pointed out there is a time dimension in these cases. Not only must the Service consider the possibility that the operator will fold his tent and quietly steal away before the present inadequate machinery can be set in motion, it must also manage its own resources efficiently. It seems self-evident that Sherlock Holmes methods are a more time-consuming and expensive way of preliminarily establishing facts—and that is what we are talking about, a precomplaint investigative demand—than would be a properly limited investigative demand.

Finally, I do not think that the legislation of the type in S. 1407 represents a simplistic "consumer versus business" faceoff. Legitimate business, legitimate users of the mail—and we must state, that this is the overwhelming majority—have a stake in this legislation as well.

Mr. Chairman, the other features of this bill lie outside the area of our particular expertise. For the most part they deal with substantive standards and remedies, and on these questions the Commission will defer to the accumulated experience of the Postal Service and of the Justice Department.

Thank you, Mr. Chairman.

[The statement of Ms. Steiger follows:]

STATEMENT OF JANET D. STEIGER, CHAIRMAN,
POSTAL RATE COMMISSION
ON THE MAIL ORDER CUSTOMER PROTECTION AMENDMENTS OF 1982

The Mail Order Customer Protection Amendments of 1982, introduced in the House of Representatives as H.R. 3973 and in the Senate as S. 1407, is a precisely designed remedy for some specific problems in the Postal Service's consumer protection program. We at the Postal Rate Commission are not experts in all phases of this activity, which does not fall within our official scope, but on the basis of our general knowledge of the postal scene we are sure that the Postal Service's support for the legislation represents a careful, reasoned judgment that it is needed. In one area where our official duties do give us a claim to speak from experience--involving the obtaining of information for administrative proceedings--we think the bill represents a significant improvement over current practice.

It is our understanding that S. 1407, as reported by the Senate Committee on Governmental Affairs, is likely to be the main vehicle for further consideration of this legislation. Our observations on the legislation will therefore use S. 1407 as a text.

Section 2 of S. 1407 would create in the Postal Service a power to issue reasonable demands for the access to books, records, or other objects it believes relate to a matter it is investigating under section 404(a)(7). The lack of such authority, it seems to us, must be a fairly serious obstacle to the Service in carrying out its statutory duty to "investigate

postal offenses and civil matters relating to the Postal Service". For instance, Mr. Pepper--who introduced H.R. 3973--noted only a few weeks ago [128 Cong Rec. E1961, April 29, 1982] that

. . . In the absence of this subpoena power, the Postal Service must send away for a product of questionable merit, wait to receive it, and have it evaluated by an expert, a process often taking as long as 4 months. Only then, if there is a solid case, can the Postal Service urge the initiation of criminal proceedings or the issuance of a stop order. Illegitimate mail order firms, well aware of the limitations on the authority of the Postal Service, often place ads, accept orders for 2 months, and fill all orders at one time as they are closing down their operations. By the time the Postal Service receives the product, it is too late.

In addition to this problem, there must be many cases where the simple fact that vital information is in the sole possession of some outside party means that the Service cannot proceed with its case--or even, perhaps, know whether it has a case.

As agency members who must decide matters on an evidentiary record, and do so under considerable time pressure, we know how frustrating such obstacles can be. This legislation attacks them using a well-tried remedy, and we do not see any reason why it should not succeed here as it has elsewhere.

For example, the mechanism established by S. 1407 is not dissimilar to that recently set up for the Federal Trade Commission [15 U.S.C. § 57b-1]. The FTC also can serve "civil investigative demands", as the FTC Act calls them, on any person it believes possesses documents or information "relevant to unfair or deceptive acts or practices in or affecting commerce". Likewise, under the Antitrust Civil Process Act, as

amended [15 U.S.C. § 1312], the Attorney General can issue such demands in aid of an antitrust investigation. So there is ample precedent for the power S. 1407 would bestow on the Postal Service.

Of course, one cannot simply assert, these days, that a new regulatory or investigative power is needed and expect to escape argument and controversy. We have become used to asking immediately whether the new authority imposes burdens disproportionate to the good it is expected to do. S. 1407, in this respect, seems to be thoroughly equipped with safeguards for the party served with a Postal Service investigative demand. In addition to the customary requirement of specificity in describing what is to be inspected and the time and place for inspection, S. 1407 flatly forbids the Service to "impose an unreasonable burden upon the party to whom the demand is issued." This is not just a pious exhortation, because the recipient of a demand, if he believes it unreasonable, is guaranteed a day in court by subsection (b) of the new section 413. I think we must assume that, if a party believes the demand to be unreasonably burdensome, he can assert that defense when the Postal Service sues to enforce its demand. I note also that the Senate report on S. 1407 states the expectation of the Committee that the Service will properly restrict the authority to issue inspection orders and will see that the orders themselves advise the respondent to his rights. [S.Rep. No. 97-392, p. 5.]

It is worth noting that the FTC procedure mentioned above

was designed to limit--not to expand--the FTC's precomplaint investigative powers. Senate Report No. 96-500 [1980 U.S. Code Cong. & Adm. News, at 1125] makes the point that the investigative demand procedure

. . . is intended to limit the practice of the Commission of giving a vague description of the general subject matter of the inquiry and provides a standard by which relevance may be determined. However, this requirement is not intended to be overly strict so as to defeat the purpose of the act or to breed litigation and encourage parties investigated to challenge the sufficiency of the notice.

By adopting a generally similar procedure, S. 1407 would in effect create for the Postal Service an investigative power of a type designed to do the necessary job without invading private rights needlessly and without allowing unchecked "fishing expeditions." It seems to us that adopting a procedure similar to that which Congress deliberately chose as a due balance between public protection and private rights, so far as the FTC was concerned, represents a good guarantee that the Postal Service is not being empowered to impose unreasonable burdens on the business community.

Besides, as Mr. Pepper pointed out, there is a time dimension in these cases. Not only must the Service consider the possibility that the operator will fold his tent and quietly steal away before the present inadequate machinery can be set in motion; it must also manage its own resources efficiently. It seems virtually self-evident that Sherlock Holmes methods are a more time-consuming and expensive way of preliminarily establishing facts than a properly-limited investigative

demand.

Mr. Chairman, I promised to keep to the subject of administrative procedure, but I would like to step out of that path for just a moment to make a slightly broader observation. I need not say, of course, that the vast majority of businesses operating by mail are not only ethical but fulfill a real need in our economy. A recent article in the Legal Times, written by Mr. Thomas McGrew, makes an interesting point regarding the interest of the businessman who deals fairly in having an efficient consumer protection mechanism. He is discussing the FTC, but I think his comments apply here too. He says:

. . . in a market where the rule "Thou shalt not falsely advertise cheap consumer products!" is not enforced, no advertiser can merely state the case for his product. He has to send two distinct messages: (1) My product has several desirable characteristics, and (2) I am not one of the liars. The second message is the more important because only the consumer who believes the second will even consider the first . . .

Quite apart from the equitable problem that the deceptive advertiser is allowed to impose added costs on the honest advertiser and the consumer, this kind of market is likely to have fewer transactions and less efficient ones because at least twice the effort is required per transaction.

I do not think that legislation like S. 1407 represents a simplistic "consumer vs. business" faceoff. Legitimate businesses--as I said, the overwhelming majority--have a stake in it too.

The other features of the legislation lie outside the area of our particular expertise. They have to do for the most part with substantive standards and remedies, and on these questions we would defer to the accumulated experience of the Postal Service.

Mr. LELAND. Thank you very much. And we certainly want to welcome the two new Commissioners and their participation here this morning.

Commissioner, an alternative to the bills before us would be to create a formal Office of Inspector General within the Postal Service. It would be responsible for internal audit and security, while the Justice Department would be primarily responsible for investigation of civil and criminal postal offenses. The Inspector General, as in other agencies, would also report regularly to the Congress.

Can you comment on this alternative?

Ms. STEIGER. I would be happy to, Mr. Chairman. It is a two-part question and I will take it in that order.

The Commission is not really knowledgeable enough about the particulars of mail fraud cases to determine if it would be detrimental to the prosecution of these cases to dismantle or to disperse the body of expertise that has been developed over the years within the Postal Service.

The mechanism of the appointment of Inspector General, of course, seems to be an established practice in many other large agencies. I can see no reason why it would not work for the Postal Service as well. I would stress that I'm sure the present Postal Inspection Service does an effective job with the internal auditing. I would not want to leave the impression that I don't think it does.

But I think the real question perhaps is whether the Inspection Service's two functions, internal inspection and law enforcement, should be sharply separated, as this proposal would do. Would you lose the body of expertise on postal fraud prosecution?

Mr. LELAND. Thank you.

The Direct Mail Marketing Association will testify later in this hearing that the subpoena authority that this legislation would give to the Postal Service should be more carefully restricted and suggest that the Federal Trade Commission's authority is not as broad as that being proposed for the Postal Service.

My question is in two parts: Do you agree or disagree with that statement, and do you think the level of authority that the Federal Trade Commission possesses would be sufficient to overcome the problems you describe?

Ms. STEIGER. Mr. Chairman, I am not an expert on the FTC. I would comment that I think it is clear that the promulgation of the rules that will cover this subpoena authority will be critical. The promulgation of such rules will allow for extensive public comment, including congressional comment. I would think that if the Congress wished to make sure that the subpoena authority was used with detachment, not by people with a particular interest—say those investigating the case at hand—the Congress could certainly indicate that an independent member, let's say, a chief regional Inspector or perhaps someone in the regional council's office, sign the order or review it. Such safeguards can, of course, be encouraged simply by the committee report or, no doubt, added to the end of new section 413.

I note here, as the General Counsel reminds me, that the FTC can compel testimony. Now, there is no provision in 413 for compelling testimony. In that sense, I think you would have to say the

authority is more narrow. Whether it is as specifically drafted, is, I think, another question.

Mr. LELAND. Thank you very much for your testimony. I want to welcome the opportunity to visit with you and your new Commissioners at some point in the future.

Ms. STEIGER. Our pleasure at any time, Mr. Chairman. Thank you.

Mr. LELAND. Our next panel is Mr. Ian Volner, representing the Association of American Publishers; Mr. Jonah Gitlitz, Sr., vice president for public affairs, and Mr. Richard Barton, vice president of Government affairs, Direct Mail Marketing Association.

Mr. Volner will go first.

STATEMENTS OF IAN D. VOLNER, COUNSEL TO THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., ACCOMPANIED BY RICHARD M. SCHMIDT, JR., SENIOR COUNSEL, AND BRIAN DeBOICE; JONAH GITLITZ, SR., VICE PRESIDENT FOR PUBLIC AFFAIRS, AND RICHARD BARTON, VICE PRESIDENT OF GOVERNMENT AFFAIRS, DIRECT MAIL MARKETING ASSOCIATION

Mr. VOLNER. Thank you, Mr. Chairman.

My name is Ian Volner, and I am here today as counsel and spokesperson for the Association of American Publishers. With me are Richard M. Schmidt, Jr., who is senior counsel to the association, and Brian DeBoice, Mr. Schmidt, Mr. DeBoice, and I practice with the law firm of Cohn Marks here in Washington.

Our concern with these bills is simple, if somewhat surprising. Over the past two decades, the U.S. Postal Service has attempted to suppress books and publications that contain, according to the Postal Service, "false ideas." We believe the pending bill can be made the appropriate vehicle to assure that the Postal Service is not an instrument for suppression of fundamental rights protected by the first amendment.

Mr. Chairman, the AAP has followed the progress of H.R. 3973 and its companion legislation in the Senate, S. 1407, with some care. I want to make it very clear that the AAP is in full sympathy with the goal of these bills. We have heard, as has this subcommittee, how individual lives have been virtually shattered, and how the savings of lifetimes have been wiped out overnight, by a moment of misplaced trust in the lies and worthless promises of those who use the mails to defraud. We have also heard the estimates given to this subcommittee regarding the present magnitude of mail fraud in dollars per year and in victims swindled. No responsible citizen or constituent group could remain unmoved by this testimony.

At the same time, the natural desire to alleviate human suffering and economic waste must not blind us to the very real dangers that arise whenever it is proposed that increased police powers be conferred upon any governmental or quasi-governmental agency. Those dangers are particularly acute when police powers are given to the Postal Service, whose primary business should be the provision of services, not law enforcement. Perhaps because the publishing industry earns its living by the practice of free speech through the means of a free press, we possess a degree of sensitivity for the

preservation of civil liberties that may exceed the norm. In any case, we share the concerns so well expressed in the opening session of hearings on this bill by Congressman Ford of Michigan, chairman of the full committee. The chairman vividly pointed out how the increased police powers which these bills would confer on the Postal Service—powers which the Postal Service affirmatively seeks—could be subverted into effective instruments for the suppression of civil liberties. The powers proposed to be conferred upon the Postal Service—I am referring most especially to the subpoena power, the expanded “stop mail” authority, the civil penalty authority, and the authority to seek contempt sanctions in the event of a resumption of the prohibited conduct through the use of any instrumentality of interstate commerce, would be extremely powerful tools to place in the hands of the Postal Service, as the chairman has observed. If those powers are necessary, then the legislation granting them must be drawn with as much care as possible to assure that the potential for abuse by the Postal Service is avoided wherever foreseeable, and that the fundamental purpose of the mails, to encourage and permit the free flow of information and ideas, is preserved.

Our position on the specific language of the bill parallels that of the Direct Mail Marketing Association from which you will next hear. We believe that the DMMA’s comments and suggestions are both supportive of civil liberties and conducive to the attainment of the legitimate ends toward which this legislation aims.

But our concern is that the bills, as drafted, are deficient in one further and very major respect. In extending the powers of the Postal Service to combat mail fraud, the bills totally ignore the fact that the Postal Service has, during the past 20 years, employed its present and more limited powers to suppress free speech. We believe it is imperative that no increase in Postal Service powers be granted by Congress without a correlative requirement that neither those increased powers nor the existing powers be used in the future by the Postal Service to perpetuate what has become an unfortunate tradition of suppression.

The Postal Service has, since at least 1959, sought to suppress a variety of books and publications. It has done this, in essence, because its investigative officials have believed that the books in question contained false ideas or false information and that the dissemination of these ideas and information to the American public would cause harm. We have no idea exactly how many books have been effectively suppressed by the Postal Service. Postal Service records and information available to the AAP indicate that roughly 20 books have been banned from the mails. This figure is certainly low, because the records we could consult reflect only those Postal Service proceedings against books that proceeded all the way to issuance of a “mail stop” order by a Postal Service administrative law judge. The number of books suppressed merely by the threat of Postal Service proceedings is probably much higher. That number is also unknown, as are the contents of all those books that never reached an audience because the Postal Service stepped in and said they contained “false” information, “false ideas.”

The methods the Postal Service uses in its suppression of books are uncomplicated, if somewhat Orwellian. To sell a book by mail,

you have to advertise it. The ideas, the beliefs, and the theories expressed in the books are restated in the ads in order to describe the books. And this is where the Postal Service steps in.

The Postal Service purports to disavow any intention to suppress the books themselves because the first amendment protects the book. But the Postal Service claims that the advertisements for the books are not constitutionally protected. The advertisements, they claim, are false and misleading, not because they misdescribe the books, but precisely because they accurately describe the contents of the books by repeating the allegedly false ideas that are in them. By this version of double-think, the Postal Service uses the ads to get at the books. Using its existing stop mail authority, the Postal Service intercepts orders placed by consumers for these books and returns the orders to the consumer under a stamp which brands the book, the ad, the author and all as a fraudulent undertaking.

There is an alternative which the Postal Service will allow, which permits books which it finds objectionable to go through the mail. The advertisement must contain a disclaimer of a size and prominence satisfactory to the Postal Service that States, in effect, that most doctors or most experts do not believe that the ideas in the book are true. The author is thus left to choose between not selling his book at all, or selling it with an advertisement that says to the reader “you may buy this book and read it, but you may not believe what is in it.”

Mr. Chairman, this subcommittee has heard the stories of unfortunate senior citizens who have been victimized by mail fraud. We have presented in our testimony another story which we believe the committee should pay close attention to before it decides what limits ought best be placed on the Postal Service’s powers.

A man named Robert Ford of Pascagoula, Miss., had an idea that he believed was true. He wrote a book about his idea, published it, and offered it for sale through the mails. It was a simple little book of about 50 pages carrying the unpretentious title “Stale Food vs. Fresh Food.” It cost about \$4. In this book, Robert Ford told the reader his idea, which was: If you eat only fresh foods and no stale foods, the buildup of fat deposits in your arteries can be reduced by a natural cleansing process. Ford believed this was true. He followed his own fresh food diet and believed that he had personally experienced its beneficial results.

The Postal Service, on the other hand, disbelieved Ford’s idea. It therefore instituted proceedings charging Ford with conducting a scheme to obtain money via the mails by means of false representations. The false representations were said to be the statements in the ad for Ford’s book that accurately described Ford’s idea in the process of accurately describing Ford’s book.

A hearing was held here in Washington before a Postal Service administrative law judge. Ford came to the hearing and tried to defend his book by examining the witness himself. The Postal Service presented testimony by a young doctor to the effect that the current consensus of medical opinion was that Ford was wrong—that fresh foods will not help cleanse the arteries of fat. Ford presented testimony from an older doctor, Dr. Charles Warren, Jr., who testified that he believed Ford’s idea was true—that fresh foods will help to cleanse the arteries. Dr. Warren also testified

that he followed Ford's diet himself and recommended it to his patients. He said he had observed the beneficial effects of the diet in his patients and in his own experience. He admitted that his view and Ford's view was a minority view in the medical profession, but he noted that it had received published support, and he observed that it was not wrong just because it was a minority view. At the hearing, Ford apparently tried to introduce certain medical articles in support of his view, but he failed to get them admitted into evidence, perhaps because he was not a lawyer and didn't know how to go about it.

The administrative law judge who heard the case found, and I quote, "Mr. Ford is a knowledgeable and sincere person who thinks that he is performing a beneficial service." The judge also found Ford's idea to be, and I quote again, "contrary to the weight of informed medical and scientific opinion." I'd like to pause for a moment to emphasize that last word. That word was "opinion." Ford's book was found to be contrary to the weight of opinion. Because Ford's book was found contrary to the weight of opinion, a mail stop order was issued against Ford. He could no longer sell his book through the mails. This decision was affirmed, and the mail stop order was made final, by a Postal Service appeals judge on February 11, 1982. The appeals judge said that the first amendment was not involved in the case.

That was the end of Robert Ford's book. Mr. Chairman, in all of this, the odd thing is that the Postal Service authorities probably did not want to suppress Ford's book. They may, indeed, have been somewhat sympathetic to the ideas in the book. What the Postal Service authorities really wanted was for Robert Ford to disclaim—to disavow—in his advertisements the thing that he believed and wrote in his book. But Ford refused. All the Postal Service authorities were seeking, they would doubtlessly tell you, is candor.

Candor, they claim, requires a statement in the advertisement that the content of the book fails to conform to the consensus of informed medical opinion. Of course, the Postal Service thereby gives itself the right to decide not only what the consensus of opinion is, but also what opinion is informed and what is uninformed. The essence of the Postal Service's view is that neither the publisher nor the author are terribly hurt and the public is benefited by what the Postal Service calls candor, but what we believe amounts to, in fact, enforced orthodoxy.

We can't accept the Postal Service's view. Today's truths and today's informed opinion are often tomorrow's quaint and sometimes amusing and sometimes not so amusing false ideas. At one time the consensus of informed medical and scientific opinion held that bleeding people with leeches was healthy. If I had written a book at that time which rejected the value of bleeding people, then under the Postal Service's policy of enforced candor, I could sell my book through the mails only if I were willing to tell my readers that the ideas did not accord with the informed consensus of those experts whose long study had led them to believe that health could be restored by the leech.

The fundamental problem with the Postal Service's demand for candor in the advertising of books and publications is that it cannot be reconciled with our Constitution. Under the first amend-

ment, there is no such thing as a false idea. Although the Postal Service may not intend it, the direct result of its actions is the suppression of ideas.

Mr. Chairman, we have prepared and submitted with our statement a memorandum that explains in greater detail this pattern of Postal Service suppression of publications. Most importantly, the memorandum contains a proposed amendment which would, we believe, halt these unlawful suppressions without curtailing in any measure the legitimate enforcement activities of the Postal Service. Our proposed amendment is essentially a codification of what is commonly called the mirror image doctrine, a doctrine that the Federal Trade Commission has followed successfully for many years. As embodied in our proposed amendment, the essential objective of the mirror image doctrine is to deprive the Postal Service of the authority to decide the truth or falsity of ideas expressed in books and other publications. The doctrine holds that if the advertisement accurately depicts the contents of the book or publication, and identifies the book or publication as the source of the statements, then there can be no mail fraud proceedings brought against the advertisement or the book. Rather than attempting to explain in detail our proposed amendment, we have submitted it as a part of our full statement.

To conclude, Mr. Chairman, the record the Postal Service has established in its treatment of books is the poorest sort of recommendation for a grant of increased police power. If such an increase in authority is found necessary to combat the evils of mail fraud, we urge the subcommittee to temper that grant of power with statutory provisions which prevent the Postal Service from suppressing publications because of a belief that they contain false ideas. After all, the Postal Service is principally in the business of facilitating the free flow of ideas, not in determining their truth or falsity. In the words of Mr. Justice Holmes, "the best test"—and we believe the only test—"of truth is the power of the thought to get itself accepted in the competition of the market."

Thank you, Mr. Chairman.

[The memorandum proposing the amendment to S. 1407 referred to by Mr. Volner, follows. The documentation regarding the case of Charles W. Ford versus the Postal Service Office of Administrative Law Judges is not reprinted.]

COHN AND MARKS

MEMORANDUM PROPOSING AN AMENDMENT TO
S. 1407 TO PREVENT POSTAL SERVICE
ABUSE OF FIRST AMENDMENT RIGHTS

Ostensibly employing its power under 39 U.S.C. §3005 to prevent schemes or devices "for obtaining money or property through the mail by means of false representations," the Postal Service has, for over two decades, attempted to judge the truth or falsity of the content of a wide variety of publications sold through the mails, and it has acted to suppress those publications that it deems to contain false ideas or opinions. Although the Postal Service has sometimes claimed that it is concerned only with the truth or falsity of advertisements for the publications in question, the main thrust of its actions has often been to adjudicate and suppress as "false" ideas or opinions presented in publications and only incidentally repeated in advertisements for those publications.

This memorandum will first explain the nature of these Postal Service abuses, will then demonstrate that such abuses plainly violate well-settled First Amendment law, and will, lastly, propose a simple addition to S. 1407 that would make applicable to the Postal Service a policy that the Federal Trade Commission has followed in this area for years. Codification in S. 1407 of this FTC policy, which is commonly termed the "mirror image" doctrine, would prevent the Postal Service from acting as a censor without restricting its

ability to engage in legitimate, constitutional enforcement measures under 39 U.S.C. §3005.

I. The Nature of Postal Service Abuses

Postal Service proceedings against books and publications generally follow a common pattern: Initially, an advertisement offering the book or publication for sale via the mails will come to the attention of a Postal Service inspector. Often, the inspector will simply notice the ad in a newspaper or magazine or will receive it in his or her personal mail. The advertisement typically describes the publication offered for sale and, in so doing, recites statements or opinions that are contained in the publication. When the statements or opinions thus recited are unorthodox or contrary to commonly accepted views, the postal service inspector often believes them to be false. When this occurs, Postal Service proceedings are instigated under §3005 to force the purveyor of the publication to cease selling it through the mails.

In these proceedings, the Postal Service generally seeks to prove that the statements or opinions recited in the advertisement and contained in the publication offered for sale are false. This is done through testimony by witnesses with expertise in the area in question. If the Postal Service succeeds in establishing a prima facie case of false statement, the purveyor of the publication may seek to rebut the

showing by proof that the statements or opinions are true. If this effort is unsuccessful, as it usually is in cases of unorthodox views, a finding will be made that the advertisement seeks to obtain money via the mails by means of false statements in violation of 39 U.S.C. §3005, and an order will be entered prohibiting sale of the publication via the mails. The effect of this order is to prevent virtually all dissemination of the publication in question, because the only effective method of marketing most of the publications in question is via the mails.

The most recent case of suppression of a book by the Postal Service occurred in February of 1982; it involved a book that advocated the consumption of fresh vegetables and other fresh foods on the theory that a fresh food diet can prevent and even reverse the build-up of fat in the arteries. In its hearing on the question, the Postal Service presented an expert medical witness who testified that the current consensus of medical opinion was that fat build-up in the arteries cannot be reversed by eating fresh foods. The book's author presented testimony by his own expert witness, a physician, who testified that there is and has been for some time a minority view that such fat build-up can indeed be reversed and, further, that a fresh food diet had, in the witness' experience, beneficially affected the condition of arterial fat build-up in patients he had personally treated.

An Administrative Law Judge concluded that the "current consensus of medical opinion" was that opinions expressed in the book and repeated in the advertisement for the book respecting the question of reversal of fat build-up were false. The Administrative Law Judge therefore found them to be false, and an order was ultimately entered proscribing the sale of the book via the mails. Attached hereto are the Postal Service opinions in the case, styled Magnolia Lab, P.S. Docket No. 10/123, together with a column by columnist James Kilpatrick concerning the case.

The Magnolia Lab case vividly illustrates that the Postal Service has set itself up as the arbiter of truth and falsity in the realm of opinion and has, moreover, pronounced with assurance that the current consensus, no less, of "scientific" opinion is "true"; ergo, all other views and opinions touching the subject are false. The logical premises and consequences of this theory of Postal Service power and "scientific" infallibility are, of course, directly contrary to everything for which the First Amendment stands.

Other examples of Postal Service efforts to suppress publications can be cited. The Postal Service has attacked at least seventeen books and publications outright, and has proceeded against numerous others. Books dealing with diet, weight loss, the martial arts, foot reflexology, supernatural powers, magic, vitamin E, and various medical problems, among

others, have been proceeded against, and the sale of many other books via the mails has been interrupted by proceedings that ended in settlement or capitulation by the publisher -- thus leaving little written record of the nature of the book or of the complaint against it. Although some of these cases involved advertisements that actually misrepresented the contents of the book in question, many were like the Magnolia Lab case and involved ads that merely recited or accurately depicted the contents of the book. In these latter cases, the Postal Service effectively suppressed books on the basis of their allegedly "false" content.

II. The Mirror Image Doctrine and Its Constitutional Basis

The Federal Trade Commission has, for more than 10 years, adhered to a Statement of Policy (The "Mirror-Image" Doctrine) pursuant to which that agency will refrain from proceeding against advertisements which accurately depict the contents of books and other publications protected by the First Amendment. The FTC Policy states:

Advertising in Books Enforcement Policy

Notice is hereby given that the Federal Trade Commission announced the following enforcement policy in regard to advertising which promotes the sale of books and other publications, and which involves issues arising under the First Amendment of the Constitution.

The Commission, as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books and other publications: Provided, the advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of statements quoted or derived from the contents of the publication; and the advertising discloses the author to be the source of opinions expressed about the publication. Whether the advice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosures have been made. This policy does not apply, however, if the publication, or its advertising, is used to promote the sale of some other product as part of a commercial scheme.

36 Fed. Reg. 13414 (July 21, 1971).

This FTC policy apparently arose out of First Amendment concerns first expressed by former FTC Commissioner Elman in a 1967 case and echoed by Judge Robinson in the review of that case by the United States Court of Appeals for the District of Columbia Circuit. See Rodale Press, Inc., 71 F.T.C. 1184 (ALJ), aff'd 71 F.T.C. 1222 (1967), remanded, 407 F. 2d 1252 (D.C. Cir.), dismissed, 74 F.T.C. 1429 (1968); 71 F.T.C. at 1247-1256 (Commissioner Elman, dissenting); 407 F. 2d at 1258 (Robinson, J., concurring). Commissioner Elman stated:

For every hope, dream and fear, a book has been written showing the way to salvation. Undoubtedly, many are pure rubbish. But one thing is clear, to me at least: It is

not the function of the Federal Trade Commission or any other agency of government to sit as a board of review examining the validity or worth of ideas, opinions, beliefs and theories expressed in books and other publications offered for sale to the public.

Rodale Press, Inc., supra, 71 F.T.C. at 1249 (Commissioner Elman, dissenting). Fortunately, the FTC listened to Commissioner Elman. Unfortunately, the Postal Service has refused to listen, although the FTC Statement of Policy and the First Amendment principles from which it derives have been pressed upon the Postal Service in a number of the proceedings in which the Postal Service has sought to suppress books.

It is well settled that "the use of the mails is almost as much a part of free speech as the right to use our tongues." Lamont v. Postmaster General, 381 U.S. 301, 305 (1965) (quoting United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting)). Moreover, books, pamphlets, leaflets and "every sort of publication which affords a vehicle of information and opinion" are protected by the First Amendment, see, e.g., Lovell v. City of Griffin, 303 U.S. 444, 452 (1938), as is the right to distribute and circulate such publications, id.; see, e.g., Winters v. New York, 333 U.S. 507, 509 (1948). Most importantly, in the present context, "The constitutional protection does not turn upon the truth, popularity or social utility of the ideas and

beliefs which are offered." New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)). In both the great and the petty areas of human discourse, members of society have the right "to impart and acquire information about their common interests," Grosjean v. American Press Co., 297 U.S. 233, 243 (1936); see Winters v. New York, supra, 333 U.S. at 510; id. at 528 (Frankfurter, J. dissenting); Thomas v. Collins, 323 U.S. 516, 531 (1945). Government cannot "contract the spectrum of available knowledge." Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

These and similar propositions have been repeatedly affirmed because they are essential to the central goal of the First Amendment: "an uninhibited marketplace of ideas in which truth will ultimately prevail." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969). Equally important to that goal is the freedom to publish advertisements by which the public learns of the availability of a book, a publication or, indeed, any other product. Thus, First Amendment law states that advertisements which are not false, misleading or related to illegal activity are protected by the First Amendment and can be regulated only if a substantial state interest would be directly advanced thereby and could not be so advanced by means less restrictive of speech. Central Hudson Gas Co. v. Public Service Commission, 100 S. Ct. 2343, 2350 (1981); see,

e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 828 (1975).

The Postal Service's persistent attacks on advertisements that recite the contents of books and publications on the ground that the recitation is "false and misleading" cannot be reconciled with these basic principles of free speech. Quite simply, the Postal Service has used Section 3005 to suppress books when, in its self-proclaimed wisdom, it determines that the publication contains "false" ideas or opinions. Although the Postal Service has sometimes claimed that it does not ban books, but only bans the solicitation and receipt of purchase orders for books, this claim is an obvious evasion: Where the advertisement solely and accurately depicts the content of the book, an attack on the content of the advertisement is necessarily an attack on the content of the book. In contrast to the restraint which the FTC has exercised, and in what amounts to flat defiance of the First Amendment, the Postal Service has set itself up -- in the words of Commissioner Elman -- as a "board of review examining the validity or worth of ideas, opinions, beliefs and theories expressed in books and other publications offered for sale to the public." "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion" West

Virginian State Board of Education v. Barnette, 319 U.S. 624, 642 (1943) (Opinion for the Court of Jackson J.).

III. Proposed Addition to S. 1407 and Explanation

We propose that S. 1407 be amended to add a new subsection (C) to §3005(a)(2). The proposed subsection 3005(a)(2)(C) would read as follows:

(2) Nothing contained in this subsection shall prohibit the mailing of--

(A) . . .

. . . ; OR

(B) . . .

. . . ; OR

(C) a book, magazine, newspaper, pamphlet or other publication offered for sale via the mails and not classified as nonmailable matter by section 3001 of this title, or a solicitation to purchase, or a purchase order for, any such publication, where

(i) the advertisement or advertisements offering such publication for sale are not materially false or misleading in their description of the publication; and

(ii) the advertisement or advertisements offering such publication for sale accurately disclose the source of any statements quoted or derived from the publication and any opinions expressed about the publication; and

(iii) neither the publication nor any advertisement offering it for sale via the mails is designed to promote the sale of some other product as part of a commercial scheme.

The proposed subsection (C) would in effect codify the FTC's mirror image doctrine and make it applicable to the Postal Service. It is drafted to allow the Postal Service to proceed against advertisements for books when they materially misdescribe the publication that is offered for sale (subsection (C)(i)) and are therefore false. It would also narrowly circumscribe the license that an advertisement could take in repeating statements or opinions taken from or made about the publication. Any such statements or opinions in an advertisement would have to be coupled with an accurate disclosure of the source of the statement or opinion (subsection (C)(ii)). Finally, the provision would not be applicable to commercial schemes that promote products other than publications, whether by advertisement or by the content of the publication itself.

The foregoing proposal does not seek to codify the full scope of First Amendment protection that is applicable to circumstances that may arise in Postal Service proceedings against publications. It is believed, however, that the provision will prove effective in curbing the most serious Postal Service abuses of free speech and will also provide needed guidance to those who advertise publications for sale via the mails by specifying the standards such persons must meet in their advertisements.

It is, we believe, especially appropriate for Congress to act on the matter at hand because a judicial remedy for Postal Service abuses is pragmatically difficult to obtain. Large publishers often bow to Postal Service pressure and settle cases to avoid the stigma of having orders for their publications returned to the sender stamped as in violation of §3005's false representation proscription. Small publishers and authors have not the resources to pursue lengthy and expensive litigation to vindicate their First Amendment rights. In many cases, their income is cut off when the sale of their publication via the mails is halted -- thus the Postal Service order suppresses both the book and the economic means by which the suppression might be contested. Under these circumstances, Congress should act to halt Postal Service infringement of free speech.

Ian D. Volner
J. Brian DeBoice

April 7, 1982

Mr. LELAND. Thank you very much.

Before we move on to the other panelists, let me ask you a few questions.

In the Senate committee's report on S. 1407, it is stated that publishers are entitled to expect that the Postal Service will act consistently with the "mirror image" doctrine.

Do you believe that the inclusion of this language in the committee report is unsatisfactory in addressing the concerns you have expressed to us in your testimony, and if so, why?

Mr. VOLNER. Unfortunately, we believe the statement in the Senate report, although it is helpful because it is the first time the Postal Service has been told explicitly, it is not quite sufficient. The problem is that the Postal Service has its own interpretation of the mirror image doctrine under which they compel the sort of disclosures that I was addressing in my testimony.

We are afraid that, absent a specific statutory provision, they will continue to do what we believe is an abuse of their power and attack books because they don't like the ideas that are in them.

Mr. LELAND. Are you telling us you don't believe the Postal Service will adhere to this mirror image doctrine as you see it?

Mr. VOLNER. We don't believe the Postal Service has adhered to the mirror image doctrine as the Trade Commission has formulated it, and I am afraid that the statement is not sufficient to induce them to do so.

Mr. LELAND. I understand.

I have been made aware that a consent agreement was reached recently between the Postal Service and Mr. Robert Ford, whom you mentioned at length in your testimony.

Do you think it represents any change in Postal Service policy from what you described in your testimony?

Mr. VOLNER. No. The Postal Service has almost always been willing, in my experience, to enter into consent agreements. The problem is that the consent agreement requires the publisher or the author to send to all persons who have ordered the book a further statement, and in that statement there must be this disclaimer. And having negotiated those consent agreements, I can tell you that the task is arduous.

The Postal Service specifies the location on the page of the disclaimer. You get into interminable arguments about the print size, and then you get into arguments about what must be in the disclaimer. In one case, for example, the Postal Service was insisting that we put in a disclaimer that the opinions expressed in the book do not accord with the consensus of medical opinion. I refused, on behalf of my client, to make that statement because I wasn't willing to assume the responsibility of deciding what is the consensus of medical opinion.

After about 2 weeks of interminable negotiation, the Postal Service finally allowed us to say that it may not accord with the consensus of medical opinion. But what they are essentially doing is forcing publishers and authors to say to their readers, as we said in our testimony, "You may buy the book, and you may read it, but you had better not believe it."

Mr. LELAND. In the Senate committee report on S. 1407 the following language appears concerning this mirror image doctrine—I quote from the report:

The Committee is concerned that an attempt at codification of one particular statement of this doctrine in suitable legislative form might be inflexible to suit actual and changing fact situations as advertising practices change. We think it wise to depend instead on the ability of the courts to assure that an appropriate balance has been struck in each of these cases and on continued legislative oversight to see the Postal Service administration of the statute comports with Congressional intent.

Can you please comment further on this matter?

Mr. VOLNER. I have two comments. The first is an intensely practical one. There is some merit to the Senate's notion that the issue that we are dealing with involves the first amendment and that is a matter for the courts. But the practical problem is this: When the Postal Service gets a temporary restraining order, the funds by which a small publisher could fight are immediately cut off. In the case of large publishers, they don't want the stigma of a stamp which says "you have engaged in a fraudulent enterprise." The result is these cases are extremely difficult to get into the courts and contest in the courts. Also, the court proceedings are long, time-consuming, and terribly costly. Book publishing is not a high-profit industry.

So it is not sufficient to simply say "well, this involves the first amendment and therefore it is appropriate for the courts." The amendment that we have proposed we believe is sufficiently generic in terms that, without attempting to codify the whole of the first amendment, it provides clear and precise guidelines to both the Postal Service and to the publisher as to what is expected of them. I think the language is sufficiently general that, even if advertising practices change, those guidelines will remain and a publisher who wants to publish a book that he is concerned about will be able to refer to the statute and say "this is what I must do and this is what I may not do if I want to avoid proceedings."

So we think it can be legislated in the frame that we have proposed it.

Mr. LELAND. Thank you very much, Mr. Volner. I understand you have an early plane to catch. We appreciate your participation and you are excused whenever you feel it necessary to leave.

Mr. VOLNER. Thank you, Mr. Chairman.

Mr. LELAND. I would like to now entertain the testimony of the Direct Mail Marketing Association, Mr. Jonah Gitlitz.

Mr. GITLITZ. Thank you, Mr. Chairman.

Mr. Chairman, in view of Dick's long-standing association with this committee, I am going to ask him to deliver the DMMA statement.

Mr. LELAND. Fine. Mr. Barton.

STATEMENT OF RICHARD BARTON

Mr. BARTON. Good morning, Mr. Chairman. It is a pleasure to be here today. I would like to add, too, that Jonah is our senior vice president for public affairs, and one of the departments under him is a very well-developed ethics department. I would like to discuss

with you a little bit today our position in the industry with regard to ethical practices.

The DMMA is the oldest and the largest trade association in the direct-response marketing and mail advertising industry. We have approximately 2,900 members in 46 States and 36 countries, ranging in size from the largest Fortune 500 companies down to small "mom and pop" operations.

The association provides the means for improved marketing education and information in an effort to help achieve increased knowledge and effectiveness for the industry. It engages in positive efforts to communicate and explain the values of direct marketing to government agencies and other public bodies, and fosters industry-consumer relationships in an attempt to improve the environment in which direct marketers operate.

Ever since we were founded in 1917, we have maintained a very deep interest in the ethics of the industry and in promoting and enforcing these ethical practices. We developed an extensive series of ethical guidelines for all forms of direct-response marketing and in particular for direct mail marketing. We will give you a copy of these guidelines to include in the record.

We also offer services such as our mail preference service which gives people an opportunity to have their names removed from mailing lists if they desire, and we promote the service in major national magazines, newspapers, and on radio and television stations.

In addition, our mail order action line is the principal consumer complaint resolution mechanism that the association has established for the benefit of the direct-response industry. Most of the consumer complaints that we receive are resolved by officials of our association contacting the company involved and reaching a mutually satisfactory arrangement.

We have a fully staffed and professional ethics department. It is headed by a director of ethical practices who is responsible for providing liaison with the Postal Inspection Service, the Federal Trade Commission, the Council of Better Business Bureaus, and any other agencies and consumer organizations throughout the country that are involved in terminating the use of false representations in direct-response marketing. This director conducts investigations of alleged unethical practices and uses his offices and the offices of DMMA to attempt to resolve complaints before they are formally submitted to DMMA's committee on ethical practices.

This committee consists of 15 DMMA members and meets approximately eight times a year. Its main function is to investigate and attempt to resolve persistent and repeated complaints that cannot be immediately satisfied by DMMA staff. Where a legal as well as an ethical violation occurs and can't be resolved, the committee will refer its entire investigatory file to the appropriate governmental agency, generally the Federal Trade Commission or the Postal Inspection Service.

Within the last 2 years, DMMA has also established a second committee in this area, the ethics policy committee, consisting of seven members. They meet six times a year, and they are responsible for developing general ethical practices for the association and for the industry at large.

Recently, an interesting development, we have cosponsored, with the Federal Trade Commission, a consumer education program featuring guidelines for shopping by mail which include warnings against specific unethical practices and a list of legal rights in mail order transactions. A pamphlet, "Make Knowledge Your Partner in Mail Order Shopping," has been published and is available to you and to anyone on request.

These are just a few of the activities that we engage in in an effort to promote ethical business practices among our members and, in fact, in the industry as a whole. We just recite them to you to indicate very strongly our intense interest in the area which you are studying today.

The DMMA supports the general purposes and objectives of S. 1407. Our deep involvement in promoting ethical practices throughout the industry has led us to support the Postal Service request for enhanced authority to act more quickly and effectively to prevent blatant false representation. But it is very important that the public need be balanced by a healthy respect for the rights of business engaged in mail order sales. In our opinion, S. 1407 goes somewhat too far in the granting of broad powers without accepted safeguards against the abuse of power.

The version of S. 1407 which passed the Senate and is the subject of your hearings today is a significantly improved version of the original bill. Many—in fact, most of the serious questions that we had about the original bill were resolved in markup in the Senate, and we certainly want to commend Senator Pryor, Senator Stevens, and their staffs for a very workmanlike and excellent job.

Rather than detail our comments on the original S. 1407, we would like to submit the original statement for the record and will just comment briefly on the bill as currently written.

As we mentioned in our original statement, properly circumscribed subpoena authority could actually be beneficial to mailers in some cases in that it could lead to a quicker resolution of differences if a mailer is not guilty of false representation. However, there is a potential for misuse and we do not believe that this potential has been completely eliminated in the Senate version of S. 1407.

Improvements over the original version include the provision that the district court rather than the Postal Service will enforce a subpoena and will determine if there is probable cause to believe the false representation statute may be violated if the subpoena is ignored, and the requirement that the Postal Service publish proposed regulations governing the use of subpoena power for notice and comment. We agree with those improvements, though we do think there needs to be more restrictions on the use of subpoena power written directly into the law.

Specifically, the restrictions that we would suggest, or the rules we suggest you look at putting in the law itself, are those which govern the Federal Trade Commission's civil investigative demands, which you have discussed briefly with Commissioner Steiger earlier this morning.

For example, while the Federal Trade Commission may serve a civil investigative demand upon a person it believes to be in possession of material or information relevant to a legal violation within

the meaning of the FTC Act, the demand, however, must, among other safeguards, state the nature of the conduct constituting the alleged violation under investigation; describe the documentary material with such definiteness and certainty as to permit it to be fairly identified; prescribe a return date or dates which will provide a reasonable period of time within which the demanded material may be assembled and made available; identify to whom such material shall be made available; and the demand can be served only in one of the prescribed manners, each designed to assure receipt by the person upon whom the demand is made, and followed by a verified return by the individual who served the demand.

Also, the FTC demand must have a specific time period within which to oppose it, and outline the procedure with which a person can oppose the demand, and a Commissioner's signature is required before the demand can be issued.

I don't know whether every one of the provisions of the FTC law would apply to the Postal Service, but I think they ought to be seriously looked at. We believe more specific requirements need to be written into the law before the Postal Service can issue a subpoena.

Postal law now permits the Postal Service to issue an order stopping mail that is in response to a scheme or device to obtain money by false representations from being delivered to any person engaged in such an activity. The Service's jurisdiction and control are over the delivery of mail now. Under the bill's proposal, the Postal Service would have the power to issue an order requiring a person to cease and desist from engaging in such activity. This shift in jurisdiction from "in rem" to "in personam" is a major expansion of postal power and one that should have a demonstrated acute need before enactment of the bill. We are not necessarily opposed to that provision, but we think it ought to be very carefully looked at and you should be comfortable with it before you enact the bill.

Also, the bill would not limit the cease and desist order to the enjoined person's use of the mail, but would consider as contempt the resumption of the activity if carried out through the use of "any instrumentality of interstate commerce." We believe that the Postal Service is somewhat overstepping the boundaries of the empowering legislation that authorized its very existence if this provision were enacted.

While the bill is perhaps not inherently legally infirm for this reason, we think that this should also be closely scrutinized before such a material extension of Postal Service authority is enacted. DMMA does not feel there is a need for establishing in the Postal Service what could be tantamount to a general law enforcement agency.

We are also pleased that the Senate bill removed the authority to level civil penalties from the Postal Service to the courts. We do not oppose the concept of civil penalties. We do feel, however, the penalty of \$10,000 for each violation is somewhat steep and consideration should be given to reducing those penalties.

DMMA would also like to go on the record in support of the testimony offered by the Association of American Publishers in connection with the advertisement of books. The Postal Service is treading on very dangerous ground when it does not agree with the content of the book. The first amendment was designed to allow the

free dissemination of ideas regardless of their content. As long as an advertisement reflects accurately the content of a book that advertisement should not be subject to false representation statutes.

So, in conclusion, Mr. Chairman, we agree with the thrust of S. 1407. We agree that the Postal Service needs some increased authority, but we think the subpoena power under the new section 413 should be subject to more precise definitions; that S. 1407 should apply only to the use of the mail, that the amount of civil penalties should be reduced, and that language requiring the Postal Service to abide by the mirror image doctrine with regard to advertising for books should be added.

Thank you very much. We appreciate the opportunity to testify. We certainly will be happy to answer any questions and will work with the staff on anything you would like us to.

[The statement on S. 1407, referred to by Mr. Barton, along with the pamphlet entitled "Ethical Business Practices," which were submitted for the record, follow:]

Comments by the
Direct Mail/Marketing Association Inc.

Re: S. 1407

STATEMENT OF DIRECT MAIL/MARKETING ASSOCIATION

The Direct Mail/Marketing Association (DMMA) submits this testimony to the Subcommittee on Civil Service, Post Office and General Services of the Committee on Government Affairs, U.S. Senate, for use on the occasion of the Subcommittee's review of S. 1407 to amend Title 39, United States Code.

Description of DMMA

DMMA, a New York Not-For-Profit Corporation, is the largest and oldest national trade association serving the vast community involved in direct-to-the-consumer marketing and mail advertising. Its membership totals more than 2,600 firms located in 46 states and 36 foreign countries. Members range in size from "Fortune 500" companies to sole practitioners and represent every functional level of industry -- manufacturing, wholesale and retail.

The Association provides the means for improved marketing education and information in an effort to help achieve increased knowledge and effectiveness for the industry. It engages in positive efforts to communicate and explain the values of direct marketing to government agencies and other public bodies, and fosters industry-consumer relationships in an attempt to improve the environment in which direct marketers operate.

Founded in 1917, DMMA has consistently maintained an interest in promoting and enforcing ethical practices in the industry. It has developed a comprehensive set of ethical guidelines for all forms of direct response marketing, including mail order. A copy of those guidelines is attached at the end of this testimony.

DMMA also offers its Mail Preference Service which provides consumers the opportunity to have their names removed from mailing lists if they wish to stop receiving unsolicited advertisements. The Association promotes this service in major national magazines and newspapers and on radio and television stations.

DMMA's Mail Order Action Line is the consumer complaint resolution mechanism that the Association has established for the benefit of the direct response industry. Most of the consumer complaints are resolved by DMMA's contacting the company involved and reaching a mutually satisfactory arrangement.

DMMA also has a fully-staffed, professional Ethics Department. It is headed by a Director of Ethical Practices who is responsible for providing liaison with the Postal Inspection Service, the Federal Trade Commission, the Council of Better Business Bureaus and other agencies and consumer organizations that are intimately involved in terminating the use of false representations in direct response marketing. The Director conducts preliminary investigations of alleged unethical practices and uses his offices to attempt to resolve complaints before they are formally submitted to DMMA's Committee on Ethical Business Practices.

DMMA's Ethics Committee consists of fifteen DMMA members and meets approximately eight times a year. Its main function is to investigate and attempt to resolve persistent and repeated complaints that cannot be immediately satisfied by DMMA's staff. Where a legal, as well as ethical, violation occurs, and cannot be resolved, the Committee refers its entire investigatory file to the appropriate governmental agency, typically the Federal Trade Commission or the Postal Inspection Service.

Within the last two years, DMMA has established an Ethics Policy Committee consisting of seven members who meet six times a year. This Committee develops general ethical policies for the Association and for the industry at large.

Recently, DMMA has developed with the Federal Trade Commission a series of consumer guidelines for shopping by mail which include warnings against specific unethical practices, and a list of "legal rights" in mail order transactions. A pamphlet, "Make Knowledge Your Partner in Mail Order Shopping," will be promoted in magazines, newspapers and radio, and will be available on request.

The above are only some of the activities that DMMA undertakes in its effort to promote ethical business practices in the direct response marketing area. DMMA would be pleased to provide additional information on these programs and activities.

Summary of S. 1407

DMMA supports the general objectives and purposes of S. 1407 and the efforts of the Postal Service to deal with practices that utilize the mail to make false representations in the sale of goods and services. At the same time, DMMA has serious misgivings with regard to the granting of broad powers without legally accepted procedures to serve as safeguards against abuse.

S. 1407 would give the Postal Service subpoena power, the authority to issue a cease and desist order against a person conducting a scheme for obtaining money through the mail by means of false representations and the additional authority to demand any article or service that a person offers for sale by mail. Any person's unreasonable failure to comply with such a demand or a subpoena would constitute probable cause to believe that the law pertaining to false representations has been violated, and would permit the Postal Service to apply to a federal district court for a temporary restraining order or a preliminary injunction directing the detention of that person's incoming mail.

Under the existing statute, which remains in effect, if the Postal Service determines upon satisfactory evidence that a person has, in fact, violated the law, it may issue an order which directs the postmaster of the post office at which mail arrives, addressed to such a person or to his representative, to return such mail to the sender appropriately marked as in violation of the law. The mailer, or his representative, must first be notified and given reasonable opportunity to be present at the receiving post office to survey the mail before the postmaster returns it to the consumer.

S. 1407 further provides that any person who evades or attempts to evade the effect of an order issued pursuant to the section pertaining to false representations and who engages in the conduct which warranted issuance of the order shall be subject to a civil penalty not to exceed \$10,000 for each day the violative conduct continues. Any such civil penalty shall be assessed by the Postal Service.

§413. Inspection Authority

Were S. 1407 enacted without Postal Service subpoena power, the Postal Service might claim an inability to fulfill its enforcement obligation without the means fully to explore and investigate potential violations. Under those circumstances unnecessary legal proceedings might be triggered under §3005(a) that a prior subpoena and investigation could have helped to avoid. That is, if the Postal Service were granted subpoena power, a subpoenaed person, before litigation, would have an opportunity to demonstrate that he had not violated the law. If he succeeds, presumably no complaint would issue and unnecessary litigation would not ensue. (Since there currently is

no requirement that the Postal Service inform a person that he is under investigation, the use of a subpoena would bring a matter into the open in its incipiency and might provide the opportunity to avoid the issuance of a formal complaint.)

Another possible result of granting the Postal Service subpoena power, however, and perhaps the more ominous one, is the potential for misuse, harassment and abuse of process that might follow, with the corresponding disruption of business routine. These two conflicting possibilities should be weighed.

The proposed subpoena authority, if enacted, should be better defined so as to avoid unnecessary legal skirmishes relating to legal sufficiency, undue breadth, proper service, time to oppose, and the like.

By contrast, while the Federal Trade Commission may issue a civil investigative demand upon a person it believes may be in possession of material or information relevant to a legal violation within the meaning of the operative section of the FTC Act, the FTC demand must, among other safeguards, (1) state the "nature of the conduct" constituting the alleged violation under investigation, with reference to the applicable law, (2) describe the documentary material with such "definiteness and certainty" as to permit it to be fairly identified, (3) prescribe a return date or dates which will provide a "reasonable period of time" within which the demanded material may be assembled and made available, (4) identify the custodian to whom such material shall be made available, and (5) be served only in one of the prescribed manners -- each designed to assure receipt by the person upon whom the demand is made (e.g., personal service, registered or certified mail, return receipt requested), followed by a verified return by the individual serving the demand.

Beyond that, the FTC provisions set forth the time period within which to oppose a demand, and the procedure to be followed. It also requires a commissioner's signature before a demand may issue, and establishes an elaborate mechanism to maintain the confidentiality of the documents the Commission receives. S. 1407 is deficient in these respects and takes the unnecessary and overreaching step of establishing a statutory presumption of wrongdoing that attaches for unreasonable failure to comply. This will be more fully discussed below. DMMA would endorse the grant of reasonable subpoena power to the Postal Service, if the subpoena power were more clearly circumscribed as it is, for example, with the FTC's civil investigative demand authority, and if the statutory presumption for failure to comply were eliminated.

§3005. False Representations; Lotteries

There is little, if any, legal distinction between a Postal Service demand for documents (§413) and its demand for an article or service (§3005). Of course, in the latter case it will first tender the advertised price before expecting compliance with the demand. Accordingly, our comments with respect to subpoena power apply equally to this second type of demand. Critical here as well, as it was in the subpoena section, is the proposal to construe, by statutory presumption, the unreasonable failure (not refusal) to provide the demanded article or service as the equivalent of probable cause to believe that a false representation violation has occurred. This, then, would per se allow the Postal Service to issue a postal stop order or, as discussed next, a cease and desist order. The statute itself would provide the potential for shortcircuiting the due process safeguards of notice and an opportunity to be heard. DMMA opposes the establishment of such a statutory presumption.

The postal laws now permit the Postal Service to issue an order stopping mail that is in response to a scheme or device to obtain money by false representations from being delivered to any person engaged in such an activity. The Service's jurisdiction and control are over the delivery of mail. Under the bill's proposal, the Postal Service would have the power to issue an order requiring a person to cease and desist from engaging in such an activity. This shift in jurisdiction from in rem to in personam is a major expansion of Postal Service power and one that should have a demonstrated acute need and sound basis before enactment.

Moreover, the bill would not limit the cease and desist order to the enjoined person's use of the mail, but would consider as contempt the resumption of the activity if carried out through the use of "any instrumentality of interstate commerce". The Postal Service seems to be overstepping the boundaries of the empowering legislation that authorized its very existence. While perhaps the bill is not inherently legally infirm for that reason, it should be closely scrutinized before such a material extension of Postal Service authority is enacted. DMMA does not feel there is a need for establishing in the Postal Service what would be tantamount to a general law enforcement agency.

§3012. Civil Penalties

DMMA favors the deterrence of fraudulent mail order operators. Assisting the Postal Service to help bring a halt to the use of schemes and devices used by illicit marketers for obtaining money through the mail by means of false representations has long been and continues to be a primary function of its Ethics Committee. Thus, DMMA could wholeheartedly support legislation that imposes civil penalties upon such wrongdoers.

The one difficulty DMMA has, however, is endorsing legislation that grants the power to assess such penalties to the Postal Service. While endorsing the concept of civil penalties under appropriate circumstances, DMMA seriously questions the need for the authority to do so to reside with the Postal Service rather than with a federal court of competent jurisdiction.

Anyone in privity with a person who evades or attempts to evade the effect of an order and who with actual knowledge of the order engages in conduct which assists in such actual or attempted evasion is also to be subject to a civil penalty not to exceed \$10,000 for each day the violative conduct continues. Once again, the Postal Service is empowered to assess any civil penalties.

Although these provisions are conceptually favored by DMMA, it again seriously questions the appropriateness for the assessment to be made by the Postal Service.

Another section of the bill provides for "due process" to be followed in determining the amount of any penalty. DMMA favors this aspect of the legislation and, indeed, could not support a final version which would fail to provide for notice and a fair hearing before penalties were assessed. Subsections (b)(1) and (2) are ones that DMMA fully endorses and believes are necessary to any acceptable legislation in this area.

It should be noted that any decision by the Postal Service to assess a civil penalty, following the notice, proposal and hearing provisions of (b)(1), shall be final unless appealed within thirty days from the date the order making the assessment was issued, without any assurance that the person required to pay the penalty actually received the notice.

The appeals procedure of subsection (c) appears to be acceptable, although the finality of a Postal Service decision (to assess) must again be questioned on the need for the Postal Service, rather than a court, to impose a civil penalty.

By its terms, subsection (d) raises another serious issue. It removes the fact finding function from the judiciary and places it with the Postal Service (" . . . the validity, amount and appropriateness of such penalty shall not be subject to review."). This shift does not appear to be necessary to the Postal Service's ability to carry out the law effectively. We see no reason why a federal court should not retain the opportunity to review the underlying supportive facts as well as the decision rendered by the Postal Service.

Conclusion

While DMMA endorses the spirit and intention of S. 1407, it cannot fully agree with its letter. DMMA recommends that changes be made to the Bill in accordance with the above comments and the questions raised by them.

Specifically, DMMA recommends that S. 1407 be amended to provide the following:

1. The subpoena power under the new section §413 and the power to demand goods and services under the new section §3005 be subject to more precise definitions, procedures and safeguards.
2. The elimination of provisions under which a failure to submit to a Postal Service subpoena or demand constitute "probable cause" to believe that the false representation laws have been violated. Federal courts should have the authority to enforce a subpoena or demand.

3. If the cease and desist authority were demonstrated to be necessary, such orders should apply only to the use of the mail. S. 1407 extends the authority to the use of "any instrumentality of interstate commerce."
4. Civil penalties should be assessed by a federal court and not unilaterally by the Postal Service.
5. Full review authority of the facts as well as the law should remain with a reviewing federal court with respect to assessment of penalties.

Association representatives would be pleased to work with staff in an effort to overcome some of the difficulties DMMA has with the Bill in order to arrive at suitable language.

Respectfully submitted,

DIRECT MAIL/MARKETING ASSOCIATION

By Jonah Gitlitz
Jonah Gitlitz
Senior Vice President
Public Affairs

By Richard A. Barton
Richard A. Barton
Vice President
Government Affairs

The Direct Mail Marketing Association's Guidelines for Ethical Business Practices

The Direct Mail/Marketing Association's Guidelines for Ethical Business Practices are intended to provide individuals and organizations involved in direct mail and direct marketing with principles of conduct that are generally accepted nationally and internationally. These Guidelines reflect DMMA's long-standing policy of high levels of ethics and the responsibility of the Association and direct marketers to the consumer and the community—a relationship that must be based on fair and ethical principles.

What distinguishes the Guidelines, which are self-regulatory in nature, is that all are urged to support them in spirit and not to treat their provisions as obstacles to be circumvented by legal ingenuity. The Guidelines are intended to be honored in the light of their aims and principles.

These Guidelines are also part of the DMMA's general philosophy that self-regulatory measures are preferable to governmental mandates whenever possible. Self-regulatory actions are more readily adaptable to changing techniques, economic and social conditions, and they encourage widespread use of sound business practices.

Because it is believed that dishonest, misleading, immoral, salacious or offensive communications make enemies for all advertising/marketing including direct response marketing, observance of these Guidelines by all concerned is recommended.



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The Terms of the Offer

Honesty Article #1

All offers should be clear, honest and complete so that the consumer may know the exact nature of what is being offered, the price, the terms of payment (including all extra charges), and the commitment involved in the placing of an order. Before publication of an offer, direct marketers should be prepared to substantiate any claims or offers made. Advertisements or specific claims which are untrue, misleading, deceptive, fraudulent or unjustly disparaging of competitors should not be used.

Clarity Article #2

A simple statement of all the essential points of the offer should be clearly displayed in the promotional material. When an offer illustrates goods which are not included or cost extra, these facts should be made clear.

Print Size Article #3

Print which by its small size, placement or other visual characteristics is likely to substantially affect the legibility of the offer, or exceptions to it should not be used.

Actual Conditions Article #4

All descriptions and promises should be in accordance with actual conditions, situations and circumstances existing at the time of the promotion. Claims regarding any limitations (such as time or quantity) should be legitimate.

Disparagement Article #5

Disparagement of any person or group on grounds of race, color, religion, national origin, sex, marital status or age is unacceptable.

CONTINUED

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Standards**Article #6**

Solicitations should not contain vulgar, immoral, profane, or offensive matter nor promote the sale of pornographic material or other matter not acceptable for advertising on moral grounds.

Advertising to Children**Article #7**

Offers suitable for adults only should not be made to children.

Photographs and Art Work**Article #8**

Photographs, illustrations, artwork, and the situations they represent, should be accurate portrayals and current reproductions of the product, service, or other subject in all particulars.

Sponsor and Intent**Article #9**

All direct marketing contacts should disclose the name of the sponsor and each purpose of the contact. No one should make offers or solicitations in the guise of research or a survey when the real intent is to sell products or services or to raise funds.

Identity of Seller**Article #10**

Every offer and shipment should sufficiently identify the full name and street address of the direct marketer so that the consumer may contact the individual or company by mail or phone.

Solicitation in the Guise of an Invoice**Article #11**

Offers that are likely to be mistaken for bills or invoices should not be used.

Postage and Handling Charges**Article #12**

Postage or shipping charges and handling charges, if any, should reflect as accurately as practicable actual costs incurred.

Special Offers**Use of the Word "Free" and other Similar Representations****Article #13**

A product or service which is offered without cost or obligation to the recipient may be unqualifiedly described as "free".

If a product or service is offered as "free", for a nominal cost or at a greatly reduced price and the offer requires the recipient to purchase some other product or service, all terms and conditions should be clearly and conspicuously disclosed and in close conjunction with the use of the term "free" or other similar phrase.

When the term "free" or other similar representations are made (for example, 2-for-1, half price or 1-cent offers), the product or service required to be purchased should not be increased in price or decreased in quality or quantity.

Negative Option Selling**Article #14**

All direct marketers should comply with the FTC regulation governing Negative Option Plans. Some of the major requirements of this regulation are listed below:

Offers which require the consumer to return a notice sent by the seller before each periodic shipment to avoid receiving merchandise should contain all important conditions of the plan including:

- a. A full description of the obligation to purchase a minimum number of items and all the charges involved and,
- b. the procedures by which the consumer receives the announcements of selections and a statement of their frequency; how the consumer rejects unwanted items and how to cancel after completing the obligation.

Negative Option Selling (Continued)

The consumer should be given advance notice of the periodic selection so that the consumer may have a minimum of ten days to exercise a timely choice.

Because of the nature of this kind of offer, special attention should be given to the clarity, completeness and prominent placement of the terms in the initial offering.

Sweepstakes**Article #15**

All direct marketers should abide by the DMMA Guidelines for Self-Regulation of Sweepstakes Promotions. Articles #16 through #18 (below) contain the basic precepts of these Guidelines.

Clear and Conspicuous**Disclosure of Rules****Article #16**

All terms and conditions of the sweepstakes, including entry procedures, the number and types of prizes, the closing dates, eligibility requirements, and the fact that no purchase is required should be disclosed in a clear and conspicuous manner in the promotion.

Devices, check boxes, reply envelopes and the like used for entering the sweepstakes only should be as conspicuous as those utilized for ordering the product or service and entering the sweepstakes.

Prizes**Article #17**

All prizes advertised should be awarded. Winners should be selected in a manner that ensures fair application of the laws of chance.

Chances of Winning**Article #18**

No sweepstakes promotion, or any of its parts, should state or imply that a recipient has won a prize or overstate the chances of winning.

Price Comparisons**Article #19**

Price comparisons may be made in two ways:

- a. between one's price and a former, future or suggested price or
- b. between one's price and the price of a competitor's comparable product.

In all price comparisons, the compared price against which the comparison is made must be fair and accurate.

In each case of comparison to a former, suggested or competitor's comparable product price, substantial sales should have been made at that price in the recent past.

For comparisons with a future price, there should be a reasonable expectation that the future price will be charged in the foreseeable future.

Guarantees**Article #20**

If a product or service is offered with a "guarantee" or a "warranty", the terms and conditions should either be set forth in full in the promotion, or the promotion should state how the consumer may obtain a copy. The guarantee should clearly state the name and address of the guarantor and the duration of the guarantee.

Any requests for repair, replacement or refund under the terms of a "guarantee" or "warranty" should be honored promptly. In an unqualified offer of refund, repair or replacement, the customer's preference shall prevail.

Special Claims**Use of Test or Survey Data****Article #21**

All test or survey data referred to in advertising should be competent and reliable as to source and methodology, and should support the specific claim for which it is cited. Advertising claims should not distort the test or survey results nor take them out of context.

Testimonials and Endorsements**Article #22**

Testimonials and endorsements should be used only if they are:

- a. Authorized by the person quoted,
- b. Genuine and related to the experience of the person giving them and
- c. Not taken out of context so as to distort the endorser's opinion or experience with the product.

The Product**Product Safety****Article #23**

Products should be safe in normal use and be free of defects likely to cause injury. To that end, they should meet or exceed current, recognized health and safety norms and be adequately tested, where applicable. Information provided with the product should include proper directions for use and full instructions covering assembly and safety warnings, whenever necessary.

Product Distribution Safety**Article #24**

Products should be distributed only in a manner that will provide reasonable safeguards against possibilities of injury.

Product Availability**Article #25**

Direct marketers should only offer merchandise when it is on hand or when there is a reasonable expectation of its receipt.

Direct marketers should not engage in dry testing unless the special nature of that offer is disclosed in the promotion.

Fulfillment**Unordered Merchandise****Article #26**

Merchandise should not be shipped without having first received a customer's permission. The exceptions are samples or gifts clearly marked as such, and merchandise mailed by a charitable organization soliciting contributions, as long as all items are sent with a clear and conspicuous statement informing the recipient of an unqualified right to treat the product as a gift and to do with it as the recipient sees fit, at no cost or obligation to the recipient.

Shipments**Article #27**

Direct marketers are reminded that they should abide by the FTC regulation regarding the prompt shipment of prepaid merchandise, the Mail Order Merchandise (30 Day) Rule.

Beyond this regulation, direct marketers are urged to ship all orders as soon as possible.

Credit and Debt Collection**Equal Credit Opportunity****Article #28**

A creditor should not discriminate on the basis of race, color, religion, national origin, sex, marital status or age. If the individual is rejected for credit, the creditor should be prepared to give reasons why.

Debt Collection**Article #29**

Unfair, misleading, deceptive or abusive methods should not be used for collecting money. The direct marketer should take reasonable steps to assure that those collecting on the direct marketer's behalf comply with this guideline.

Use of Mailing Lists**List Rental Practices****Article #30**

Every list owner who sells, exchanges, or rents lists should see to it that each individual on the list is informed of those practices, and should offer an option to have the individual's name deleted when rentals or purchases are made. The list owner should remove names from the owner's customer or donor lists when requested directly by the individual, and by use of the DMMA Mail Preference Service name removal list.

List brokers and compilers should take reasonable steps to assure that the list owners follow these list practices.

Personal Information**Article #31**

All list owners, brokers and compilers should be protective of the consumer's right to privacy and sensitive to the information collected on lists and subsequently considered for transfer.

Information supplied by consumers such as, but not limited to, medical, financial, insurance or court data should not be included on lists that are rented or exchanged when there is a reasonable expectation by the consumer that the information would be kept confidential.

List Usage Agreements**Article #32**

List owners, brokers, compilers and users should make every attempt to establish the exact nature of the list's intended usage prior to the sale or rental of the list. Owners, brokers and compilers should not permit the sale or rental of their lists for an offer that is in violation of any of the Ethical Guidelines of DMMA. Promotions should be directed to those segments of the public most likely to be interested in their causes or to have a use for their products or services.

List Abuse**Article #33**

No list or list data should be used in violation of the lawful rights of the list owner nor of the agreement between the parties; any such misuse should be brought to the attention of the lawful owner.

Telephone Marketing

(See Articles #9 and #27)

Reasonable Hours**Article #34**

All telephone contacts should be made during reasonable hours.

Disclosure and Tactics**Article #35**

All telephone solicitations should disclose to the buyer during the conversation the cost of the merchandise, all terms, conditions and the payment plan and whether there will be postage and handling charges. At no time should "high pressure" tactics be utilized.

Use of Automatic Electronic Equipment**Article #36**

No telephone marketer should solicit sales using automatic electronic dialing equipment unless the telephone immediately disconnects when the called person hangs up.

Taping of Conversation**Article #37**

Taping of telephone conversations should not be conducted without notice to the person called and that person's consent, as well as the use of a beeping device.

**Telephone Name Removal/
Restricted Contacts**

Article #38

Telephone marketers should remove the name of any contact from their telephone lists when requested to do so.

Telephone marketers should not call telephone subscribers who have unlisted or unpublished telephone numbers unless a prior relationship exists.

**Fund
Raising**

(See Article #26)

**Commission Prohibition/
Authenticity of Organization**

Article #39

Fund raisers should make no percentage or commission arrangements whereby any person or firm assisting or participating in a fund raising activity is paid a fee proportionate to the funds raised, nor should they solicit for non-functioning organizations.

**Laws, Codes,
and Regulations**

Article #40

Direct marketers should operate in accordance with the Better Business Bureau's Code of Advertising and be cognizant of and adhere to laws and regulations of the United States Postal Service, the Federal Trade Commission, the Federal Reserve Board, and other applicable Federal, state and local laws governing advertising, marketing practices, and the transaction of business by mail, telephone, and the print and broadcast media.

**DMMA Ethics
Department**

In its continuing efforts to improve the public confidence in direct mail and direct marketing, DMMA sponsors several activities in its Ethics Department.

Ethical Guidelines are maintained, updated periodically and distributed to the field.

A Committee on Ethical Business Practices monitors the mails and direct offerings to the consumer and investigates complaints brought to its attention.

An Ethics Policy Committee initiates programs and projects directed toward improved ethical activity in the direct marketing area.

MOAL (Mail Order Action Line) handles consumer mail order complaints and MPS (Mail Preference Service) offers mail flow reduction or increased specialized mail to consumers.

All ethics activities are directed by a full-time Director of Ethical Practices.

For additional information or to report
questionable practices contact:

John M. Cavanaugh
Director, Ethical Practices

Revised 3/10/81

Mr. LELAND. Thank you very much, Mr. Barton.

You told us you would prefer the language in the law governing the FTC's subpoena authority to the language in Senate bill 1407. Can you tell us what you feel are the essential differences and how the language in S. 1407 could lead to the legal skirmishes you warned us were a possibility?

Mr. BARTON. There is very little specifically written into S. 1407 on subpoena power right now. The Postal Service can issue a subpoena virtually for almost any reason if they have reason to believe there are false representations. The Senate bill did add an improvement by requiring the Postal Service, before it exercises its subpoena authority, to publish rules and regulations in the Federal Register for notice and comment, giving any interested party an opportunity to work with the Postal Service to develop more clear rules in the issuing of subpoenas.

It is quite conceivable the rules that the Postal Service itself develops could look a lot like the Federal Trade Commission rules, and that would be fine with us. But we would rather have that written into the law because we think that provides more safeguards and narrows the scope of the subpoena authority but still gives the Postal Service a very good opportunity to do what they need to do.

Mr. LELAND. You said that the civil penalties suggested in the bill are somewhat steep. What do you think would be a more appropriate penalty?

Mr. BARTON. I hesitate—[laughter]. We were discussing this yesterday in the office and I can't really say that \$1,000 is better than \$10,000. I think you could probably talk about something in the range of \$1,000 to \$5,000. I think it would be less frightening to legitimate mailers.

Mr. GITLITZ. These penalties are based on a daily penalty for a violation.

Mr. LELAND. OK.

Can you give us an explanation of why you think S. 1407 should apply only to the mail and not to any instrumentality of interstate commerce?

Mr. BARTON. We all love the Postal Service and think it's a wonderful institution. But, as a matter of fact, I think just from a legal viewpoint a very serious question arises as to whether the Postal Service's police authority, which is already very broad with mail fraud statutes as they stand, should in fact apply to anything outside the mail. It is just sort of a basic, I guess, civil liberty stand on the part of the association. I think we would say the same thing about the Department of Agriculture. We wouldn't want the Inspector General in the Department of Agriculture investigating the mail.

On the other hand, I think you should be really very seriously interested with the fact that the Postal Service could go in and, for example, move against a company because it was using television and telephones. Other people ought to enforce that. We really don't believe the Postal Service's authority should extend beyond postal matters.

Mr. LELAND. You told us you cosponsored a consumer education program with the Federal Trade Commission. Do you have any-

thing similar with the Postal Service, or is anything similar being discussed or considered?

Mr. GITLITZ. That's a very good question, Mr. Chairman. We have given some thought to that, but nothing has developed as yet. But we have had some chats with them about greater cooperation in consumer education efforts that they are interested in and so are we.

You might be interested to know that this program we have now undertaken with the Federal Trade Commission is credited by Chairman Jim Miller to have reduced apparently, just in the brief period of time it has been in place, about 7 months, the volume of mail order complaints that they are getting. The first quarter complaints that the Federal Trade Commission has received in 1982 is about 25 percent less than they received in the first quarter of 1981, a drop from about 6,000-plus complaints to 4,000-plus complaints. We would like to undertake a similar consumer education program with the Postal Service as well.

Mr. LELAND. It is highly commendable. I would hope that you would keep us informed about your future discussions with the Postal Service.

Mr. GITLITZ. We will, Mr. Chairman. Thank you.

Mr. LELAND. An alternative to the bills before us would be to create a formal Office of Inspector General within the Postal Service. It would be responsible for internal audit and security, while the Justice Department would be primarily responsible for investigation of civil and criminal postal offenses. The Inspector General, as in other agencies, would also report regularly to the Congress.

Can we have your comments on this, either of you or both?

Mr. BARTON. We really haven't studied the issue and I would prefer to go back to our lawyers and to our Government Relations Committee to take a careful look at it.

Again, without even criticizing the Postal Service, I think they have used the authority very well. The Postal Inspection Service is, I think, the largest Federal police force we have, or at least the second largest. I'm not sure how it compares to the FBI. I think just the simple provision of Inspectors General in other departments having to report to Congress probably would be a pretty good thing.

I am not really clear about the differences other than that. I think we could probably study that a little more and give you a more formal opinion than that.

Mr. LELAND. If you will, I certainly would appreciate, without any objection, that you would comment by letter on this issue. I would really appreciate that.

Mr. BARTON. I would be glad to.

Mr. LELAND. Mr. Gitlitz, I understand that you have an airplane to catch, too.

Mr. GITLITZ. Yes, I do, Mr. Chairman.

Mr. BARTON. Everybody is leaving town. [Laughter.]

Mr. LELAND. Well, with what's going on here today in Congress, I would suggest that everybody do leave town, maybe even the country.

Mr. BARTON. Well, I'm going to Roanoke tomorrow to try to pull the fat out of the fire.

Mr. LELAND. I thank both of you for coming to participate today.

Mr. GITLITZ. Thank you very much.

Mr. LELAND. I would like to ask our next panel to come forward, if you will. Mr. Art Sackler, general counsel for the National Newspaper Association; Mr. Stephen Jones, director, Industry Standards Division, Council of Better Business Bureaus; and Mr. John Maraney, president, National Star Route Mail Carriers Association.

I thank you gentlemen for joining us and for your participation today. Mr. Sackler, will you proceed first, please?

STATEMENTS OF ARTHUR B. SACKLER, GENERAL COUNSEL, NATIONAL NEWSPAPER ASSOCIATION; STEPHEN JONES, DIRECTOR, INDUSTRY STANDARDS DIVISION, COUNCIL OF BETTER BUSINESS BUREAUS, INC.; AND JOHN MARANEY, EXECUTIVE DIRECTOR, NATIONAL STAR ROUTE MAIL CONTRACTORS ASSOCIATION, ACCOMPANIED BY JOSEPH DETTMAR, LEGAL COUNSEL TO THE ASSOCIATION

Mr. SACKLER. Thank you, Mr. Chairman. I would like to thank you for entering our statement in the record, and I will summarize briefly what we want to say.

Mr. LELAND. Thank you very much.

Mr. SACKLER. The members of the National Newspaper Association are as concerned as anyone with mail fraud and false representations through the mail. We certainly would wish to see greater protection for those who are or may be cheated or swindled, but we don't want to see it at the expense of any fundamental rights. We think that despite the good work done by Senator Pryor and his people on the Senate side, we think there is still some real potential for abuse under S. 1407 in terms of chilling first amendment rights, possibly some due process problems. We think the bill needs stronger safeguards so that the rights of all consumers, purveyors and advertisers and third parties are all protected.

Let me give you a couple of specific suggestions. We are quite concerned from the third party aspect with the fact that there is no exclusion of third parties from the written demand procedure. We think that from our standpoint there is considerable potential for disruption, for expenditure of large sums of money disproportionate to the resources of the, in our case, particular newspaper involved to try and combat any kind of demand that they think is unjustified. We would prefer to see a third party exclusion in the statute rather than going through the administrative rules process.

We also think there has been a fair amount of discussion about the FTC-CID procedure as a model for the written demand. As far as the entire CID process goes, I'm not sure we're in a position to say whether that would be superior to what S. 1407 has or what the Postal Service may come up with in terms of rules and regulations. But one particular aspect we think is quite beneficial in the FTC statute is the provision for quashing of demands at the administrative level. We think that that or something like it is essential for due process, so that someone served with a demand has a chance to have it quashed before any damage is done, if it unlawful or issued on insufficient grounds, something like that.

We also would join with the Association of American Publishers and the Direct Mail Marketing Association in urging you to adopt some version of the "Mirror Image Doctrine," and we also would like to see some kind of third party protection for newspapers and others who would not be considered to be agents or representatives of advertisers if the advertiser of a particular type of product or scheme or what have you the Postal Service may be investigating simply says to return requests for that product or service to a box at a newspaper or another publication. We would like to see that specifically not to be a representative or an agent because that is an innocent involvement.

We also have some concern with the followup to the cease and desist order, where any resumption through any instrumentality of interstate commerce would be considered resumption of the practice. We think that this is an expansion of the Postal Service jurisdiction that we are not sure is appropriate. We think it is more appropriate to involve the Department of Justice or the Federal Trade Commission when you're cutting across all instrumentalities of interstate commerce.

That's about it in terms of summarizing our comments. I would be glad to answer any questions you might have.

Thank you.

[The statement of Mr. Sackler follows:]

STATEMENT OF
ARTHUR B. SACKLER
GENERAL COUNSEL

NATIONAL NEWSPAPER ASSOCIATION

Good morning, Mr. Chairman. The National Newspaper Association appreciates this opportunity to testify on the Postal Service Amendments of 1981, S. 1407 and H.R. 3973. Inasmuch as you have advised that a version of S. 1407 will be introduced in the House, our comments will focus on that bill. My name is Arthur B. Sackler and I am General Counsel to the Association.

As you know, NNA is a non-profit trade association representing nearly 5500 weekly and daily community newspapers located throughout the United States. Mr. Chairman, the members of NNA share the concern of Members of Congress and American citizens across the nation over schemes that defraud or mislead many who are not perpetually skeptical, cheating numerous people, particularly the vulnerable elderly, of frequently their lives' savings. Therefore, we believe that those who would "con" should and must be stopped. We applaud the Postal Inspection Service for the job it has done up until now combatting those engaging in such unscrupulous practices. We also note, however, that the vast majority of those advertising and generally conducting mail order businesses are legitimate and honest. They neither defraud nor intentionally mislead consumers.

NNA is particularly aware of the problems flowing from these schemes. All too frequently our members are faced with the question of whether to accept advertisements for enterprises or goods that are of dubious quality or efficacy, if not apparently fraudulent. While recognizing that they have no legal liability for such ads, our members typically feel a high degree of responsibility to their communities and take it upon themselves to evaluate such ads before exercising their absolute right to accept or reject them. Such evaluation usually takes the form of an inquiry to an appropriate office of a State, such as the Secretary of State or the Attorney General, or to the local Better Business Bureau. Of

course, because many of our mailers mail so heavily, they have long been cognizant of the Postal Service's central role in dealing with information, including advertisements, concerning fraudulent or intentionally misleading schemes. NNA certainly does not oppose the concept of strengthening the ability of the Postal Inspection Service to deal with fraudulent or openly misleading schemes. We do, however, have some problems with the legislation as drafted. These problems all revolve around the belief that there must be an adequate system of checks upon the authority conferred to prevent abuses of basic constitutional rights, including due process and First Amendment.

Our first problem is that we do not see in S. 1407 any distinction between those under investigation and third parties. We believe that newspapers and other periodical publications, as well as others, should be specifically excluded from being subject to investigative demands when they are third parties to any scheme, enterprise, operation, etc., under investigation by the Postal Service. We note the language at page 5 of the Senate report on S. 1407 (No. 97-392) that the Postal Service "contemplates proposing rules. . .which would differentiate. . .between. . .targets of investigations and third parties." This goes in the right direction, but the language is nonspecific and does not necessarily connote an exclusion. We believe some explicit statutory direction in this area is necessary.

NNA member newspapers deal with large numbers of advertisements in each issue that they publish. Chief Postal Inspector Kenneth H. Fletcher testified last October before the Senate Governmental Affairs Subcommittee on Civil Service, Post Office, and General Services that the Inspection Service received more than 200,000 complaints of mail fraud yearly and, just in the

period from October 1980 to June 1981, initiated 2100 mail fraud investigations. With that level of alleged incidence, the large numbers of advertisements for enterprises or goods later showed to be fraudulent or misleading which find their way into newspapers despite screening, and the resulting severe workload problems for the Inspection Service, we believe that there is a significant potential for use of the investigative demand authority provided in section 2(a) of S. 1407 in a way that will create shortcuts. The most obvious shortcut is to demand to see the records of newspapers or other periodical publications with respect to any such enterprise or good under investigation.

While such a shortcut is perhaps understandable from the perspective of the Inspection Service, it would play havoc with newspapers which are made subject to the investigative demands. Disruption of work schedules and staff time expended in responding to potentially a number of these each year would not only handicap newspapers, especially the smaller ones represented by NNA, in trying to meet deadlines and efficiently do their job, but it would also effectively impress those newspapers into service as an enforcement arm of the Inspection Service. To a certain extent, investigative demands could in and of themselves cast a "chill" upon publications by impeding their production process.

We would urge you, Mr. Chairman, to create an express exemption for newspapers and other periodical publications from the scope of the demand authority. In this, you would be tracking the approach taken in current 39 U.S.C. §3007(b) and the new section 3012(a)(3) of title 39 as proposed at section 4(a) of S. 1407. This exclusion, in our view, would apply only when newspapers and other periodical

publications would be third parties to an investigation by the Inspection Service. It would not apply if such publications were themselves directly implicated in any allegedly fraudulent or misleading scheme.

In the alternative, we would urge you to follow the examples of numerous courts which have had to decide whether to enforce subpoenas against newspapers as third parties in civil litigation. Virtually every court has held that a three-part test must be applied to determine whether a subpoena will be enforced. Those seeking enforcement must demonstrate to the court that the information they are seeking is relevant to their case, that all alternative sources of information have been exhausted, and that there is a compelling need for the information. Zerilli v. Smith, 31 F.R. Serv. 2d 1572 (D.C. Cir. 1981); Carey v. Hume, 492 F. 2d (D.C. Cir.), cert. dismissed, 412 U.S. 938 (1974); Riley v. City of Chester, 612 F. 2d 708 (3d Cir. 1979); Silkwood v. Kerr-McGee Corp., 563 F. 2d 533 (10th Cir. 1978); Cervantes v. Time Inc., 464 F. 2d 986 (8th Cir. 1972). See also Democratic National Committee v. McCord 356 F. Supp. 1394 (D. D. C. 1973); Gulliver's Periodicals Limited v. Charles Levy Circulating Company, 455 F. Supp. 1197 (N.D. Ill. 1978); and Altemose Construction Company v. Building and Construction Trades Council of Philadelphia, 443 F. Supp. 49 (E.D. Pa., 1977). As a second choice, this test should be expressly included in new section 413(a) of title 39 as proposed at Section 2(a) of S. 1407.

Another concern NNA has with the investigative demand section is that there is no express authority for the parties served to move to have the demand quashed at the administrative level. Since the Postal Service under this section will in all probability be obtaining the written demands on an ex parte basis, some method to check its authority must be provided. This will help

prevent any abuses of this process, either inadvertent or intentional by Postal Service personnel. The power to issue such demands is a potent one and constitutes a grave intrusion into the affairs of those businesses and individuals upon whom it is served. When one is issued on insufficient or unlawful grounds, due process would demand that some way be provided to rectify the situation before there is any damage to the party served. Providing an opportunity to quash would seem the appropriate answer.

We believe that the civil investigative demand authority granted for the Federal Trade Commission at 15 U.S.C. §57(b)-1 provides a pertinent example of the appropriate balance of authority. Subsection (f) sets up a procedure for quashing of C.I.D.'s by the Commission itself. Our preference, of course, would be to have such direction included in the statute similar to that provided to the FTC. However, it may be sufficient to explicitly note in report language that the Postal Service is expected to include such an opportunity in the regulations it will promulgate to implement this section. Perhaps to prevent any change in the situation pending resolution of any motion to quash, some authority could be granted to temporarily prohibit the destruction or concealment of any records or information sought under the demand.

On a more general level, we would urge that the so-called "Mirror Image Doctrine," 36 F.R. 13, 414 (1971), devised and adopted by the Federal Trade Commission, be made part of S. 1407. Advertising, whether through the mails or otherwise, enjoys significant protection under the First Amendment. See, e.g., Bigelow v. Virginia, 421 U.S. 809 (1975); Virginia State Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bates v. State Bar of Arizona, 433 U.S. 350 (1979); Central Hudson Gas and Electric Corporation v. Public Service Commission of New York, 477 U.S. 557 (1980); and In Re R.M.J.

50 U.S.L.W. 4185, ___ U.S. ___ (1982). These cases have stood for the proposition that commercial speech cannot be restrained except if it is clearly unlawful or misleading. A problem arises when the case is of a borderline nature; the underlying activity is neither clearly lawful nor unlawful and the advertising thereof is but a faithful reflection of that activity. In such cases, the Mirror Image Doctrine strikes, as the Senate report on S. 1407 states (p. 8), a reasonable balance between protecting the rights of consumers and of advertisers.

Again, we are pleased to note that the Postal Service advised the Senate subcommittee that in practice it conformed to the Mirror Image Doctrine and would continue to do so (see Report No. 97-392 at 8). However, we believe that the rights at stake are of such a magnitude that explicit statutory direction is necessary here, too. A Mirror Image-type prescription would ensure that First Amendment rights, as well as those of consumers, would be taken into account in every situation.

Turning to the questions which form the foci of your consideration of S. 1407, we have no specific information to offer with respect to question 1 other than the general position of the members of the Association provided at the outset of this testimony. We have also expressed our concern with section 2 of S. 1407.

With respect to your third question, we believe that again some distinction must be drawn between those who are subject to the orders, and those, such as newspapers, which are only third parties to the false or misleading claims about schemes. We also have a specific concern with section 3 and that is with proposed subsection (c)-1 of Section 3005. We would simply want it clarified that when an advertiser under investigation by the Inspection Service has provided that payment may be made care of a box at the newspaper when the newspaper is not a knowing participant in the scheme, that that newspaper

(or other periodical publication) is not an agent or representative of the advertiser.

We have no specific concerns with the civil penalties section, Section 4 of S. 1407.

We also have no problem with considering it a violation of a cease and desist order if there is a resumption of the activity through "any instrumentality of interstate commerce." It would seem a logical and necessary corollary of any cease and desist order. We would raise the question, however, of whether it is appropriate to confer on the Postal Service consumer protection authority which exceeds the scope of its customary and conventional jurisdiction. Perhaps it might be more appropriate to expand the scope of the original cease and desist order through cooperation with either the Department of Justice or the Federal Trade Commission. Those agencies seem more suitably equipped to deal with questions cutting across the breadth of interstate commerce.

Mr. Chairman, thank you for considering our comments. I will be happy to try and answer any questions you might have.

Mr. LELAND. Thank you very much.

You indicated that the language on page 5 of the Senate report of S. 1407 goes in the right direction but is not sufficient. Why do you believe that explicit statutory direction is necessary?

Mr. SACKLER. Well, first of all, the language that is in the report is a little bit vague. It is not sufficiently and specifically directed—I think that it is possible that rules and regulations that may come out of the process could be protective enough, but we think that the rights involved here are important enough to require some kind of explicit statutory direction to have an exclusion, which is what we would prefer.

Mr. LELAND. Do you not believe that the Postal Service would propose that third parties be exempt?

Mr. SACKLER. Well, we think that they probably will. It is said that that's the case in the report. But we still think that guidance from the Congress, specific guidance, is necessary.

Mr. LELAND. You expressed a fear that the Inspection Service would take short cuts in their investigations by demanding to see the records of newspapers. Is there anything in your past experiences or observations of the Postal Service that cause this concern?

Mr. SACKLER. I have not had a chance really to see if anything specific from the Postal Service has happened of that nature, and I am not sure that it has. But it has happened in other contexts, particularly in civil litigational contexts, and sometimes in the criminal context. What I am saying is not that the Postal Service has, in fact, done this, but that the potential for it to happen would be there.

Mr. LELAND. You said that investigative demands could cast a chill on publications by impeding their production process. Can you explain further why you believe that and how you think it would happen?

Mr. SACKLER. Well, if the Inspection Service were trying to investigate some fraudulent or allegedly fraudulent operation that had advertised through a newspaper, and were trying to turn up any kind of evidence whatsoever in terms of identifying the individual or organization involved, in terms of trying to track them down or see what information might have been given to the newspaper, I think there is a possibility there that, rather than going through some alternative way, directly trying to find out the information about the individual, the newspaper, as has happened on numerous occasions in the civil context, could be levied with a demand to turn over whatever information it might have.

If that is the case, particularly in the case of a small operation, which is what is typically the type of newspaper that is a member of the National Newspaper Association, you have got to devote an extraordinary amount of staff time to try and dig up whatever records you might have, extraordinary in terms of what's available in total staff. It might not be the same case with a larger news organization. And when you have a situation where the same person is the editor and the advertising director, for example, and perhaps even the publisher, all rolled up into one, it is going to considerably disrupt the schedule. I think in that sense it impedes the production process.

Mr. LELAND. To follow up on that, do you believe the free flow of information would be impeded?

Mr. SACKLER. From the standpoint of disrupted schedules, missed deadlines and that kind of thing, yes, the potential for that is there.

Mr. LELAND. Can you just comment on what you believe about the bill that is pending in the Senate, on the first amendment problems?

Mr. SACKLER. I think that was our primary concern, that there would be an impact on being able to freely provide information as you put it. There would be some kind of impact on the production process from having to devote staff time, that kind of thing.

Mr. LELAND. Thank you very much.

Mr. Stephen Jones, director of the industry standards division, Council of Better Business Bureaus.

STATEMENT OF STEPHEN JONES

Mr. JONES. Thank you, Mr. Chairman.

I am Stephen Jones, director of the industry standards division of the Council of Better Business Bureaus. I appreciate your invitation to comment on our experience with the mail order problems of consumers.

My comments are based on the experiences of the National Council of Better Business Bureaus and its 154 bureaus and branches around the country.

While the Council of Better Business Bureaus does not take a position either in support of or opposition to this proposed legislation being considered by this subcommittee, we are pleased to present our views on mail order problems in hopes that they will provide some useful information for your consideration.

One of the primary services of Better Business Bureaus is providing information to consumers and resolving problems they have with businesses. In 1981 there were nearly 7 million inquiries and complaints handled by BBB's across the country about a variety of businesses, and this represented an increase of about 5 percent over the previous year.

Doing business by mail has a long and proud history in this country. Undoubtedly it serves the needs and desires of millions of Americans for the most part in a legitimate and fair way. Nevertheless, better business bureau experience has shown, from the standpoint of consumers, that there are serious problems in this industry, problems that, despite the best efforts of the better business bureaus, the U.S. Postal Service and other law enforcement agencies, persist year in and year out.

In 1981, as in years past, complaints about mail order companies topped the list of BBB complaint categories. Over 20 percent of all the complaints received by better business Bureaus dealt with mail order. And to the total of over 76,000 mail order complaints can be added another 10,000-plus complaints about magazines ordered by mail.

The bulk of these complaints did not allege what is usually characterized as fraud or misrepresentation. Over 80 percent of them

involved nondelivery, delivery delays, or problems with billings and refunds.

To give a more realistic picture, here is a summary of the types of complaints about mail order companies received from American consumers during 1981:

Type of complaint:	Percent
Delivery—delay/damage.....	59.3
Credit/billing.....	16.1
Failure to provide refund.....	12.0
Unsatisfactory service ¹	7.1
Product quality/performance.....	1.9
Selling practices.....	1.5
Advertising practices.....	.7
Guarantee/warranty.....	.5
Discontinued business.....	.5
Unsatisfactory repair.....	.4

¹ Unrelated to repair.

These findings are further buttressed by a study that we are now making with our new computer capability of the mail order problems. Preliminary statistics gathered from 22 better business bureaus so far this year again show the large majority of mail order complaints, 71 percent of them, concerned late or nondelivery of ordered merchandise.

Now, I don't mean by these statistics to minimize the problem. Recently one better business bureau was receiving complaints on a mail order company in California at the rate of over 500 a month. Complainants were just not getting what they had ordered and the delays were very late, if at all.

Not receiving an adequate response from the company, the better business bureau had no choice but to refer the complainants to the Federal Trade Commission, which is charged with enforcing regulations requiring timely delivery of mail order goods. But soon the BBB's started hearing again from complainants who had received form letters from the FTC telling them that it does not handle individual complaints and offering faint hope of eventual recovery of lost money if the FTC does decide to sue the company. Better business bureaus have had similar experiences with at least three other west coast mail order firms this year.

This recitation is not meant to suggest there are not problems of outright fraud and misrepresentation through the mails. Rather, we are suggesting that the problem encompasses more than fraud, and therefore the solution should relate to more than mail fraud.

Certainly mail fraud through the mails is a serious problem, and hard economic conditions seem to spawn more unscrupulous schemes designed to take money from those who can least afford to lose it.

In 1980 the better business bureau completed a study of what are commonly called work at home schemes. These plans are usually advertised in magazines and newspapers. They promise hundreds of dollars a month for only a few hours of work at home, stuffing envelopes or engaged in some similar activity.

The study of 55 such promotions showed not one actually offered employment. They were mostly lures to sell information on how to set up one's own business, or to conduct the same scheme that bilked the consumer in the first place. Those who answered the ads

almost always had to put up their own money for more information, envelopes, stamps and placing their own advertising. The chances of making money from participation in these schemes were nil.

While individual losses are not great by some standards, the aggregate losses are huge. The Postal Service recently charged that four men running several envelope-stuffing schemes had taken over \$650,000 from more than 50,000 victims. Moreover, those who are prey to these promotions are generally on fixed incomes or are out of work and can ill afford to throw money away.

Better business bureaus did make considerable efforts to publicize the results of our study of these work-at-home schemes. We sent bulletins to the media warning them of what to look out for in these promotions, and each of the 154 bureaus made efforts on their own to alert the public to the danger of these schemes. Perhaps as a result of this effort and the aggressive actions of the Postal Service, our 1981 statistics show a 50-percent reduction in complaints about work-at-home schemes. It is below the 1980 level, which was a record level.

Another example of fraud that is tailored to fit hard times involves companies that advertise bogus offers of jobs, and even relocation expenses. But after the jobseeker has sent a fee for "processing" or some other type of activity, they deliver little or nothing. The Dallas Better Business Bureau, for example, received complaints from Michigan jobseekers who had sent résumés and fees to a Plano, Tex., job service and never did hear from it. Mail subsequently sent by the better business bureau to the company was returned marked "moved—left no address."

Small businesses are also prey to this. Companies advertise themselves as loan brokers and require advance fees for loans supposedly from \$50,000 to a million dollars. They have promised refunds if the loans are not forthcoming. After giving the money to one such company, a Texas consumer trying to borrow money to buy a dairy farm became uneasy, called both Dallas and the Omaha offices of the loan broker, and found the phones were disconnected and the people had disappeared.

The Detroit Better Business Bureau has unearthed another mail offer aimed at thousands of unemployed auto workers. The company advertised for individuals to assemble at home prefabricated auto parts, supposedly for a Japanese auto manufacturer. There was a \$21 fee for an interview. The Japanese auto maker, when contacted, disclaimed any knowledge of the company or the plan.

One interesting point about this last example is that apparently the individual running this so-called employment service was also known to have operated an envelope-stuffing scheme. This is not unusual. No one who has worked for a better business bureau for any length of time has not been frustrated by the repeated resurfacing of swindlers thought to be put out of business. No sooner is a Postal Service stop order issued against a promotion for a hair grower or some other miracle cure than a new offer of a slightly different product, from a new post office, appears, bearing the signs of the previous promotion. Experienced BBB personnel and, no doubt, Postal Service employees, can often tell who is behind a pro-

motion merely by the typeface used in the ads or the style of the copy.

As I stated earlier, better business bureaus handle tens of thousands of complaints dealing with mail order every year. But over 70 percent of these are resolved. The better business bureau is not a government agency; it cannot prosecute criminals. Our high success rate in resolving consumer complaints is evidence that most of the companies we receive complaints about are honest, conscientious, and anxious to have good customer relations by correcting any mistakes they have made.

When I once asked a hardware salesman if the padlock he was selling me was thiefproof, he told me that no lock was completely safe, because "locks are made to protect you from honest people." The same is true for the role of the better business bureau. When we get evidence of fraud or misrepresentation, we must and do work closely with Postal Service inspectors and other law enforcement people, with whom we have had excellent relations over the years. Our national advertising division, which hears challenges to the truth and accuracy of advertising on a national scale, regularly refers to the Postal Service advertising for clearly worthless products, such as miracle weight reduction pills and body developers, knowing from experience that the sellers of these bogus goods are not amenable to self-regulation. When we find evidence that the same principals who have been stopped in one phony scheme have moved on to another, we turn it over to the postal inspectors, who have been efficient, professional, and cooperative. We believe they should be given every reasonable opportunity to stop fraud more expeditiously than they can now.

One final point. During 1981 better business bureaus received inquiries about mail order offers from 147,000 consumers. Many of the problems consumers do have with mail order, or with any other type of business for that matter, could easily be avoided by calling the BBB before doing business.

Thank you again for the opportunity to be here. Please be assured of our full cooperation.

Mr. LELAND. Thank you very much, Mr. Jones.

In our first hearing we had several witnesses who were victims of mail fraud. One of them told us she had contacted the better business bureau in her area before doing business with a firm that turned out to be fraudulent.

Can you explain to us how a situation like that can occur and if there is anything that can be done to prevent it?

Mr. JONES. Well, better business bureaus develop information as a result of inquiries or their own investigations. It may have happened that we had received no complaints and had no notice that the company that was fraudulent was, indeed, engaged in an operation like that.

We do have limited resources; yet we try very hard to keep on top of these matters. I don't know how one could avoid, on occasion, there being scams or schemes that avoid our notice. The people move in and out of different things very quickly and we have to be very conscious of our liability to suit from people who are wrongly identified as being a particularly bad business. But we try very hard to keep on top of this thing.

Mr. LELAND. You told us you believe postal inspectors should be given every reasonable opportunity to stop fraud more expeditiously than they do now. Are you saying the present situation is inadequate?

Mr. JONES. I think we believe that, because of the repeated resurfacing of people after mail stop orders, that there does seem to be a problem, that recidivist mail order fraud people are not stopped as well as we think they should be.

We are not proposing any specific legislation or any laws one way or the other on that. But it is a continuing problem that we see through the diligent efforts of the Postal Service, that a company will be put out of business presumably and within a matter of weeks be peddling the same goods.

Mr. LELAND. In recent years have complaints about mail order businesses risen more rapidly than complaints about other types of businesses?

Mr. JONES. They have stayed at a high level. They have not risen much in the last 2 or 3 years. They had risen precipitously in years before that.

Mr. LELAND. Then the issue must be coming more to the forefront as opposed to in the past. If you are saying that the number of cases coming before you have not significantly increased, it seems that the issue is more dramatic today than before.

Would you agree with that?

Mr. JONES. That the issue is more dramatic?

Mr. LELAND. Yes. In other words, people are becoming more aware.

Mr. JONES. Yes, I think they are. I think, through our efforts, through DMMA's efforts with FTC, and the FTC's own regulations, it has made people more aware of these things.

However, there is still a very high level of complaints, a multiple of the next level.

Mr. LELAND. You told us you are able to resolve 70 percent of the consumer complaints dealing with mail orders, and that this is evidence that most of these companies are honest.

What steps do you take when you find a company that is apparently dishonest?

Mr. JONES. Well, the way the better business bureau works with mail order companies, they often will contact the company and present the complaint to the company, and the company will presumably respond. Sometimes it becomes evident quite quickly that a company is not responding to complaints and the complaints start to pile up. When we see this happen, we will contact either the Federal Trade Commission at times or the local better business bureau may contact the State authorities. There are State laws about delivery of products through the mail, or the Postal Service. Because if it becomes evident a mail order company is not amenable to self-regulation, as I pointed out here, there is nothing more that the better business bureau can do, since it depends on the goodwill of the companies involved.

Mr. LELAND. Is there any kind of publication that you might produce, other than the decertification of the company by way of contacting the FTC?

Mr. JONES. Better business bureaus maintain reports on companies. Any consumer can call up the better business bureau and obtain a report on the company. If the company has a record of complaints and not delivering the goods, that will be in the report. It presumably forewarns the consumer against dealing with the company if it, indeed, has a bad record.

Mr. LELAND. What about a current victim who might have been abused by this company, and you find that this company is fraudulent, is there any means by which the person who is being victimized can indeed get information at that point?

I understand your publication, but the problem I'm having is—and maybe this is not your responsibility—that when you find that a company is fraudulent, the persons being abused at that particular time when you make this find will not have information available.

Is there any way you might notify people by way of public media or whatever?

Mr. JONES. Yes. Better business bureaus will, on occasion, when they come upon a company that is very clearly violating the law or not providing what they are offering, or the offer is bogus, will, besides notifying the appropriate law enforcement people, will publicly release a statement saying that the consumer should be aware that someone is in the area or someone is offering by mail any given product that is worthless or that the people are being taken.

Once the fraud has taken place, it really is a matter for law enforcement authorities. We cannot go after and prosecute people for that.

Mr. LELAND. I understand that.

The other thing, you noted that you contact the Federal Trade Commission and then the last organization you said you contact would be the Postal Service. I know you didn't mean that necessarily in that order.

Mr. JONES. No.

Mr. LELAND. Is it in that order in reality?

Mr. JONES. No. It is usually in the other order.

Mr. LELAND. You do contact the Postal Service immediately?

Mr. JONES. If it is a matter of people simply not getting what they ordered, we may contact the FTC because they have the rules on that. But if it's a matter of something that looks like or smells like a fraud, we would talk to the Postal Service right away.

Mr. LELAND. Thank you very much. I appreciate your participation here today.

Mr. JONES. Thank you.

Mr. LELAND. Mr. Maraney, the president of the National Star Route Mail Contractors Association.

STATEMENT OF JOHN MARANEY

Mr. MARANEY. I have a short statement, Mr. Chairman. It will only take me a couple of minutes to read it.

Mr. LELAND. Thank you.

Mr. MARANEY. With me today is Joseph Dettmar, of the law firm of Garvey, Schubert, Adams, and Barer, legal counsel to the association.

The National Star Route Mail Contractors Association is a national trade association ultimately representing approximately 13,000 companies and individuals who contract with the Postal Service to transport the mail over the road. Historically, the routes on which mail was transported by independent contractors were known as star route; hence our association's name.

The facilities of the U.S. Postal Service are linked together by a transportation network extending over millions of miles. With the decline of railroad transportation and cutbacks in air transportation, surface transportation by highway contractors has become the most significant aspect of this transportation network. More than 90 percent of all highway transportation for the Postal Service is conducted by independent contractors. In rural areas, a significant portion of the mail is delivered by independent contractors.

More than 99 percent of the star route carriers are small businessmen as defined by the Small Business Administration. Approximately 98 percent of these businessmen are engaged exclusively in star route contracting.

The Star Route Association has no dispute with the purpose of this legislation. The Congress ought to be concerned about attempts to defraud the elderly through various uses of the mail.

To carry out this bill, the Postal Service is given broad powers, including sweeping inspection authority, to enforce the provisions of the act. We offer no comment as to whether these broad powers are necessary. The proposed legislation is of great concern to us, however, since the broad police powers given to the Postal Service would encompass the purely commercial transactions between our members and the Postal Service.

H.R. 3973 gives the Postal Service access to all "books, records, documents or other objects that the Postal Service has reason to believe relate to any matter under investigation by the Postal Service pursuant to its authority under section 404(a)(7) of this title."

Section 404(a)(7) gives the Postal Service the power "to investigate postal offenses and civil matters relating to the Postal Service." Thus, H.R. 3973 would give the Postal Service the power to give any employee the authority to demand and receive total access to the records of any person or group in order to investigate any "civil matters" relating to the Postal Service.

These broad powers contrast with the relatively narrow purpose of this legislation. In his statement introducing this bill, Representative Pepper stated that its purpose was "to strengthen the enforcement powers of the U.S. Postal Service to deal with schemes perpetrated through the mails which involve the obtaining of money by means of false representation."

If that is the intent of the legislation, the scope of the powers conferred upon the Postal Service should be limited accordingly.

The star route contractors are particularly sensitive to this issue because, as small businessmen contracting with the Postal Service, our members are particularly vulnerable to the authority exercised by the Postal Service. When the Office of Postmaster General was eliminated and the new Postal Service was created, the Congress expressed the intention that the new Service would be an independent enterprise operated in a businesslike manner. The Postal Service has certainly followed that mandate in its dealings with

the star route contractors concerning contracts to provide transportation and delivery service. The Postal Service is a hard-nosed businessman, and has earned a reputation for driving hard bargains in its contractual and other business dealings with our members.

We do not object to that behavior, for we believe that the people who use mail service deserve their money's worth. But we become very concerned when a commercial purchaser of our members' services acquires broad police power to subpoena their records, subject to no review whatever. Such authority in the hands of the Postal Service undermines the basis of a healthy and equitable contractual relationship between the Service and the star route contractors. It gives the Postal Service a commercial advantage that would not be tolerated in any normal business relationship.

The Congress must prevent the misuse of police power for commercial advantage. It can do so here simply by limiting the authority conferred by this bill to the purposes which it is intended to serve. We recommend that section 2 of the bill be amended at line 16 to delete the words "section 404(a)(7) of this title" and insert in lieu thereof, "section 3005 of this title."

Mr. Chairman, I appreciate the opportunity to testify before this subcommittee, and I will be glad to answer any questions or work with the committee staff in any way.

Mr. LELAND. We certainly want to thank you for giving us your testimony.

You are telling us you're opposed to the Postal Service having access to your books and records because they could obtain information about your members' costs, profits and so on, and thus gain an unfair advantage when negotiating contracts.

Is that correct?

Mr. MARANEY: No, sir. They already have authority now to have access to records and books involving transactions between the contractors and the Postal Service. Clause 20 of the general provisions, which all the contractors sign, gives them that access.

Mr. LELAND. Do you believe that the third party exemption that was advocated by the National Newspaper Association would alleviate your concerns?

Mr. MARANEY. I would like to defer to counsel on that.

Mr. DETTMAR. Mr. Chairman, we think not. That seems to be a protection designed to protect against the kind of innocent third parties involved in mail transactions and mail fraud. Here this would be one party, the Postal Service dealing with the second party, the star route contractor. Third party protection would not prevent the kind of abuse that we're concerned about here.

Mr. LELAND. I want to thank you very much for your testimony, all of you.

This is our last panel today. The Chair will now recess the subcommittee, subject to the call of the chair.

Thank you very much.

[Whereupon, at 11:50 a.m., the subcommittee was adjourned, subject to the call of the chair.]

MAIL FRAUD/FALSE REPRESENTATION

THURSDAY, JULY 15, 1982

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON POSTAL
PERSONNEL AND MODERNIZATION, COMMITTEE ON POST
OFFICE AND CIVIL SERVICE,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 311, Cannon House Office Building, Hon. Mickey Leland (chairman of the subcommittee) presiding.

Mr. LELAND. Good morning, ladies and gentlemen.

Welcome to this third hearing of the Subcommittee on Postal Personnel and Modernization on H.R. 3973 and its companion Senate resolution, S. 1407, which are intended to strengthen the U.S. Postal Service's investigatory and enforcement powers to help prevent mail fraud.

Today we will hear from Mr. Clinton Miller of the National Health Federation; Mrs. Gertrude Engel of the Health Victory Group and Mr. Joel Amkraut of the Council on Postal Suppression.

Mr. Miller, if you will, I would appreciate it if you would come forward now.

STATEMENT OF CLINTON RAY MILLER, EXECUTIVE DIRECTOR AND LEGISLATIVE ADVOCATE OF THE NATIONAL HEALTH FEDERATION AND MAUREEN SALAMAN, PRESIDENT, NATIONAL HEALTH FEDERATION

Mr. MILLER. Thank you very much, Mr. Chairman.

I appreciate having this opportunity to testify. It is refreshing compared to the lack of opportunity we had when this bill was speeding through the Senate.

My name is Clinton Ray Miller. I am executive director and legislative advocate of the National Health Federation. With me today to my right is Maureen Salaman, president of the National Health Federation.

The National Health Federation is a 28-year-old national consumer organization of 20,000 aware and well-informed members who vigorously defend health freedom and oppose every form of health tyranny. We believe health freedom is as important as religious freedom. We insist we have the constitutional right to read and write, buy or sell health books, magazines, and pamphlets without censorship, harassment, or investigation from the police arm of the U.S. Postal Service or any other governmental agency, so long as in the exercise of that freedom we are not a threat or hazard to someone else exercising an equal freedom.

We have targeted H.R. 3973 and S. 1407 as amended recently by the Senate as bills to kill.

H.R. 3973 and S. 1407 are a giant step in the wrong direction at the wrong time for the wrong reasons with the wrong agency.

At this time, if I may, I would like to have Maureen Salaman, with your permission, Mr. Chairman, divide our testimony into two parts. We would like to have our president present her statement at this time and then I will emphasize a few parts about our exhibits and summarize my written testimony, if that meets with your approval.

Mr. LELAND. You may proceed as you wish.

STATEMENT OF MAUREEN SALAMAN

Ms. SALAMAN. My name is Maureen Salaman. I am president of the National Health Federation. I am hostess of the "Totally Yours" radio talk show in San Francisco and associate editor of the National Health Federation's journal, Health Freedom News.

I deeply appreciate the opportunity to testify against H.R. 3973 and S. 1407 because I sincerely believe these bills should be killed.

There is perhaps no single aspect of George Orwell's classic novel "1984" more chilling than the idea of the thought police, government agents in the service of "Big Brother" whose sole purpose in life was to suppress ideas or points of view contrary to the established party line.

And as we draw closer to that ominous date, we cannot help but be conscious of the fact that many of the props for Orwell's scenario are already in place. Now comes the clincher. Will the thought police actually become a fact of life?

Now pending before this subcommittee is a piece of legislation that we shall call simply the P.O. thought police bill. It was introduced in the House by Representative Claude Pepper as H.R. 3973 and in the Senate by Senator David Pryor as S. 1407 and has received the stamp of approval from the Reagan administration's Office of Management and Budget.

S. 1407 has already been passed by the Senate, after a single day's field hearings in Little Rock, Ark. which was chaired by Senator David Pryor. Fortunately, H.R. 3973 will receive more exhaustive hearings by your subcommittee.

Ostensibly this proposed new law is aimed at curbing mail fraud, a noble purpose, which has caused it to attract 300 cosponsors in the House of Representatives.

The post office bill would grant to the U.S. Postal Service broad new powers to regulate not only what is sent through the mail but what may be transported by any other means.

How, you may ask, does a move against mail fraud constitute the establishment of a big brother-style thought police?

Even under present law, the Postal Service has assumed the power to interfere in the free dissemination of innovative ideas in health care. All that is necessary is that the Postal Service decide a person is guilty of false representation in offering something for sale by mail. Once the Postal Service makes this determination, they may impose a mail stop on that person, halting delivery of mail to the accused and sending all mail addressed to him back to

the sender, marked to indicate the addressee has been determined guilty of false representation.

The full extent to which this power can be, and is, abused was shown last year in a decision by a Federal administrative law judge, Edwin Bernstein. Bernstein's dangerous, precedent-setting decision came in the case of a man who had written a booklet advocating a diet of natural vegetables as a way to keep your arteries clean.

The man was offering the booklet for sale by mail. He was not selling drugs. He was not even selling health food or vitamins. He was offering a book for sale. In short, he was attempting to market an idea.

But the Postal Service decided it did not like the idea. So it accused the author of false representation and imposed a mail stop on his mail.

Judge Bernstein upheld that decision. In so doing, he declared, "I found the representations in (the) booklet to be unproven and contrary to the weight of informed medical and scientific opinion." Thus, said the judge, the booklet contained false representations—and its sale through the mail was banned.

Think about it. A book advocating an idea contrary to the weight of medical and scientific opinion can now be banned in America.

John Stuart Mills in his book on Liberty once wrote that all new ideas have always come from the realm of unorthodoxy. When you suppress the unorthodox and new ideas, that society will eventually atrophy and die.

Now when we are talking then in terms of the weight of medical and scientific opinion, what if it turns out later that the weight of scientific and medical opinion is wrong?

Too bad. Big Brother has spoken. You shall not contradict him. Welcome to the new dark ages. Get ready for 1984.

But the above action took place under existing law. The Post Office bill would increase its authority to invade privacy and enforce its orthodox opinions 10,000 fold.

The new law, as amended by the Senate would:

Authorize a \$10,000 per day penalty against any person who continues to write or distribute a pamphlet, newspaper, magazine or book after being issued a Postal Service order to cease and desist from such activity.

Authorize the Postal Service to designate any or all of its more than 600,000 post office employees to demand access without a search warrant to any home, business, private library, files, bank vaults or safes to inspect and copy books, records, documents or other objects that the Postal Service has reason to believe relate to any matter under investigation.

Forbid the shipment or transportation of a banned book not only by mail but any other instrumentality of interstate commerce including airlines, parcel service, buses, trucks or your own automobile.

This new proposal violates freedom of speech, freedom of the press and freedom of thought in general. When you hear that gentle rapping on your door, when the postman rings your bell but has no mail to deliver to you, ask not for whom the thought police come, they come for you.

Those of us who are concerned with developing new, innovative, and poison-free approaches to health care do so knowing that the present day weight of scientific and medical opinion sees things differently. Judged by men such as Bernstein, we stand to be found guilty of false representation.

The weight of informed medical and scientific opinion once held that the Earth was flat, that the Sun revolved around the Earth, that bleeding a sick person was a cure for illness, that touching the hand of the king could cure certain illnesses, that the blood did not circulate in the body and that a person thrown into water was a witch if he could float.

Up until about a century ago, informed medical and scientific opinion scoffed at the idea that germs could cause disease, and reputable surgeons did not bother to wash their hands before performing operations.

The history of medicine and health care shows that nearly all progress has started with unorthodox ideas which were opposed to the weight of informed medical and scientific opinion. Where new ideas have been suppressed, the growth of human knowledge has stagnated. Where free inquiry has been encouraged progress has been made in years rather than centuries.

Historically, dictatorships seldom come about by the would-be dictator convincing people that tyranny is a good idea. Dictators make themselves appear acceptable by offering themselves and their political systems as the solutions to problems, real or imagined, perceived by the people in general. They may promise agrarian reform so the peasants can own the land they work. Or they may promise to alleviate unemployment, so the poor will not go hungry. And now, it would appear, they would promise an end to mail fraud.

But when they speak of their noble motives, they do not tell their unsuspecting victims of the full extent to which they can and will use the new powers given to them to solve the problems they publicly attack.

The threat to our constitutional freedoms embodied in the new Post Office bill is very real. With bipartisan support in Congress and approval from the Reagan administration's OMB, this bill stands a very good chance of becoming law this year unless killed by your subcommittee. And once it does, any voice contradicting the weight of informed medical and scientific opinion in America may be snuffed out in the name of protecting the public from false representations.

The National Health Federation considers the bill so potentially dangerous that we are re-opening our Washington office, to be headed by Clinton Miller, NHF's experienced legislative advocate, to lobby in opposition to this bill.

Mr. Chairman, I brought a copy of Robert Ford's banned booklet for each member of the subcommittee. I urge you to defeat H.R. 3973 and in its place to enact legislation which will assure the Postal Service will never ban a book again.

Thank you.

Mr. MILLER. Now, Mr. Chairman, for decades—and I am talking about over 30 years—the Postal Service has demonstrated again and again and again that it can be depended upon for one thing.

We can depend upon the Post Office Department to abuse and misuse any police authority that this Congress gives it.

Maybe it is the uniform that it can't handle, but the National Health Federation is unalterably opposed to legislation which gives the Post Office Department any scintilla of new inspection authority or stiff penalties for violation of their arbitrary orders or demands.

We wholeheartedly endorse and support the testimony and the mirror image amendment offered by the Association of American Publishers at the last hearing. However, we wish to make it clear that this amendment would not make the bill acceptable nor remove our objections to the many other tyrannical provisions of the bill.

Senator Pryor told this subcommittee that about 100 years ago the Postal Service was given authority to prosecute fraud. If Congress made about 100 years ago a foolish mistake and gave the Postal Department responsibility to investigate and prosecute mail fraud in addition to its main and what we think should be its only responsibility, to deliver the mail, Congress did so in error.

We do not think that it is a proper thing for this Congress to amplify this error by continuing to go down an obviously wrong street. We believe that the suggestion made by the chairman of the full committee, William Ford, is a far better idea. We believe Ford has a better idea and we completely support his revolutionary common-sense proposal to get the Post Office completely out of the police business and back into the business of delivering the mail promptly, efficiently, and inexpensively.

Chairman Ford was 100 percent right when he recently told Senator David Pryor, who is the chief Senate sponsor of S. 1407, before this subcommittee that we already have a Department of Justice in this country, we have a Federal police force and a Federal prosecutorial force and a Federal judiciary that are designed to protect everyone's interests out there.

I might point out the Department of Justice knows the difference between fraud and false and misleading.

I predict that Ford's following statements will be widely quoted in the history books and the law books of the future, to remind us that at one time we were silly enough to think that governmental employees can play cops and robbers and Post Office at the same time.

Now here is Ford's better idea. It is 200 years old.

My own view is that the U.S. Postal Service—in the spirit of Benjamin Franklin who devised the system—has a duty to carry anything in the mails that isn't going to explode or cause a fire. It is none of our business what people put in there. It is between the person who mails it and the person who receives it.

Now, Mr. Chairman, since I heard this statement by Mr. Ford I have tried his idea out on several conventions. I have yet to find a consumer that doesn't want the Post Office Department to stop playing this censorship role and that was not totally outraged at the role that it is now playing as a policeman.

Now I have an apology to make to this subcommittee that I do not have an entirely new bill prepared at this time to offer as a substitute bill for H.R. 3973 and S. 1407 to do what Chairman Ford

has proposed. We are working on it and will submit it for the committee record the moment it is completed.

Now we want to make it clear that the National Health Federation is deeply concerned with mail fraud. We know it is serious and in many instances goes unpunished and we submit today, Mr. Chairman, it is going deliberately unpunished by design by the Post Office Department. We agree with Representative Claude Pepper and with the 300 House well-intentioned cosponsors of the bill that legislation is needed, but we know from 27 years of experience with prostituted Federal agencies like the Food and Drug Administration and the once evil agency, the Federal Trade Commission, which is a born-again agency as of recent years, that H.R. 3973 and S. 1407 will not do the job.

In fact, the proposed legislation would make the problem worse and I mean far worse.

Mail fraud legislation is needed. The problem is H.R. 3973 and S. 1407 are not mail fraud by any stretch of the imagination.

Now I am not a lawyer. It took me a long time to get it through my head that when the Post Office Department was talking about fraud they didn't even mean fraud. They used such mind-boggling terms as civil fraud, mixing the two terms and blurring the distinction so those of us who are not lawyers can't know the difference between a noncriminal civil offense and a fraud which means a crime has been committed.

Now to convict a person of fraud, used in the proper sense the burden of proof is as it should always be, on the Government, to prove a person is guilty of intentional deception to cause another person to give up property or some lawful rights.

The key word, Mr. Chairman, is intent and we lay people don't understand that. Without intent to deceive there is no fraud, without intent a person has not committed a crime and should not be prosecuted or convicted and I find in the Post Office testimony before this subcommittee that they blur the two terms as though they are synonymous.

Now we believe that fraud should be prosecuted vigorously as a crime. It is a terrible crime. The punishment should be criminal and not civil penalties. The proceedings should be criminal and not civil or administrative. The accused should be prosecuted under the criminal statute by, as Chairman Ford suggested, the Department of Justice. With, incidentally, all the protections that come when a person is charged with a criminal violation.

Now this is the one and only Government agency which should be the Federal police force which according to Chairman Ford is designed to protect everyone's interests out there.

Then the NHF and the public and the Congress must watch that single Federal police force very, very carefully when it is the only Federal police department.

Now look carefully at the bill. The bill is not asking to increase criminal penalties. It is asking to increase civil penalties. And how much? From zero which it has been, the maximum amount we could charge anyone for a civil offense was zero dollars for the last 200 years. They want now to increase it to an astronomical \$10,000 per day or \$3 million a year.

Now one adviser tells me this can be \$20,000 per day and over \$6 million a year under page 16, lines 6 to 11 of S. 1407 as amended out of the Senate.

Mr. Chairman, these penalties are 10 times as high as penalties for a criminal violation of postal statutes. That means that I would be guilty of privity, for just walking up to you and saying, "I would like to sell you this banned book for 35 cents," and you give me 35 cents, I would be subject to a higher penalty by tenfold than if a person were to send a bomb to every Member of Congress that exploded on their desk and killed the Congressman. The Post Office Department regards the thoughts or the ideas in this booklet as far more dangerous than any bomb that would be sent to a President or a Member of Congress.

Now when you have civil penalties that are 10 times as high as the penalties for criminal violation of postal statutes, suggested in a piece of legislation, one has to wonder about the motives behind the people who say civil offenses have now become this horrendous.

It is NHF's position that for some 200 years zero cents has been properly the maximum civil penalty and for the next 2,000 or 2 million years that should be the maximum civil penalty for a person who is not even charged, let alone tried and convicted of a crime.

Now we believe that the Post Office Department has conned the Congress. We believe they have done a beautiful job. We believe back in 1967 the Post Office Department was able to trick Congress as they are trying to trick it now into enacting a horrible bill. The bill then was H.R. 1411 using the same misleading propaganda and deception they have used to get massive congressional support for these two bills.

The Post Office lied at that time to Congress that it was too hard for its inspectors to get evidence of intent in fraud cases. The majority of Congress and the majority of the Postal Committee at this time swallowed that lie and voted for H.R. 1411.

At that time, to his everlasting credit Ford dissented and I think they may be building monuments to this man in Michigan, because of it. Representative William Ford was not then chairman of the full House Post Office Committee but his minority views at that time were so prophetically true and they fit the present time and the bill so well that we respectfully request his minority view be included as part of our testimony. I have included it as exhibit 1.

For more than 20 years now the Postal Service has patiently won incredible precedents in the courts and concessions from Congress which now allow them to win virtually all of the criminal cases they take to court. I am talking about a success rate of 98 to 99 percent.

The Post Office wins 98 to 99 percent convictions. At least they report this to Congress. In 1980 the Postal Service boasted a total of 9,057 convictions with convictions obtained in 99 percent of all criminal cases brought to trial.

In 1981 the convictions dropped in half to a total of 5,410. Now for some curious reason the Post Office Department cut the cases in half at the time the bill was pending before this committee in 1981 although they were still winning 98 percent of the cases they tried.

I submit, Mr. Chairman, this committee should ask some very hard questions of the Post Office when they appear before you and ask why if, as they have claimed that fraud is rampant, they cut in half the number of prosecutions that they brought when they were winning prosecutions virtually in all their cases.

Now, in view of this, Senator Pryor appeared before this committee and he testified before Claude Pepper's committee and the term that he used is that the Post Office Department is helpless. With a 99 percent conviction rate the Post Office Department has to lie to convince Congress that it is powerless and impotent to enforce the law against real criminals.

Why? So that Congress will grant the Post Office Department unlimited and even broader police powers.

Senator David Pryor apparently believed the Post Office lie because he testified before Chairman Claude Pepper's Select Committee on Aging as follows and here is his exact quote:

The fact that our current law is powerless * * *

Notice the choice of words—

Powerless to prevent companies faced with discovery and prosecution from merely closing their doors and opening up a new shop across the State line is one of the primary reasons legislation to reform this state of affairs is so desperately needed. The 100-year-old statute under which the Postal Service inspector is forced to operate simply leaves him helpless * * * and I emphasize that beautiful word helpless, helpless to do anything in many cases.

Now if you will at this time turn to page 14 of my printed testimony, I would like to show how sometimes people who make these kinds of statements get caught up in their own dissembling.

At the bottom of the page, the second paragraph up, notice that I state that Kenneth H. Fletcher, the Chief U.S. Postal Inspector, made my point quite well when he testified before the Senate Post Office Subcommittee on October 13, 1981.

Now this was before Senator Pryor's hearing down in Arkansas. This points out, I think, the extreme reluctance of the Post Office Department to prosecute real mail fraud under the criminal statutes which they have.

Now here is Fletcher's quote:

We had a long series of investigations of an individual who peddled phony aphrodisiacs by mail. In the course of his activities over the years, he used about 55 different names and addresses. At least 25 administrative actions were filed. After each filing he simply moved on to new addresses, reestablishing the promotion under different names. He was put out of business only after he was finally convicted for mail fraud under the criminal statute.

Finally it occurred to them that they had a criminal statute and he was finally put out of business only after he was finally convicted for mail fraud under the criminal statute.

Now, how in commonsense does it take 25 times going unsuccessfully after a criminal with civil proceedings for the Postal Service to finally get it through their head that when you do what this man was doing it is a fraud and it is a crime. They should have gone after him the first time with criminal proceedings.

Now helpless? Nonsense. The Post Office Department is now the most despised, the most feared and by far the most powerful agency in the United States. Surpassing the CIA and FBI and every other Government agency.

Helpless indeed.

With the enactment of H.R. 1411, over the minority objections of wise legislators like William D. Ford and Jerome Waldie, the Postal Service inspector could now burn books without fire.

Now there are certain powers, when you run a Government agency, that are marvelous. When you have learned how to ban a book this is the ball game. The Food and Drug Administration tried for years to ban books. They would walk into health food stores and they would seize books on cider vinegar, if you can imagine. They claimed that the books were false and misleading labels for products. FDA spent millions of tax dollars trying to convince Congress that what Congress and the people wanted them to do was to ban books.

The Federal Trade Commission went after Rodale Press. They thought, "Boy, we are going to go after their publications" and they unsuccessfully spent millions of dollars to convict Rodale Press. The Post Office Department is the only agency that has done it and got away with it.

In my exhibit 2, you will find 12 books that the Post Office now boast they have banned. They list them publicly. Before 1967 when they would ban books—it was just by a threat and they would only go after little publishers. This book is entitled "The Miracle of Fasting," and they banned this book, or threatened to.

The next one is "Better Eyesight," in which it is suggested that there are some normal little exercises that can prevent, perhaps, our eyes from going bad. And this one is "Bragg's Apple Cider Vinegar Book." The Post Office Department, prior to the 1967 enactment of H.R. 1411, was going after books three at a time. You will find in my exhibit 3, an undated Post Office Department notice of fraud for three books that were published at that time by a California company, "The Miracle of Fasting," they seemed to have a real problem with fasting; the "Secret of Facial Rejuvenation" and "Removing Facial Wrinkles," They charged that the ads were in violation of law.

When we went over and talked to the Postal Service at that time, they told Mr. Bragg—and his daughter Patricia, "We find the title of the book is false and misleading."

She said, "What if we don't even run any ad at all?"

The postal inspector said, "That wouldn't do because even the title, 'The Miracle of Fasting' is misleading and illegal, you can't even list the title of the booklet."

Now this agency—and I am talking about a despised agency—now has the power to ban books and is bragging about it. Before H.R. 1411, the Post Office Department had to prove fraud to ban a book and the Supreme Court 20 years before then had told the Post Office Department that if it ever went after a book with false and misleading claims it had to prove a fraudulent intent by the publisher.

Now I would like to encourage the chairman to invite Patricia Bragg to testify. Patricia Bragg may have written some false things in here. I think most people who write books may not write the truth as all of us see it, but they could never prove that she had an intent to deceive. Because if I have ever seen a person who believes in what she wrote—she was a believer, she really believed that

fasting was a miracle. And this book has been used by Conrad Hilton, by Clint Eastwood, by Dick Gregory, by practically every Hollywood person who is into fasting as their bible, and, rightly or wrongly, they believe in fasting.

They believe in it with an intensity that exceeds the religious fervor of people who were fighting for religious freedom in previous ages. The POD they could never prove they had an intent to deceive. But they came in and convinced this Committee and Congress in 1967 that it should take away the need for the POD to prove intent to deceive to ban a book and that is why Chairman Ford pleaded with this committee not to take away this burden of proof.

Now history has proven Congress made a horrible mistake in 1967 when it enacted H.R. 1411 and that should be repealed in place of the bill that is before us.

The interesting thing is they can now burn books without fire. When Hitler banned books he would make a pile of them and burn them out in the square and then everybody would see it and they said that was as bad as burning people.

How many books has the Post Office burned or banned to date? We have no way of knowing because they only list 16. We have just two firms in California that have contacted us since they knew we were opposing this bill and have listed over a dozen they have banned that were not even listed on the POD list.

Starting in 1968 the Post Office Department has now made public a growing list of banned publications because it can now pretend—and it is pretending—that it believes it is banning books with full congressional knowledge and approval following enactment of H.R. 1411 in 1967.

Prior to 1968, however, the Postal Service was forcing books out of the marketplace three at a time, simply by writing threatening letters to small publishers who, when they could check with an attorney here at Washington, they would find out their fees would exceed per day what some of them were showing in net profit per year. See exhibit 3 on that one.

The Post Office Department has prosecuted incidentally a disproportionate number of health book authors and publishers. When you go down this list of 12 of them I think you will find out that 8 of the 12 are clearly health books. Now why?

Mr. Chairman, I have tried to explain this earlier to a couple of staff members who are here covering the bill and no Congressman can understand why the Post Office is behaving like it is unless they get and read the proceedings of the First National Congress on Medical Quackery of October 6 and 7, 1961. This Congress was held over at the Sheraton Park Hotel and it was packed. At this Congress which the American Medical Association cosponsored, with the U.S. Food and Drug Administration and three other agencies, they planned an open conspiracy to drive their competitors out of business. They were so arrogant at that time that they openly conspired. Here they had the Food and Drug Administration, the Federal Trade Commission and the Post Office Department at that time represented by the Hon. J. Edward Day, the Postmaster General.

The bottom line was that the American Medical Association captured these three agencies and they told them: Your purpose is to

enforce the law as we see it. When we say this is quackery you are to go after it as quackery.

They told the Food and Drug Administration they were to go after vitamins and minerals and the Food and Drug Administration like a puppet went after vitamins and minerals and said: We are going to ban all vitamins and minerals except those that have a very limited potency and combination and they issued a proposal to do exactly that. It would have taken 90 percent of the vitamins and minerals then on the market and would have put them under RX, which would have put them under control of the American Medical Association. Fortunately Congress enacted what was then known as the Proxmire vitamin bill. It stated to the Food and Drug Administration, "We are not about to limit people's vitamins and minerals," Congress enacted that bill unanimously. There wasn't an opposing vote in the Senate or in the House.

Then the AMA went to the Federal Trade Commission and said, "We would like you to ban books on vitamins."

So it sicced the Federal Trade Commission on to Rodale Press. Fortunately the Federal Trade Commission has changed for the better. Fortunately for, we the people, but unfortunately for the Federal Trade Commission because when you don't do what the AMA says whether you are a Congressman or an agency they are out to destroy you as they are now attempting to destroy the Federal Trade Commission. As you know there is legislation now pending in Congress with 200 cosponsors to take the AMA doctors completely out from jurisdiction of the Federal Trade Commission. The AMA has told the Federal Trade Commission, "We either run you and you do what we tell you or we will make sure you don't even touch us." There are 200 cosponsors on that bill at the present time.

We are also deeply concerned about the attack of the Post Office Department against chiropractors. We find that the Post Office Department has lined up with the AMA to destroy chiropractors. And they did it publicly, back in 1961. We have tried under the Freedom of Information Act to find out how health books are targeted by the Post Office Department. The Post Office Department has consistently refused—and I haven't even added it as an exhibit because it would take 50 pages—every request we have made under the Freedom of Information Act for a copy of its policy manual which sets out the basis by which cases are selected for prosecution.

Now, Mr. Chairman, I think you are the only one in the world who can find this out from the Post Office Department because in addition to being a police department, it is a secret police department, and they are not telling any Congressman why they targeted this particular book by Robert Ford.

We have asked them: "How many complaints were made against this book?" They admit to receiving thousands and tens of thousands and hundreds of thousands of complaints against real fraud. Is there any correlation at all between the number of complaints they receive against a person committing real fraud and the cases they select for prosecution? They refuse to answer that question.

Now it seems to me this policy should be open to the public so if we find 50,000 complaints against a person doing a certain really fraudulent promotion, that we should be able to ask: And how long

did it take to go after them as criminals? In this particular case they won't even answer a question. They won't tell who filed the complaint against this book. We believe it may be the American Medical Association because the theories and contents of this book, if true and widely understood, would remove the need for heart bypass surgery, at \$25,000 to \$50,000 a shot. If you want to find something that is bankrupting this country and that would do more toward balancing the budget than anything else, check out the cost of heart bypass surgery which the American Medical Association is convinced that any person must have who has clogged arteries.

The Postal Service is becoming a secret police that will not open its consumer files to the public or Congress so we may see if it is going after the real criminals and my point is that they are not. The post office refuses to reveal who complained or how many complained or indeed if anybody complained against Ford's famous booklet.

The U.S. Postal Service is out to destroy chiropractors because AMA has targeted it. As a police officer, the Postal Service has chosen sides in the marketplace battle between medical doctors and chiropractors. The National Health Federation doesn't take sides in that battle.

We have some medical doctors in the National Health Federation as well as some chiropractors. But the medical doctors who join the National Health Federation don't feel threatened because they have some competition out there. They are not one bit worried because somebody has an alternative approach to health.

For more than 20 years the American Medical Association has openly conspired with the U.S. Postal Service to try to destroy chiropractors, which is the second largest healing profession. In 1961, the American Medical Association engineered the first National Congress on Medical Quackery here in Washington, D.C.

The purpose, of course, was to stop—the stated purpose was to stop medical quackery which was misdefined exactly as fraud has been misdefined in an attempt to get this committee to act.

Quite simply, any professional—and here is the AMA's definition of quackery—that doesn't pay dues to or is not controlled by the AMA is a quack.

The Federal agencies which joined the AMA in cosponsoring this infamous meeting were the FDA, the Department of Justice, the Federal Trade Commission, and the Post Office Department.

Oliver Field defined the enemy and set the stage in his speech: "The AMA's fight against the quack." He had an interesting title—because the AMA likes to play at cops and robbers, too—he called himself the director of the Department of Investigation of the American Medical Association, and he acted and behaved as though this was some kind of a quasi-official title. Here is what he said.

The medical profession

Now remember he is talking to the P.O. and other Government agencies that Congress funds

The medical profession needs help in stemming the tide of such things as chiropractic. The campaign then should be positive in that it should seek to dissuade and

discourage youngsters from following a fraudulent course by enrolling in chiropractic schools. Attention should be given to high schools, academies, or junior colleges. No one can expect or hope to keep all people from being lured into such a fraudulent system of healing, but as long as the minimum is achieved, chiropractic will dry up for want of nourishment to its roots; namely, matriculation to its schools.

Mr. LELAND. Mr. Miller, may I stop you for just a second. The House is in session now and I am sure that we will be interrupted with some votes in the near future. We have been very generous in yielding you time. I would hope that you can summarize the rest of your statement so that we can expedite our proceedings, if you will.

Mr. MILLER. Thank you, Mr. Chairman, and I will summarize simply by saying that I have just received from Patricia Bragg, the person whose books the Postal Service attempted to ban by threats, a statement too late to include as one of my exhibits. With your permission, I would like to submit this to the staff for inclusion in the committee record.

Mr. LELAND. Without objection.

Mr. MILLER. We would like to thank you at this time very, very much for allowing us to appear before this committee. We feel that this is the proper way. The Senate should have held similar hearings.

Thank you.

Mr. LELAND. Thank you, Mr. Miller and thank you Ms. Salaman. The remainder of your statement will be made part of the record at this time.

[The remainder of Mr. Miller's statement follows. Exhibits which were referred to are not included in this record.]

The code word of the AMA engineered and controlled 1961, Medical Quackery Congress was "Quackery." Oliver Field, the AMA spokesman, didn't mince any words when he explained that when the AMA said "Quackery" it meant Chiropractic. Thereafter all other agency heads could use the code word and everyone else understood that the enemy was Quackery, i.e. Chiropractic.

J. Edward Day, who was then the Postmaster General, explained to the Quackery Congress how the Post Office would attack Quackery (Chiropractic) or any other AMA enemies in its Administrative Courts. He described how three of the four government agencies would work with the AMA to prosecute "Quackery" not crimes. The role of the Department of Justice was downplayed because, of course, the AMA, PO, FDA, FTC Quackery Congress was not to protect us from multimillion dollar medical crimes. The new target was to be medical "quackery" as defined by the AMA to be Chiropractic.

Said Mr. Day:

"An excellent working agreement exists between the Food and Drug Administration, the Federal Trade Commission and the Post Office Department, to prevent overlapping and to maintain good coordination in the exchange of information.

"Under this agreement the Post Office Department handles cases where use of the mails is an integral part of any suspect promotion. Food and Drug is concerned with ingredients and labeling. Federal Trade has jurisdiction in all cases of questionable advertising, but gives the Post Office Department primary jurisdiction when use of the mails is involved.

"The Post Office Department has a working agreement under which it contributes to the salary and expenses of doctors and chemists employed by the Food and Drug

Administration for the purpose of analyzing submitted samples of suspect remedies and cures.

"If tests conducted by these scientists indicate that formal action should be undertaken, a complaint setting forth charges of fraudulent misrepresentation is filed with the Post Office Department's Chief Hearing Examiner.

"The promoter is named respondent, and arrangements are made for him to appear with his attorneys at a formal hearing at which both sides of the case are heard on the record.

"If the fraud charges are proven, a fraud order is issued for the Postmaster General by the Post Office Department's Judicial Officer. When such an order is issued, a promoter can receive no funds through the mail, and for all practical purposes, his operations are shut off. All mail sent to him is returned to the sender marked "Fraudulent" except that which, on its face, is clearly not connected with the unlawful enterprise." (Proceedings p. 30)

To its everlasting credit, after the 1961 Quackery Congress, the FTC started cleaning up its act at the same time the Postal Service got progressively meaner and dirtier. The FTC learned from its case against Rodale Press, Inc. that the dissenting opinion of FTC Commissioner Elman was the will of millions of health freedom minded people, their Congress and the appellate court. Instead of sulking, FTC, without a mandate from Congress, gave birth to the Elman or "mirror image doctrine" which has kept that agency out of hot water with first amendment citizens ever since.

Not only that, FTC, once a puppet of the AMA, responded properly to a request by Congressman John Moss and carefully investigated monopoly charges against the AMA. When FTC found the charges to be true, it prosecuted, and has now found that the AMA is its most vicious enemy. The AMA position is that if it can't control the FTC like it now controls the postal service, it most certainly will not be regulated by it.

P.O. "TRUTH" IS THE "CONSENSUS OF MEDICAL OPINION"

J. Edward Day, the Postmaster General, made it clear that the Post Office had sought for and won powerful legal precedents for the AMA/PO contention that the "consensus of medical opinion" was to be court enforceable truth in the U. S. after 1961. Any health opinions in conflict with that medical opinion could be and have been successfully prosecuted at the whim of the P.O. since that time.

The Postmaster General boasted;

"The role and weight to be accorded medical testimony in Administrative hearings before the Post Office Department was established by two recent United States Circuit Court decisions--Owens Laboratories, Inc. versus Schroeder, and the U. S. Health Club versus Major.

"These decisions enunciate a rule that informed medical consensus and the 'universality of scientific belief' may be established through the testimony of a medical doctor.

"The rule greatly strengthens the Department's position in medical fraud cases."

I should say it did! It made it so that one single medical doctor chosen by the Post Office as an expert witness can establish court enforceable scientific truth for the entire U. S.

This is precisely what happened in the Magnolia Lab case referred to by Ian D. Volner in his June 3 testimony before this Subcommittee.

One single medical doctor established a prima facie case

that the opinions expressed in a booklet were false, Oh, I know that the Post Office has tried to mislead you and all other members of Congress by telling your staffs that they didn't go after Mr. Ford's booklet, but only after a false and misleading advertisement for the booklet in the National Enquirer. The bottom line is that the Post Office has lied to you and your staffs and continues to lie to the press and the public about this case to this very moment.

The Post Office went after the opinions in the booklet!

Here is the Orwellian decision rendered by the Post Office's Administrative "Judge" which, believe it or not, was upheld on appeal:

"Although I found that the booklet contained some helpful suggestions and its author, Mr. Robert Ford is a knowledgeable and sincere person who thinks that he is performing a beneficial service, I found the representations in the Respondent's booklet to be unproven and contrary to the weight of informed medical and scientific opinion. As indicated by Dr. Murray, a danger of this publication is that it will deceive people who have arteriosclerotic problems into believing that they can cure these problems by diet alone instead of seeking medical help. (Emphasis added)

"Because the advertisements and this booklet contain materially false representations, they violate the provisions of 39 U.S. Code Sec. 3005. Therefore, Respondents' motion to dismiss is denied and a mail stop order, substantially in the form attached should be issued against Respondents."

Signed

Edwin S. Bernstein

Administrative Law Judge

"PRIVITY" THE SUPER CRIME AGAINST THE SUPER STATE

NHF is unalterably opposed to the bill's \$10,000 daily civil penalties against persons who act in "privity" with others who are struggling to keep a book in circulation after the P. O. has won a stop or cease and desist order.

It is one thing to harbour a criminal. It is quite another to give comfort and support even to buying and selling the books of a pamphleteer or publisher whose publication has been banned by the P. O.

P. O. POLICE IGNORES CRIMINAL POSTAL FRAUD

One thing becomes increasingly clear as we scrutinize H.R. 3973/S.1407 against the enforcement pattern of the Post Office. The P. O. Police want nothing to do with real postal fraud. They don't want to investigate postal fraud. They don't want to prosecute it. In fact they want and have allowed postal fraud to flourish for then they can come whimpering to Congress year after year, that they are powerless and "helpless" and ask for more and more civil authority to control every book we read, product we buy, and thought we think.

If the present trend continues, long before 1984 the Postal Service will not be prosecuting a single mail fraud case and their entire secret police force will be concentrating on controlling the civil aspects of our lives. The Pryor-Pepper bill will give them a congressional mandate to do so.

Here are the figures published by the Postal Service for fiscal years 1980 and 1981:

CRIMINAL INVESTIGATIONS AND CONVICTIONS

	<u>1980</u>	<u>1981</u>
1. Total criminal investigations completed	189,474	29,018
2. Total convictions obtained	9,576	5,410
3. Per cent of convictions obtained of all cases brought to trial: - - - - -	99%	98%

CIVIL ADMINISTRATIVE ACTIONS

	<u>1980</u>	<u>1981</u>
1. Cases presented to the USPS Law Department	226	371
2. False Representation Orders issued	72	169
3. Consent Agreements entered	67	177
4. Temporary Restraining Orders	43	59

If mail fraud is suddenly running rampant in the United States could it be possible it is being carefully orchestrated that way? Is it possible a super agency is attempting to manipulate Congress by making sure there is an epidemic of mail fraud raging at precisely the same time Congress, by some fortunate timing, is debating a bill to give the P. O. more authority?

Kenneth H. Fletcher, Chief U.S. Postal Inspector made my point quite well when he testified before the Senate Post Office Subcommittee on Oct. 13, 1981, as follows:

"We had a long series of investigations of an individual who peddled phony aphrodisiacs by mail. In the course of his activities over the years, he used about 55 different names and addresses. At least 25 administrative actions were filed. After each filing he simply moved

on to new addresses, reestablishing the promotion under different names. He was put out of business only after he was finally convicted for mail fraud under the criminal statute." (Emphasis is mine)

The question one might naturally ask is why it took 25 unsuccessful administrative actions before someone at the P. O. finally decided to prosecute the individual cited by Mr. Fletcher "for mail fraud under the criminal statute."

"REBELLION TO TYRANTS IS OBEDIENCE TO GOD"
Thomas Jefferson

Rebellion to tyrants may be obedience to God but under Pepper's bill it could also be "privity" with a \$10,000 daily fine.

I must confess, Mr. Chairman, that I am now daily committing what would be the unpardonable offense of "privity" under Pepper's bill. I have used another "instrumentality of interstate commerce" than the U.S. Postal Service to get a supply of Robert Ford's banned booklets so I could redistribute them to NHF members and Congress.

The bill says: (p. 16 lines 11-15)

"The resumption through the use of any instrumentality of interstate commerce of any activity with respect to which a cease and desist order has been issued shall . . . be considered to be a failure to comply with such order."

Any person who fails to comply with any order or who has actual knowledge of such order is in "privity" with the person against whom the order was issued and is liable to the United States for a civil penalty in an amount not to exceed \$10,000 for each day of such conduct.

IN SUMMARY

The National Health Federation is opposed to the Pryor-Pepper Mail Fraud Bill because:

- (1) It will not accomplish what its cosponsors intend. It is not a mail fraud bill.
- (2) Chairman William Ford is right. Any new legislation should put the P. O. out of the police business.
- (3) H.R. 1411 enacted in 1967 should be repealed before any new authority is given the P. O.
- (4) The P. O. has a shameful history of banning 16 publications in the past 14 years under its present authority.
- (5) The P. O. has tried to mislead Congress by claiming it only went after the false advertising of the Ford booklet: when the facts in the hearing record prove otherwise.
- (6) The P. O. has tried to mislead Congress into believing it is "helpless" when, in fact it wins convictions in 98 - 99% of criminal cases brought to trial.
- (7) The P. O. has unfairly joined with the American Medical Association to harass and prosecute Chiropractors by holding that the "consensus of medical opinion" was to be court enforceable truth.

Mr. LELAND. I would yield to my colleague from California, Mr. Dannemeyer.

Mr. DANNEMEYER. I would like to ask these witnesses, for my edification, before 1967, what tool did the Post Office Department have to prosecute mail fraud at that time?

Mr. MILLER. They had the same power they have now. It is just that the burden of proof required them to always prove there was an intent to deceive.

The bill H.R. 1411 made a simple three-word change in the law. It took the word "fraud" out and put "false and misleading" in, so that no longer does the Post Office Department have to prove there was a fraudulent intent in any author's mind when they wrote a book in order to ban it.

Mr. DANNEMEYER. Based on your knowledge, are there cases before 1967 when the Post Office prosecuted people successfully for mail fraud?

Mr. MILLER. I don't have a record from the Post Office. I just have the people who complained to us that they were caving in to threats by the Post Office Department, and the answer is "Yes."

Health Research Publishing Co. in California—I believe you are from California, Mr. Dannemeyer—up in Mokelumne Hills, sent me documents on how they successfully banned many of his books.

Mr. DANNEMEYER. This was before 1967?

Mr. MILLER. Yes. After 1967 they left him alone. They went after some new precedents that they had been trying to establish in other areas, and you can follow a pattern of precedent setting here, but the Health Research Co. was a little publishing company which would reprint health and esoteric books of all kinds. The Post Office would give him list after list of books they wouldn't let him advertise or sell.

Mr. DANNEMEYER. Before 1967?

Mr. MILLER. Yes, sir.

Mr. DANNEMEYER. On the grounds they were fraudulent?

Mr. MILLER. Yes, and they had to prove fraud. He employed a Washington attorney on three of them, and the attorney agreed with them that they would change their advertising if the Post Office Department would let the books continue to be sold. I would like to put a copy of the list and his statement in the record at this time so you can know how they were misusing the authority they had before 1967.

Mr. DANNEMEYER. I find it interesting by way of contrast that our system will preclude the distribution through mailing a book by an author that apparently advocates fasting, in terms of what we eat, the physical food we ingest into our mouths, and by the same token we will tolerate the distribution of pornographic material that speaks to a different psyche, not our stomach but our minds, in terms of inciting lust, which our U.S. Supreme Court, in spite of its efforts, says it cannot really come to grips with in terms of what is or what is not pornographic.

We can incite ourselves to lust beyond man's imagination so we perform like animals, through the distribution of pornography, but at the same time we preclude the distribution of materials that suggest there is a better way to acquire good health, through fasting.

I find it interesting that a culture would acquit itself in such a way.

Mr. MILLER. I couldn't state it better.

Mr. DANNEMEYER. You are suggesting, and I sense what you are saying is that the action Congress should take would be to repeal what we did in 1967.

Mr. MILLER. And 100 years ago.

Mr. DANNEMEYER. What was done 100 years ago?

Mr. MILLER. I am not a historian, but evidently Pryor had done his homework. He said about 100 years ago Congress gave the Postal Service the right to check fraud in the mail. They shouldn't have even done that.

Mr. DANNEMEYER. How about the gentleman who developed this aphrodisiac? You know, the world has been looking for an aphrodisiac from the beginning of time.

Mr. LELAND. Have you checked the history on that?

Mr. DANNEMEYER. Poets have spoken of it, the Bible speaks of it. Apparently this gentleman has been moving about and seeking to distribute his book notwithstanding accusations of fraud. Shouldn't our system permit the prosecution of that kind of person for fraud? If the Post Office can prove beyond a reasonable doubt an intent to deceive, don't you think the Post Office should be permitted to do that?

Mr. MILLER. The answer is a qualified "Yes." The system should, but the system should not be the present system. We agree with Chairman Ford's suggestion and Benjamin Franklin's suggestion, if you find somebody—let's take a real good example.

Let's say instead of an aphrodisiac, you have something that will hurt a person's sexual life, make them impotent and hurt them forever. It is a dangerous, horrible product that should be banned, and he should be put in jail for it.

Those of us who make the complaint, should write to the Department of Justice because that is the proper Federal police force, and say, "This should be investigated." The Post Office Department shouldn't even worry about it. If I put a package in the mail with a stamp on it, the only thing the Post Office should worry about is how fast they can get it to the party it is mailed to. That is all they should be concerned with.

Mr. DANNEMEYER. I guess what you are saying, Mr. Miller, is you think our system should give the Justice Department the privilege and the duty of pursuing prosecution under criminal fraud rather than the Post Office Department.

Mr. MILLER. Precisely. And then it shouldn't be messing around with books. Even the Justice Department should never do this. We should then watch the Justice Department very carefully.

Mr. DANNEMEYER. This is news to me, and like any citizen, I try to stay up on what is happening in our country.

I am appalled, frankly, as a citizen, let alone a Member of Congress, to find out there has been an agency of Government, which I serve, that has banned a book that speaks to the topic of fasting as a means of improving health. I am just appalled that our system will tolerate that.

It may be the biggest, phoniest scheme in the world, but that is what free speech is all about. What in the world is the Post Office Department doing prosecuting a book and an author of that type?

I suppose the claim can be made, you know, that if you fast forever you will be dead. That is true. That is harmful to health, to fast forever, but to fast for 2 days or 4 days—Moses fasted for 40 days and 40 nights, and he was used by God as an instrument of bringing forth the foundation of Western civilization. It didn't seem to hurt him.

Thank you very much.

Mr. LELAND. I thank the gentleman from California.

Mr. Miller, I am concerned. You have made some very serious allegations, and you have followed with scrutiny the testimony before today in these hearings regarding this matter.

Can you comment to us on the "mirror image" amendment that has been proposed by the American Publishers Association and some others who have come before us who are particularly concerned about just what you are talking about?

Mr. MILLER. We believe the mirror image amendment is the biggest step in the right direction any agency has ever taken. I think when the Federal Trade Commission, upon their own initiative, without congressional legislation, adopted the mirror image doctrine it was exactly what we expected that agency to do.

For example, in one of my exhibits, I think it is exhibit 7, I have included the advertisement for this booklet because whenever anybody has called the Post Office and said, "Is this book really banned?" The Post Office says no, we went after an advertisement on the book. We only have our people look at the advertisement to see if there is anything misleading or false about it.

It was as fair an ad as any person could write. Many people could write a different ad, but you look at the ad in our exhibit side by side with this booklet and you will find the book is exactly what is described.

We agree with the Association of American Publishers and Ian Volner, who gave their testimony. But we don't think it is the Post Office Department's duty to monitor advertising of books.

We have a Federal Trade Commission that handles advertising, and it does a very good job now that they are born again. I mean, they are now after the AMA. They said, "Look, the AMA can't monopolize health in America." That is what FTC is for.

The mirror image doctrine will not make the Post Office Department a well behaved agency. Certainly we will support it. If we can't get anything better, we will support that amendment. We will support an amendment made by a gentleman from West Virginia who said, "Couldn't we just add an amendment that says that any person who gives a money-back guarantee and performs it would be exempt from any provisions of the Post Office law?"

That seems to be reasonable. If anybody offers anything through the mail and they offer a money-back guarantee and in fact keep the guarantee, like Sears Roebuck, it seems to me that the Post Office Department should not even be worried about whether or not I waste my money for anything as long as I can get a money-back guarantee.

We can amend this monster as often as we want, but I think all we are doing is rearranging the scar tissue.

Mr. LELAND. Mr. Miller, in all of our deliberations regarding this matter, we have heard testimony that the problem has reached such proportions that something absolutely has to be done in regard to this very devastating problem to people we have heard from who have been victimized by fraudulent mail, and advertising.

Don't you consider that the problem is indeed serious, and to such a degree that it is considered to be epidemic?

Mr. MILLER. I believe that if the epidemic is there, the infectious agent is the Post Office Department.

Mr. LELAND. The implication there is that it is the Post Office that is the culprit in the matter.

Mr. MILLER. Look at the record. How can you justify dropping from 10,000 cases to 5,000 cases in 1 year? If it is epidemic, why haven't they come before you to say they don't have budget. They went from 10,000 prosecutions to 5,000 between 1980 and 1981.

We submit it was nicely timed with the enactment of this bill so when they came and said, "Hey, there is a lot of fraud out there," there would be a lot of fraud out there.

They are not without weapons. All they have to do is go through their complaint file and say, "OK. Let's go after real fraud."

I think this case Fletcher pointed out is typical of what they are doing. Why on earth would they go after a case 25 times under civil procedures? A second-grade student would know on the second time around, if you don't get him on civil procedure you get him the second time with a criminal charge.

They are not enforcing the law against criminals right now. They won't reveal their files. You call them up. Maybe you will get better answers than we, but we call and say, "Show us the relationship between these real frauds you are talking about and your inability to get them under the criminal statutes," and they refuse totally even to talk to you.

Mr. LELAND. Mr. Miller, I am concerned when you say the Post Office is the culprit. I am concerned that there have been other people who have suggested that the people who have produced some of the alleged fraudulent and misleading materials through the mail have really hurt a lot of people; namely, Senator Pryor and Congressman Pepper.

I am concerned that they feel that the matter is so prevalent and so pressing that indeed they would come and push this legislation with all of their resources and influence.

Are you saying that, in fact, they are just altogether wrong; that the Post Office should have no role in this matter of trying to curb the problems that we see in dealing with mail fraud?

Mr. MILLER. It seems to me, Mr. Chairman, that if you will check the figures in my testimony, the Post Office Department is deliberately restraining its enforcement against true fraud. Nothing else can come out of those figures.

Let me make an analogy. Here in Washington, D.C., if the police wanted to have an increased appropriation for the vice squad, it would try to show that prostitution is running rampant, so they pull off all the cops and they let prostitutes invade the nice resi-

dential areas so people will begin to call in and say, "We don't want these prostitutes out on the corner with our schoolchildren," and then they would come before you and say, "Mr. Congressman, we can't handle the problem. We have to have more money. We have to have more authority," and suddenly they get it and they do that which they already had the authority to do, only they do it afterward.

This is the oldest con game in history. Any person who has ever read the newspapers knows when agencies need more power or more money they deliberately contrive a situation to appear helpless.

Now, I am not saying, and I hope that I have emphasized this, that the problem is not serious, but I am saying they ought to prosecute it with the power they now have or better yet, turn it over to the Department of Justice. The post office should prepare their cases properly, not like they did in Kansas City.

My exhibits 4, 5, and 6 point out over in Kansas City the Post Office went after 16 white-collar professionals. After they destroyed the reputations of these people and destroyed their businesses, they had eight people they couldn't even convict. One judge overturned a jury conviction of an attorney that was unjustly caught up in this white-collar scandal.

I have included his full statement in my testimony, but he said that the investigatory abuses of the Postal Service shocked the conscience of the court.

The Postal Service doesn't know how to even run a decent investigation. The Justice Department does, and we think that the proper thing for us to do now is to have Congress say, "Obviously here is an agency that is having an awfully hard time even delivering mail. Let's get mail censorship out of the Post Office Department. Let's make it so when a complaint comes in on fraud, we give it to the Justice Department and then make sure we watch the Justice Department."

Then we don't run roughshod over people who are absolutely innocent. Eight of those people in Kansas City were innocent. When they were through, the newspaper account which I have included points out that the Postal investigators said, "Sure, we ruined their businesses, we destroyed their reputations, we have destroyed them financially, but a 50-percent record is not bad."

Mr. LELAND. Mr. Miller, thank you very much, and I thank you and your associate for your testimony.

Let me assure you we are carefully considering this matter, and we are trying to take into account all concerns. We have been as comprehensive, I think, as any subcommittee could be in regard to this matter because we do feel that it is a very important issue and a very complicated issue, particularly with regard to the first amendment rights. Please understand that we have heard your grievance and we will consider what you have said.

Mr. MILLER. Thank you very much, Mr. Chairman.

Ms. SALAMAN. Thank you very much for allowing me to appear before you today.

STATEMENT OF GERTRUDE ENGEL, ACCOMPANIED BY VICTOR EARL IRONS

Ms. ENGEL. Mr. Chairman, my name is Gertrude Engel, and I brought with me one of the giants in America, Mr. Victor Earl Irons, who is 87 years old. He is absolutely alert, has a marvelous mind, and is looking for freedom. We call him our Uncle Sam as the health person in America.

Mr. LELAND. We certainly welcome you to our hearing.

Ms. ENGEL. We thank you for the honor and privilege of appearing before you today.

We speak in behalf of the Health Victory Group, St. Ives Laboratories, Natural Food Associates, American Health Education Foundation, which issues 636,000 "Pathways to Living" every month that are circulated throughout the country, and Victor Earl Irons is our "Mr. America for Health."

We wish to extend kindness accolades to key staff members initiating proceedings re: S. 1407 and H.R. 3973 for their wisdom and understanding, namely: Val Halamandaris, Ed Jayne, Wayne Schley, Knox Walkup, George Davis and Louis Delgado, for their allowances of friendly, frank and fair discussions requesting considerations for hearings and amendment changes. We have 100 Senators, and 99 are my very best friends.

We realize that S. 1407 passed and they asked for three changes. We met with these marvelously skilled people and talked about three changes we wanted, and they believed in us and cooperated. We suggested written investigator demands instead of subpoena to seek access to any books, records, documents or other related matters.

The reason we made this suggestion is because during my 12 years working in Washington, D.C., and with most of the agencies and with the post office based on experience. Incidentally we were in Mr. William Bolger's office on Monday. Absolutely supreme. Mr. Bolger is one of the most dedicated Postmasters General we have ever had in Government. He is not only handsome but he is smart, too, and I was so glad to have the opportunity to meet that remarkable man and several people here today were with me at the time we went to see the Postmaster General.

Our second request was for appropriate district court determination instead of an administrative law judge.

I have found in past proceedings where I have appeared as a witness with the Food and Drug Administration that if they didn't like the way I wore my dress or my personal appearance, to be very factual about it, they might say, "Well, no, we are not for you," so, therefore, I felt that anything we did should not be administered by an administrative law clerk; it should go to the court. Let the judge make the decision. He is the smartest one on the bench.

Our third one was status for a penalty of up to \$10,000 a day for those who evade the order.

We were against that. In my experience—I have had 29 years of it in public relations, in research, in lecturing, traveling around the country—I find that \$10,000 a day may be in excess of any poor

person who couldn't afford to pay it, and maybe the judge would allow him or her to have probation.

We don't know the psychological demeanor of people, why they do the things they do. Maybe they do it because they feel inadequate. There are all kinds of reasons and we have to deal with an individual on a psychological basis, and I happen to be a psychology major.

We are dealing with a highly sensitive issue, and we note the mail fraud statute under title 39, United States Code, section 3005, has been in effect for a long time and it has accomplished miracles.

I have had a bleeding heart when I attend a formal hearing here and listen to these people who were bilked out of \$65,000, \$25,000, victimized by con artists, and I know what those con artists are like because just the other day I had someone call me on the telephone who used a fictitious name and wanted to involve me in something that I had no use for whatsoever, but he was very cunning, very smart, and I said, "No, thank you," and I hung up.

I think that we are not against, totally against, this bill. I am for what Mr. Irons believes in. He believes in freedom. Now, the word "freedom" takes on a lot of connotations: how you use your freedom, where you are giving your freedom, when and why.

We have wonderful Congressmen here, I believe, and I am sorry to know that in November some of them will be defeated. That is because of misunderstandings and the situations that exist in the country today.

I feel just as does James Kilpatrick, who spelled out new powers for the Postal Service when he wrote that in cases of palpable fraud, of course, the Postal Service should have power to act, but where the sums of money are small and the supposed benefits are subjective, I submit that the power, might and majesty of the U.S. Government ought to be put to better use, and the right to spend our own money embraces a right to waste if we choose.

Now, can the Postal Service evaluate health information? I am told we have 17 regional investigators, or postal agents. Scientists are all experts, yet no two agree. I have talked to many of them and making judgments with regard to advertisements and claims for health products and services is not easy.

I understand through the Postal Service that these people get an education on who they believe is using the mails for fraud, but they are not educated in psychology and science. It takes education. It takes people who are aware of what is going on to be able to ascertain who should be convicted for mail fraud, who should be charged with things that are not common, and this is the way it should go.

We have to temper our mercy with justice, and we have to be able to have some questioning in the evaluation of health products and services.

Now, does the Postal authority know this? Do they lead one to self-diagnosis and self-medication? Are services being sold on the basis of personal testimonials? If research findings are quoted, who did the research? Were they done by qualified and unbiased people?

If authorities are quoted, who are they? If literature is presented, is it acceptable to medical, dental and public health professionals?

Does the sales appeal play on fears or superstitious belief? Is the sponsor of the product or services a recognized, bona fide organization? Is the product offered as a cure-all or as a sure-cure for cancer, arthritis, or heart disease?

When doubt exists with regard to health products and services, they should be checked out with the family doctor, the local health department, the Better Business Bureau or the school or college health educator. Well-recognized organizations occasionally put out publications evaluating certain kinds of health information that is of value to the consumer.

Mr. Kenneth Fletcher, who is the Chief Postal Inspector, said, "The ideal solution is, of course, to prevent individuals from being victimized in the first place." With that we all agree. He suggests public awareness.

Radio announcements—and I don't know whether, Mr. Chairman, you heard them recently—say, "If you suspect mail fraud, contact your Postal Inspector." It merely takes a telephone call to do that and keep them aware of what is going on.

We suggest valuation assistance from newspapers and magazine publishers. Now, the reason I say that, Mr. Chairman, did you see Newsweek magazine? Did you ever see anything more horrible than the figure of the bosom of a woman? I really think if anybody is going to do anything at all, they might talk with the Newsweek authority.

I think they owe an apology to womanhood. Now, to go on to this. If you suspect mail fraud contact your postal inspector. We suggest valuation assistance. We respectfully request your reconsideration for delay. Mr. Chairman, I would like to see, and I would like to offer my services as a volunteer, and a chance to digest more of what the Supreme Court just had in their opinion on the book situation. Here is the Supreme Court situation which just came up and this is what they recommended because there was quite a controversy on whether school systems should ban certain pornographic books, certain other kinds of literature from the schools and do you know, Mr. Chairman, what happened? The Supreme Court said: "No board member of any school system is educated enough to ban a book from a child who wants to read it, or from a student." And I thought it was a tremendous opinion. Therefore, we are going to carry on, we are covered at least by the Supreme Court decision which is already in effect and I think it is great. I was going to suggest a task force, if I may, please, and I will work with you as a volunteer.

Because of the interference with FTC, FDA, Justice Department, and police and others, this will be in the record. I just wanted you to reconsider a delay of this bill so we can do more research, compile more literature, and I am willing to conduct it myself here in Washington. I am used to it.

Mr. LELAND. I would advise that you work very closely with the staff of my subcommittee.

Ms. ENGEL. You have some marvelous staff members and I want to congratulate them for their courtesy and kindness.

May I have the opportunity of discussing this with them so we can consider more research on this.

Mr. LELAND. You have the right to ask anyone.

Ms. ENGEL. We appreciate it.

Mr. LELAND. Did the gentleman have something to say?

Ms. ENGEL. No, he just wants to extend his wishes today for success in our endeavors.

Mr. LELAND. Thank you very much.

Mr. Joel Amkraut is the next witness.

STATEMENT OF JOEL AMKRAUT, PRESIDENT, COUNCIL ON
POSTAL SUPPRESSION

Mr. AMKRAUT. Thank you, Mr. Chairman.

I have prepared some notes, I have summarized the testimony and I will submit the written testimony for the record with your permission.

My name is Joel Amkraut and I am the spokesman for the Council on Postal Suppression which is an organization recently formed to monitor and hopefully oppose postal service violations of free speech and other abuses of their power.

I would like to put this whole matter of the bill in perspective. We have heard a lot about various abuses of the Post Office against free speech and against the holistic health field as a matter of course but I think Mr. Ford asked the real question which is whether the Postal Service should be in the law enforcement business at all. Maybe it should simply stick to the mail and let the Justice Department enforce the laws.

The Post Office might only concern itself with handling the mail rather than being interested in what is being mailed. I would also like to point out, since the Post Office has tried to make it seem that this bill is an outgrowth of a supposed epidemic of mail fraud, this bill doesn't really respond to any new revelations.

Many of the same powers in the bill were found in H.R. 6307 of the 96th Congress and the Post Office seems to have used Mr. Pepper's fraud hearings simply as a vehicle to resume its search for more power.

I would also like to clarify a few other matters about the present state of the law which have been somewhat muddled and confused by the Post Office in lobbying for this bill.

First off, I would like to clarify the distinction between criminal and civil law. Under title 18, United States Code, section 1314, that is the Postal Service—criminal mail fraud provision. It has the usual procedure in criminal cases with the appropriate due process procedures. The bill though, in lobbying for the bill the Postal Service has presented victims of criminal fraud and yet this bill deals primarily with the so-called false representation statute, title 39 United States Code, section 3005 which is an entirely separate matter. So, the Postal Service has paraded before Congress victims of genuine mail fraud and then by some sort of ledger domain tried to make it seem if things would be improved if they got more power for the false representation statutes. Except for the inspection provisions of this H.R. 3973, the entire bill deals with false representation statutes, not with genuine criminal mail fraud.

There has also been a few confusing points in testimony. The Post Office has attempted to make it seem that the present limited sanctions of the false representation statutes hamper enforcement

of the criminal statute, which is true. They have also tried to give the impression that the normal due process procedures present in the criminal law hamper, or exist under the false representation procedures, which also is not true.

I would like to comment on some of the abuses that already exist under the present false representation statute, section 3005. First I would like to point out that the criminal law, section 1314, that is, is already extremely broad and even without the inspection provisions present in this bill it has allowed the Post Office more or less to go through the country and jump into any case it desires. Many of these cases, as Mr. Miller pointed out, have to do with chiropractors or other aspects of nonorthodox or holistic health but since this bill deals with false representation statutes I am going to concentrate on present abuses.

Now, this is just under the present law. The Post Office is able to do the following. The problems with section 3005 are several but I would say they stem from the overbroad authority and lack of genuine due process in these proceedings. I hate to use the phrase "kangaroo courts" to describe section 3005 proceeding but I have talked to a number of attorneys who have litigated these matters, I have talked to a number of respondents and the phrase "kangaroo court" just keeps recurring and in our own opinion I know of no other term to describe these proceedings.

What you have here is a captive in-house Postal Service court. I use "court" in quotation marks. The respondent in these cases is in a Postal Service hearing room before a Postal Service judge and jury. The Postal Service Act is the appellate court and of course there is a Postal Service prosecutor and the whole matter is taking place under Postal Service rules of procedure and relying on Postal Service precedents and case law.

In such a situation it is perhaps not surprising that the Post Office prevails in about 99 percent of such cases. I don't know of a single health-related case under section 3005 where the respondent won at the hearing level. Perhaps the Post Office could name one but I couldn't find one and none of the attorneys I spoke to could tell me of one.

The cases that actually reached the hearing stage under section 3005, are only the tip of the iceberg because for every case which does go that far there are countless cases which the respondent simply threw in the towel and refused to waste money on what really was a preordained conclusion.

One of the problems there is that essentially there is very little accountability. The Post Office can render a decision on what amounts to an ipsi disit basis essentially answering to no one. They do not have to bring their case to a jury or judge. For several practical reasons appeal is not available to the respondent. First off, most of the victims of Postal Service prosecution are small firms with little legal sophistication or resources for legal counsel. Now, even if such a firm would decide to contest the 3005 matter at the hearing, it is expensive. The decision is at the hearing for all practical purposes to be considered to have been made in advance and once the decision goes against you at the hearing level you have a second layer of Postal Service administrative process. You have to

appeal to the judicial officer, which again entails considerable legal expense which probably is not available.

Only after that can you appeal up to the Federal courts and even at that point you are not entitled to a trial de novo. The Federal court will basically only look to see that the procedure has been followed and it won't question the findings of fact. Essentially when the Post Office makes a decision, it is made.

Of course the standard of so-called proof in 3005 proceedings are considerably less than in criminal proceedings. The Post Office doesn't have to show any criminal intent or intent to defraud. They have no need to actually prove injury to anyone. In fact, under the present law even if you are offering the refund guarantee and honoring it, it doesn't make any difference.

Also, of course, the evidence standard is the so-called preponderance of evidence of administrative law which as you probably know is considerably less than the beyond a reasonable doubt standard of criminal law.

One of the present problems under the law that really upsets me comes in under the companion statutes, section 3007, of which very little has been said at these hearings.

Now title 39, United States Code, 3007 allows impoundment of the respondent's mail pending an administrative proceeding. Even before the administrative proceeding is begun the Post Office may seek permission to impound the mail. The Post Office, thank heaven, has to go to a district court to get this injunction or temporary restraining order and injunction. However, the section 3007 is quite restrictively written. It says the judge shall grant the injunction, not may grant the injunction, if probable cause is shown. The probable cause has been interpreted sometimes as meaning that the Post Office has the prima facie case just for starting the case so essentially they are saying if the Post Office is not blatantly in error even in prosecuting a case it is entitled to impound the mail until the administration procedure has run its course.

Now, obviously for a mail order business when you shut off the incoming mail it is equivalent to padlocking the door. I can think of very few businesses that could survive with their income cut off for more than perhaps a week or a couple of weeks and these administrative proceedings may go on for months or even years. This has been pointed out to the Post Office and the Post Office has indicated it is their policy that they will make no special effort to expedite proceedings when an injunction is in effect. The Post Office apparently would prefer to bleed the respondent to death rather than letting a conclusion at law be the actual deciding factor.

The present abusive statutory setup and lack of due process lead to a number of violations. As Ian Volher pretty substantially described in his testimony at the last hearing, there has been a long series of book suppressions and suppressions of periodicals and other ideas. This has been well documented. I won't waste your time now going over it in detail. The latest case is the suppression of the Nutritional Bulk Book put out by Magnolia Laboratories. It is essentially distressing when, contrasted with the Postal Service's duty to disseminate ideas, not decide to suppress them or judge what is worthy of being distributed.

The other aspect of abuse under the present law which hasn't been much described is suppression of products. The Postal Office uses its already overbroad authority to suppress various products. A prime victim of this sort of action is the entire holistic health field. Under Postal Service created precedents and case law, the Post Office has reached the point where it has stretched its already broad authority like taffy to the point where it has decided that if a product, or what you say about it, is not in consensus with the majority of informed medical and scientific opinion, then that product is false and misleading.

In other words, a majority viewpoint in the field of science or health is, per se, wrong and therefore the Post Office can impose a stop order. Again cases under section 3005 deal with holistic health. Mr. Miller documented what appears to be a long-term pattern of Postal Service abuse against the holistic health field ranging from chiropractors and other aspects. That was several decades ago but things haven't changed as the recent Magnolia Lab case indicates.

It appears that the Post office has taken up the sword for the medical establishment and almost acts as an arm of the FDA at times. The Post Office has refused our Freedom of Information Act requests seeking to clarify such liaisons and insists on maintaining its own secret guidelines for choosing cases, prosecuting them or settling them.

As an organization considerably concerned with Postal Service abuses we are continually distressed by their insistence on their own body of what we would call secret law in contravention of the spirit and probably the letter of the Freedom of Information Act and the spirit of openness in government.

I would like to summarize H.R. 3973 and show how abuses would come about. Postal Service power is shown in several areas. The inspection authority expands the Postal Service general investigatory powers. It affects any matter under investigation by the Post Office. The rest of the bill deals with section 3005, of title 39, United States Code.

Dealing with the inspection authority first we have to consider that this authority would be granted in the context of the already extremely broad authority granted to the Postal Service under 180 SC 1313, the Criminal Mail Fraud Statutes. The 1314 section is extremely broad. Essentially the Post Office can jump in anywhere, where the use of mails is part of a supposed scheme.

Now, this would mean, for instance, a chiropractor being persecuted by FDA or anyone else, the Post Office could jump in, the thought being that he presumably mails out bills to patients, or medicare billing or any other use of the mails. Essentially they have a mandate to involve themselves in almost any Federal case almost anywhere at will.

We also object, in addition to the section 3005 being questionable in itself, there is a presupposition of wrongdoing. If someone gets a demand from the Post Office and resists that up to the court level he is presumed to be guilty of whatever the matter in question is. This would allow the Postal Service to impose a stop order immediately.

We also object to the apparent extension of this inspection authority to involve third parties. There is apparently nothing in this section that would prevent the Post Office from serving its demands on third parties. For example, if it was chasing a mail order company it could go out to anyone it suspected of buying from that company and demand to see the person's checkbook. It could go on similar fishing expeditions almost at will.

There is an obvious ability to intimidate there because even though the Postal Service has to back up its inspection authority with an order from the court, when two Postal Inspectors with guns come to an average small business or a home or a church with all the majesty of the U.S. Government behind them, with an official log document in hand, the recipient is going to be extremely intimidated, to say the least, and I would suspect very likely would turn over the documents at that point.

So, we object to the inspection authority on principle and we think if any is granted it should be extremely limited as to breadth and cause. There should be procedures for watching it at an agency level, and other procedures which I cover in more detail in my written testimony.

The rest of the bill of course deals with section 3005. It adds more power to the Postal Service false representation statutes.

Now the first objection we have deals with the product demand authority. This is essentially the same as the search subpoena inspection authority except of course that the Postal Service has to pay for the product they are demanding. We do not think that supposed failure to provide the product on demand should be proof, per se, of guilt, as it is in the present proposed law. Obviously as with inspection authority, any resistance to demand should be entirely separate from legal factfinding and conclusion at law. We do not believe in short circuiting even the scant safeguard of a Postal Service in-house hearing. We don't think resistance to the demands or failure should have any implication of guilt.

The next major power here that comes to mind is the cease and desist authority. We consider this an extremely dangerous and unjustified expansion of Postal Service authority from over the mails to over the persons. I remind you that this cease and desist authority would be granted not to a U.S. court but to a lawyer, what appears to be a kangaroo court. It would be in addition to the present power to issue stop orders, so you are basically investing a biased court with still more power.

I would like to point out in passing an apparent contradiction between Postal Service lobbying and statements for this bill and the state of the law.

In connection with requesting and justifying cease and desist authority the Postal Service has indicated that a person with a stop order against him can simply move from place to place and use a new address and thereby evade the stop orders and for the Post Office to institute new proceedings. I believe there was a case cited today where the Post Office supposedly did 25 administrative proceedings in a matter involving an aphrodisiac. Well, these statements are completely contrary to title 39, Code of Federal Regulations part 952 which is the rules of practice in proceedings under title 39, United States Code section 3005. Section 952.29 of these

rules of practice allow the Post Office to simply modify the existing stop orders to apply to a new address, if someone is trying to get around a stop order.

So, apparently this is a blatant misrepresentation of the state of the present law.

We do not feel the Post Office has justified cease and desist power for itself. Aside from that rationalization I haven't seen anything in the evidence that would justify such power, or a need for such power.

We also object to the expansion of Postal Service authority to cover any means of interstate commerce. It would appear as the DMMA's testimony pointed out that this would overstep the Postal Service's very mandate for existence. We were so surprised at this section of the bill that it almost seemed as if it was something intended to be thrown away as a supposed concession to opponents. We are astonished that the phone company or United Parcel Service has not yet brought this matter up but at any rate we do not feel the Postal Service should have any authority over United Parcel Service, over courier services, over phone calls, over door-to-door sales or for this matter if I want to load a bunch of books in my car and go through the country State by State, they shouldn't have authority over that either. Their present authority that is somewhat questionable should be limited only to the mails.

Another very dangerous part of this bill is the in privity clause, which allows the Post Office to not only hang a sword over a person against whom it has instituted a case but over anyone supposedly in privity with him. Now, we have to consider this privity clause in the context of the cease and desist order and the interstate commerce clause and as a detail in the context of the massive civil fines. If you, Mr. Chairman, for example, were selling a vitamin supplement or let's say amino acid supplement because there have been several such cases recently, and the Postal Service kangaroo court ruled against you, and if they had this power, they would probably issue a vague cease and desist forbidding you from ever again making supposed false representations about the value of amino acids or other nutritional supplements.

With that hanging over your head, at any time the Postal Service could come down on you with a request for \$20,000 a day in fines because it would be \$10,000 for trying to get around a stop order and \$10,000 for trying to get around a cease and desist order.

The average person in this situation would probably be intimidated out of the entire supplement field knowing that such a sword hung over his head, at this time.

Furthermore, in the context of the in privity clause, other persons would be extremely reluctant to be involved in business with you because if you sold anything in the food supplement area they could be accused of being in privity with your attempt to get around this restriction and the fines could be imposed on them also.

It seems to us, Mr. Chairman, such a clause in combination with the other clauses in the expansion to cover all means of interstate commerce could mean that any person once prosecuted by the Post Office, could almost be branded as an untouchable in his area of

business and people would be afraid to become involved with him as partners, or even suppliers.

I would like to remind you that all these powers contemplated in what we feel is a very ill-advised bill, would enforce not the judgments of a Federal court but what has been termed with good reason as a kangaroo court.

Just touching on the fines, we do think \$20,000 a day is excessive to say the least, especially when you consider that it is not enforcing an outside court, just the judgments of an administrative so-called court.

We feel, Mr. Chairman, that the real task before you is not to give the Postal Service more power but to remedy the abuses that stem from defects in the present law.

Now the National Health Federation has not yet prepared its suggested amendments to the bill and the ACLU presumably will have some comments about the present state of the law and about the bill under consideration but I would like to briefly explain two amendments I have and then I would be glad to answer any questions you have, sir.

The first amendment I propose, which is of course in my written testimony, would to a small degree help remedy some of the more glaring lacks of due process in the present section 3005 statutory scheme.

We propose that there be an addition that, for conviction there has to be an intent to defraud.

We also propose that any such orders issued by the Postal Service shall be subject to a trial de novo in Federal court if the respondent wants and that if he prevails the Post Office shall be liable for double the damages done by the action under 3005.

Now, the other amendment I propose as to title 39 U.S.C., 3005, the impoundment statute. Basically what I have done here is leave the remedy open in extreme cases where such an extreme remedy is justified and yet I tried to restrict it so the Post Office will not be able to impose the impoundment as an adjunct punishment. And I say the restraining order or injunction should be sought or granted only in extraordinary circumstances where there is major public financial harm or where a product is directly, itself, physically dangerous or harmful.

I also say that if an impoundment is in effect the Post Office should expedite matters so that the injunction will not substitute for a conclusion of law by destroying the business itself. I say that the Post Office should also make arrangements to set up an escrow or other arrangement so that the injunction itself won't cause irreparable harm to the company.

Also that the impoundment should only prevent the delivery of actual money to the respondent because I know in a number of cases the Postal Service has used the impoundment, interpreted it themselves, and prevent communication from customers to the company in question.

Mr. Chairman, we emphasize that these amendments are offered only to try to ameliorate a very bad bill and only if the rest of the bill were discarded.

I would be honored to answer any questions you have.

Mr. LELAND. I have no questions. You have been most explicit and I certainly appreciate your cogent arguments against what you feel to be a bad bill. I would suggest to you as I have suggested earlier, that we are really trying to resolve a problem that is most severe, and damaging to thousands of people in this country. We have heard testimony from them and from their institutions and we are directly concerned with that.

We are not trying to jam anything down anybody's throat. It is not our purpose to enhance the police powers of the Postal Service but rather to look at options, look at avenues by which we can resolve this problem. If it follows that it is the case that we have to do that with the Post Office, then so be it. We take into consideration the objections made by you and other witnesses who have objected to what they consider to be alleged abuse of powers that might be rendered to the Post Office.

Mr. AMKRAUT. Mr. Chairman, the Post Office has brought before this committee some very sad stories of persons and especially senior citizens damaged by mail fraud. I would like to point out that the really bad cases deal not with the section 3005 that are blatant criminal mail fraud. In this case we give more power under the false representation statutes. I think a criminal should be prosecuted as a criminal and criminal mail fraud be prosecuted as criminal mail fraud but I think that many of the cases under 3005, especially the health-related ones, are little more than the Postal Service enforcing its own version of orthodoxy and judging that that person is correct and branding anyone else as liars and scoundrels.

Mr. LELAND. I understand.

Thank you very much for your testimony. We certainly appreciate it.

Mr. AMKRAUT. Thank you, Mr. Chairman.

Mr. LELAND. The Chair will now adjourn this session of this subcommittee. The next hearing will be July 20. Thank you.

[Whereupon at 12:55 p.m. the subcommittee adjourned.]

[The prepared statement submitted by Mr. Amkraut follows:]

STATEMENT OF JOEL AMKRAUT, President
Council On Postal Suppression (COPS)

My name is Joel Amkraut, and I am here today as President and spokesman for the Council On Postal Suppression (C.O.P.S.), a "watchdog" organization concerned with Postal Service powers and actions. COPS is a new organization, formed in response to a continuing pattern of Postal Service abuses against businesses and individuals. I myself have an extensive background in mailorder/ direct mail advertising and marketing, and have monitored and studied Postal Service police activities for several years, with mounting dismay.

On behalf of COPS, I thank the Subcommittee for this chance to testify on HR.3973. We are very concerned about this bill, because it vests tremendous new powers in an already abusive agency and an already abusive statutory scheme, without doing anything to remedy present abuses and inequities.

Postal Service Lobbying For HR.3973

HR.3973, The Postal Service Amendments of 1981, supposedly arose from Mr. Claude Peppers' series of fraud hearings, conducted by his committee on the aging. Actually, the Postal Service has for some time sought additional powers for itself, and many of the provisions of HR.3973 were present in HR.6307 of the 96th congress. HR.3973 is not a response to new revelations or need; rather the USPS used the fraud hearings as a vehicle to again seek new powers.

USPS lobbying for HR.3973 has been characterized by emotion rather than fact. COPS is in sympathy with victims of genuine mail fraud, but we are disappointed that the USPS has chosen to ignore factual issues in favor of emotion in rationalizing its desire for new powers. It also seems that the USPS has confused issues by parading victims of

actual mail fraud (18 USC §1341) even though this bill deals primarily with "False Representations" statutes (39 USC §3005), an entirely separate matter. Also confusing the issue, the USPS has implied that the due process procedures of the §1341 criminal statute hamper enforcement of §3005 (not correct) and that the lesser powers of the civil statute limit enforcement of the criminal statute (also untrue).

Most strikingly, the Postal Service has downplayed the startling extent of its present administrative police powers: as we shall detail, under present law, the USPS can, limited merely by bureaucratic whim and inertia, destroy mailorder firms, without the victim having a fair and impartial "day in court." Because the USPS has so muddled the facts of its present powers, our first task is to put HR.3973 into the perspective of the present law, before we detail the problems with this bill.

Present Postal Service Fraud and "False Representation" Statutes

The Postal Service has two avenues against mail fraud or supposed false representations. USPS may act under either, or both.

18 USC §1341 is the criminal mail fraud statute. USPS can, (acting through the U.S. Attorney) seek penalties of 5 years and/or \$1,000 per violation. The accused is entitled to normal due process safeguards. The USPS's conviction rate under §1341 ranged from 98% to 99% during the last four years, according to USPS Postal Inspection Division annual reports.

39 USC §3005 is the "false representation" statute. Under 3005, the USPS can impose punishment without the defendant being entitled to a "day in court" or to a trial by his peers. 3005 Lets the USPS issue a "stop order", returning the Respondent's mail to senders, rubberstamped with the

uncomplimentary message, "Return To Sender: Order Issued Against Addressee For Violation Of False Representation Law."

Before issuing such a stop order, the Postal Service must follow a few administrative procedures and offer the respondent an opportunity for a "hearing." The respondent does not have a right to a judge or jury trial, or to subpoena witnesses, and the standards of proof are far lesser than in a real court proceeding.

After exhausting "administrative remedies" at a second administrative "court" level, the respondent may appeal to a U.S. court. For procedural and practical reasons, such a step is generally fruitless and unavailable as a practical consideration. As a practical matter the agency "decision" is an ipse dixit, without review or redress available.

If it wishes, the USPS may often impound mail even before the §3005 hearing(s). The companion statute to 3005, §3007, allows the USPS to seek a restraining order/injunction and impound mail during or even before administrative proceedings are started. Using §3007 the Postal Service can and has stopped businesses in a matter of hours. For a mailorder business, impounding mail is equivalent to padlocking the door; the impoundment makes any eventual conclusion at law moot, and preempts the legal process by financially destroying the firm and removing its means to appeal any injustice.

COPS wishes to emphasize that the subject bill (except for the broad "inspection authority" provision) deals with the USPS's powers under §3005, not under the criminal statute §1341.

Our testimony, therefore, will deal with §3005 and the bill's effects on §3005.

Present Abuses Under "False Representation" Statute 39 USC §3005

Postal Service violations of free speech and due process

stem from its existing over-broad powers and lack of due process safeguards. While COPS hesitates to characterize §3005 proceedings as "kangaroo courts", that phrase continually recurs in conversations with experienced attorneys and we know of no other term to accurately convey the essence of the 3005 scheme. Why are these proceedings termed a "stacked deck?" How does the USPS abuse business and the public under §3005? What is the nature of the abuses?

Captive "courts": §3005 Respondents face a USPS "judge"/"jury", USPS rules of evidence, USPS prosecutor, and must rely on equally-biased USPS-created precedents and case law during the proceeding(s) in a USPS hearing room under USPS rules of procedure. Not surprisingly, despite the apparent weakness of many cases, the USPS "wins" about 98% of such hearings, and approximately 100% of healthrelated §3005 cases. (COPS has not been able to find a health-related §3005 case where respondent prevailed in the USPS hearing).

Also note that many §3005 cases are concluded without hearings, since respondents simply abandon their defense, logically considering the hearing only an expensive (for them) pro forma procedure to lend surface legitimacy to a preordained conclusion. So the actual "decisions" from §3005 cases that reach the hearing state is only the tip of the iceberg; for every case where decisions are rendered there are others that end with capitulation in the face of an impossible situation.

Lack of outside jury or judge: The most glaring feature is the denial of "trial by peers." Coupled with the effective non-availability of judicial review, this lack means that the USPS may impose punishment on an ipse dixit basis answerable to no one and limited only by bureaucratic whim and scheduling, and occasional public outrage.

Lax standards of "proof.": The USPS need not show intent to deceive, nor even that anyone was deceived or injured. Also, the standard of "proof" is the "preponderance of evidence" standard, a much lesser requirement than the "beyond a reasonable doubt" of criminal procedures.

Punishment before hearings: Under companion statute 39 USC §3007, the USPS may obtain court permission to impound mail even before any complaint has been issued. Impounding stops normal business income, and makes any conclusion at law moot, the injunction itself destroying the business as well as its resources to seek redress. As a stated policy, the USPS will not expedite proceedings when an impoundment is in effect, preferring to "bleed" its victim to death. While such an impoundment should in fairness be limited to extraordinary cases, the USPS seems to employ it more and more as a substitute for due process and as an adjunct punishment (not contemplated by the legislature) in civil and/or criminal cases. §3007 is restrictively written, and leaves the judge little leeway, saying the court "shall" (not "may") grant the injunction if probable cause (for filing a complaint) is shown.

We observe, as an indication of USPS arrogance, that no matter how minor the supposed false representation in a §3005 matter, the USPS will not contact the company and offer to discuss or negotiate the matter: rather the companies' first warning of any trouble or supposed wrongdoing is a formal complaint or, if the USPS uses the §3007 "punishment before hearing" route, perhaps a phone call that a restraining order against his mail is being sought!

As we've explained, the USPS can, and does, through its §3005 kangaroo courts, impose punishment and destroy mailorder businesses as it chooses. Using §3007, it can destroy the businesses without a conclusion even from its own biased hearings. And these powers are all in addition

to its extremely broad existing powers to seek strong criminal sanctions under 18 USC §1341, whenever it so desires.

Violations of free speech: As free speech, free intercourse of commerce and ideas through the mails should only be struck down for the most powerful justification. Yet, the USPS interferes on minor, or even specious pretexts. Even if, *arguendo*, commercial free speech is "less equal" than other free speech, there remains the matter of book suppression. As the Association of American Publishers so ably documented in June 3 testimony before this subcommittee, the USPS has recklessly trampled the first amendment, engaging in a sordid history of suppression of ideas. It is ironic that the most recent such suppression, of a nutrition booklet (USPS vs Magnolia Labs, USPS Case No.10/123) was in progress even as the USPS sought, through this bill, still more powers.

The continual suppression of ideas and enforcement of USPS-approved orthodoxy is especially startling when contrasted with the USPS's supposedly diametrically-opposed duty; to facilitate, not discourage, the free flow and exchange of ideas.

Suppression of products: USPS uses its present powers to suppress products as well as ideas. The Postal Service has twisted its already broad authority like taffy, reaching the point where it now says a product (or book) which disagrees with the prevailing majority scientific and/or medical opinion is automatically, *per se* "wrong." While the boilerplate phrase, "Not in accordance with the consensus of informed medical and scientific opinion." pops up in USPS "decision" after "decision", a simpler way of putting the matter would be to say that if your opinion is not in the majority, the Postal Service has decided you're wrong. The USPS has taken it upon itself to decide not only what the current "consensus" might be, but has also in its majesty ruled that the current

consensus is the "right" one.

Product suppression is also 1st amendment suppression since the public is prevented from receiving the information about products or information being sold.

The "majority is right" attitude is especially evident in the USPS's energetic persecution of wholistic health products and books. A high percentage of §3005 actions are against wholistic health products such as vitamins and other nutritional supplements. The most recent major "book suppression" concerned a booklet on nutrition, and the USPS has recently forced from the marketplace a number of excellent amino acid food supplement products, essentially because less than a majority of doctors use them. The bottom line in all those cases, when all was said and done, is that minority scientific opinions are automatically wrong.

The presence of the National Health Federation at this hearing is especially appropriate, since the wholistic health field has suffered so much from Postal Service persecution.

We note that the Postal Service has admitted working closely with the FDA. Unfortunately, the USPS has thumbed its nose at our repeated Freedom Of Information Act requests, refusing to clarify such liaisons, to explain FDA and other influence on its decision-making, or to make its prosecutorial guidelines public. We are continually distressed by the USPS's undemocratic insistence on maintaining its own "secret law" in contravention of the spirit and letter of the Freedom Of Information Act, and the spirit of openness and due process in government.

Ian D. Volner, representing the Association of American Publishers, offered the "mirror image" amendment, which would codify guidelines for book advertising, and help protect against future USPS violations of the first amendment in the area of book suppression. If this bill does become law

(we hope not!) there should be amendments to at least add some semblance of protection to products as well as books. We respectfully suggest that a key element in protecting against abuses would be to add due process to the presently abusive §3005/3007 scheme.

Summary of Postal Service Amendments of 1981, HR.3973.

HR.3973 expands USPS powers and jurisdiction but does nothing to limit abuse of present powers. Except for the §413 ("Inspection Authority") which gives investigatory quasi search/subpoena powers for any matter the USPS chooses to investigate, the entire bill is designed to provide more police powers in §3005 investigations and persecutions.

§413 "Inspection Authority" would give quasi search/subpoena power, allowing the USPS to demand access to home or office to "...inspect or copy any books, records, documents, or other objects..." it thinks relate to an investigation. The demand is enforceable via the U.S. Court with commensurate penalties, and refusal also would constitute "probable cause" to assume guilt and allow immediate imposition of stop orders and the newly-empowered cease and desist orders.

§3005 Amendments would give USPS new authority to issue cease & desist orders in addition to the existing power to issue stop orders. The USPS would also get a "product demand" power, essentially subpoena power to make a purchase, with "unreasonable failure" constituting "probable cause" of guilt, and, as with the inspection demand, allowing immediate imposition of stop orders and cease and desist orders.

§3012 of 39 USC Would be amended to provide stiff penalties. Attempting to evade a stop order or cease & desist order could bring fines of \$10,000 per day on each supposed evasion; total of \$20,000 per day. The fine also applies to anyone

"acting in privity" with such evasion. Postal Service jurisdiction is also expanded to apply the stop orders / cease & desist orders to cover any means of interstate commerce.

Comments on HR.3973

§413 Inspection Authority: This broadly-drawn authority has frightening potential for abuse of process with corresponding disruption of personal and business routine. HR.3973 would leave the Postal Service to fill in the details of these powers, and we may be sure they will not strive to circumscribe their powers!

Any such authorities should be clearly restricted and defined as far as proper service, time to oppose, legal requirements, and the like are concerned. There should also be an opportunity to quash the demand at the agency level, as well as at the district court level.

COPS opposes, as unnecessary, quasi search/subpoena authority for the USPS. If any is given, the FTC scheme is an appropriate model. The FTC must (1) State the alleged specific violation, (2) specifically describe the material sought, (3) prescribe a date allowing a "reasonable period of time", (4) identify the responsible custodian, (5) service the demand in a prescribed manner to guarantee actual receipt. The FTC also gives a time period and procedure to oppose the demand, requires a commissioner's signature for the demand, and establishes a mechanism to maintain the confidentiality of materials received. The USPS's scheme under §413 is clearly deficient and based on past experience, the USPS cannot be trusted to "fill in the details" fairly.

Even with safeguards, tremendous abusive potential exists, ranging from loss of business's, employee's, and customer's privacy, to loss of trade secrets and great potential for intimidation by armed postal employees.

We also object to the presumption of wrongdoing attached to "unreasonable" non-compliance. This provision would allow the USPS to shortcut even the scant safeguard of its own pseudo-hearing. COPS feels that non-compliance should be separate from any legal fact-finding, and resistance to (possibly unreasonable) demands should not constitute evidence of any guilt.

We also note that the proposed powers would allow harassment of third parties. The USPS could harass customers, potential customers of its victims, or even take it upon itself to abuse competitors such as United Parcel Service or various courier services.

Since the USPS has pointed to other agencies having similar authorities, lowering the tenor of its lobbying to an agency equivalent of "keeping up with the Joneses", we would point out in passing that agencies such as the FTC were designed as regulatory agencies, while the Postal Service is presumably in the process of distributing communications. (even though it seeks to arrogate to itself the functions of a police agency.)

§3005 (False representations, lotteries: 39 USC §3005 would be rewritten incorporating new powers and authority.

Product demand authority is similar to the document demands (§413) with the addition of paying the purchase price. We object to the statutory presumption of wrongdoing for supposed "failure" (not "refusal") to comply. Such presumption would allow circumvention of hearings and any due process and conclusion at law. Other than that, COPS does not find any intrinsic harm in the product demand provision; the only harm is indirect in that any new powers to the USPS encourage its traditional pattern of abuses.

The addition of cease & desist authority to the present stop order authority is a far more dangerous matter. Under

present §3005, the USPS's sole authority is over mail delivery and the cashing of postal money orders; the USPS is not presently a general law enforcement agency, and does not have power to issue orders against persons. This is a startling expansion of power from over the mails to over the person(s). The USPS's present §3005 power has enabled a sad history of abuses, but they are as nothing compared to what we could expect if the same agency had cease & desist powers. Raising the USPS to a level of U.S. courts is a tremendously reckless step, certainly not justified by any evidence in the records.

The stop order power and new cease & desist power would be expanded to apply to any means of interstate commerce. In seeking to raise itself to a level of a general federal law enforcement agency (conveniently incorporating its own "judicial" system), the USPS is apparently overstepping its very mandate for existence. The USPS should not have anything to say about door-to-door sales, telephone advertising, or other non-mail communications or selling.

Coupled with the new cease & desist power (and the penalty section, §3012) is the expanded scope to cover persons supposedly "in privity with" anyone trying to get around a stop order or cease & desist order. This vague provision, when coupled with vaguely-worded cease & desist orders and the startling fines, would be a powerful sword hanging over not only the principal of any respondent firm, but over employees, agents, suppliers, ad agencies, or even attorneys or anyone contemplating business ventures with the victim. It could impute "guilt by association" and mean that a one-time victim of Postal Service persecution might be branded an "untouchable" and thereby isolated from the business and social community.

We respectfully remind you to keep all these provisions in context, by remembering that they enforce and empower judgements, not of a real court, but of a biased, in-house "kangaroo court."

§3012 Civil Penalties: Fines for supposed violations of stop orders or cease & desist orders could be up to \$20,000 per day. Tied to vaguely-worded orders, and coupled with the sword hanging over anyone "in privity with" respondents, they help ensure substantial potential for abuse and long-term intimidation of free speech and other freedoms, not only for respondents but for non-involved persons.

The "in privity" expansion of jurisdiction is recklessly overbroad, and especially objectionable when considered in the light of the interstate commerce clause and the massive civil penalties.

Summary

While the Postal Service's pattern and tradition of abuses have been well-documented, there is not justification for the powers in HR.3973. This bill contains vast potential for abuse of free speech and other bureaucratic mischief, while being of questionable value in deterring genuine mail fraud. The new powers proposed are especially shocking when considered in light of the recipient's long tradition of arrogant violations of free speech and due process violations.

It is noteworthy and indicative of the USPS's arrogance and lack of respect for normal due process, that it actively sought and advocated, in the original versions of this bill, to put itself on the level of real courts, and in many ways remove itself from judicial review.

COPS feels that the real need is to remedy present abuses and violations by the Postal Service. Only after measures have been taken to remedy abuses, should congress consider proposing any new authorities. Two of the problems which scream for attention are the kangaroo courts under §3005, and the "punishment before trial" scheme of the §3007 companion statute. (We discuss that to a greater degree in our proposed amendments)

COPS feels that any measure to confer new powers on the Postal Service should be stopped. The only Postal Service bill we can in good conscience support, would be one expressly designed to limit USPS power and thereby limit its abuses. Our amendments are offered only to ameliorate an ill-conceived, very bad bill which should not pass, and we want to be absolutely clear; we feel that HR.3973 should end, here and now. If our amendments were substituted for the text of the present HR.3973 we would urge passage, but short of that, let there be no doubt; we oppose with all our heart, more powers for the Postal Service.

Proposed Amendments to HR.3973Proposed amendment dealing with 39 USC §3005

Discussion/explanation: This amendment would help remedy some of the more glaring lacks of due process and resultant abuses, by restoring some semblance of due process to the present §3005 statutory scheme. The allowance of a trial de novo would, in particular, help assure that the Postal Service might be answerable to other authority.

We propose that HR.3973 be amended to add the following to §3005 (a)(1)(A). The proposed addition is underlined.

(A) is engaged in conducting a scheme or device for obtaining money or property through the mail by means of false representations, including the mailing of matter which is nonmailable under section 3001(d) of this title; with intent to defraud; or

(If the remainder of Sec. 3 of HR.3973 is deleted, this change would of course directly amend §3005 (a) of 39 USC.)

We propose that HR.3973 be amended to add the following new section (3) to §3005 (b):

(3) Any such orders issued by the Postal Service shall be subject to a trial de novo if desired by the respondent, such trial to take place in the district court where the respondent does business or desires to pursue such a remedy. If respondent prevails in such a trial de novo, the USPS shall be liable for double damages for the damage done to respondent by the USPS action under §3005.

Proposed Amendments To 39 USC §3007

Discussion/explanation: This amendment would help restore some reason and fairness to the §3007, which permits "punishment before hearing" by allowing impoundment of mail before or during administrative proceedings. It would still leave this action open, when circumstances actually warrant.

We propose that HR.3973 be amended to add the following new section 6 to the bill:

Sec. 6. Section 3007 of title 39, United States code, is amended by changing the word "shall" (...grant the temporary restraining order and preliminary injunction) to "may" (grant the temporary restraining order and injunction) §3007 is also amended by adding the following new paragraph (c) to the present text:

(c) The restraining order and preliminary injunction shall be sought or granted only in extraordinary circumstances, where a mailorder promotion entails major public financial loss, or where a product being sold is directly and intrinsically physically harmful to the buyer. If a restraining order/injunction is granted, the Postal Service shall expedite administrative procedure to the fullest extent desired by the respondent. The Postal Service shall also, if the restraining order/injunction is granted, take all possible measures in good faith to set up an escrow or other arrangement for the funds sent to the respondent, so that the impoundment scheme does not in itself impose financial hardship to an unnecessary degree.

The impoundment under §3007 shall restrict only delivery of actual checks, cash, or money orders, and nothing in this section shall empower the withholding of any other materials sent to the respondent, nor shall anything prohibit the respondent from taking recorded notes on the material withheld. If the impoundment is granted and the respondent prevails in statutory proceedings, the USPS shall be liable for double damages caused by the impoundment.

We emphasize that these amendments are offered only as attempts to ameliorate a very bad bill. Only if the rest of the bill was discarded, such that the amendments constituted the bill, would we favor passage of HR.3973.

MAIL FRAUD/FALSE REPRESENTATION

TUESDAY JULY 20, 1982

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON POSTAL
PERSONNEL AND MODERNIZATION, COMMITTEE ON POST
OFFICE AND CIVIL SERVICE,

Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 311, Cannon House Office Building, Hon. Mickey Leland, presiding.

Mr. LELAND. Good morning, ladies and gentlemen. Welcome to the fourth public hearing of the Subcommittee on Postal Personnel and Modernization on H.R. 3973 and S. 1407 which seek to increase the U.S. Postal Service's investigatory and enforcement powers to augment the prevention of mail fraud.

A final public hearing is scheduled for Thursday of this week.

Today we will hear from Mr. David Minton of the Magazine Publishers Association and Mr. John Shattuck, a representative of the American Civil Liberties Union. We certainly want to welcome particularly Mr. David Minton, who has made an invaluable contribution of course to all of us here in setting the real foundation of what it is that this Post Office and Civil Service Committee represents.

Mr. Minton, will you come forward and please be our first witness.

STATEMENT OF DAVID MINTON, WASHINGTON COUNSEL, MAGAZINE PUBLISHERS ASSOCIATION

Mr. MINTON. Thank you very much, Mr. Chairman.

My name is David Minton, and I am the Washington Counsel for the Magazine Publishers—

Mr. LELAND. Will you hold on just a second.

[At this point, several spectators left the hearing room.]

Mr. MINTON. I expected no less.

The two most significant contributions that I personally claim for the time that I served this committee was that I am the person who flew that paper airplane up there [indicating]; and the second is I am the person who filled Tim May's water glass with 100 proof vodka when he was testifying before the committee, so I was not surprised at my former colleagues. I think that the last official thing I did was to deny most of them a pay increase a couple of years ago, so it is no surprise to me that they would behave as they have just behaved.

I look forward to the questions which your noted staff is prepared to ask. If any of them have to do with the practice of law, I

will respectfully request permission to enter material in the record at a later date.

In behalf of my client, the Magazine Publishers Association, I would like to express our views on the bills S. 1407 and H.R. 3973, which are designed to curtail mail fraud abuses in the U.S. Postal System.

Mr. Chairman, I have a prepared statement which I would ask to have inserted in the record.

Mr. LELAND. That will be done.

Mr. MINTON. Upon reflection, we have no doubt that there is a serious problem of mail fraud and that remedies are necessary to increase the authority of the Postal Service to handle the problem, but we believe that the kind of "nuclear attack" which is included in S. 1407 is a remedy far out of proportion to the problems.

This bill effectively allows a postal inspector to enter upon the premises of any citizen, any person, or any business enterprise without a search warrant and seize and copy any object that he determines is within the purview of an investigation that he has decided, on his own volition, to undertake. Because it is described under section 404(7) of title 39, the postal laws, to be a criminal offense against the Postal Service, or a civil matter within the purview of the Postal Service.

Civil matters include a whole list of activities. It is a civil matter to deliver letters; it is a civil matter to have a postage permit for a political action committee, or a labor union, a church, a benevolent society, or the brotherhood of electricians.

So, with this authority, it would truly be "Katy bar the door" on any activity that any postal inspector on his own volition decided to investigate.

Now for the past 200 years we have had a requirement in the laws of the United States, and the several States, that if a police officer wants to go into somebody's house or business establishment and search it and seize papers in conducting any kind of investigation for bank robbery, arson, murder, rape, pillage, treason, whatever it may be, he goes to a judge and he says, "Judge, I think this man has committed a crime and here's why I think so." And the judge, who is, at least allegedly, a dispassionate third party, considers the validity of the evidence and determines whether under the fourth amendment there is probable cause to issue a warrant.

Well, that isn't the case in this bill; in this bill the postal inspector shows up at the door with a piece of paper and says, "I demand that you let me in the door to investigate and see if you are engaged in mail fraud," or whatever else he may be investigating. The average American citizen, who doesn't know the fourth amendment from Ebbetts Field, is going to admit that postal inspector and surrender his rights to that allegation of police power.

Granted, it would be easier if you could throw people in jail and clap them in irons and do a lot of other things that would further the cause of law and order without restrictions upon the police powers, but until the law changed—that precious heritage of not allowing the police to enter upon your property and seize your goods and copy your documents—until that law is changed, by constitutional amendment, it would seem to us that this kind of legislation is unconstitutional. And if it isn't unconstitutional, it is at

least very bad law and we recommend most strongly that this subcommittee recommend against the enactment of that search and seizure power.

Another provision of the bill would allow the Postal Service to demand across-the-counter sale of a commodity. Although we do not think that is the best idea we have ever heard of, we recognize that in many cases it is virtually impossible for the Postal Service to complete a transaction by sending in a response to an advertisement and getting the merchandise that has been ordered.

By the time all that is done the businessman has frequently picked up and moved to another post office box or another county or another State and that kind of scheme cannot be captured. So the demand clause is not nearly the kind of terrible legislation that the search and seizure clause is.

We do have some reservations about the presumption of guilt, that if an individual refuses to make the sale, then it is probable cause to believe that he is engaged in some kind of scheme. That reverses the burden of proof, in essence. It doesn't say so. No language in this bill really says what it does, but aside from the euphemistic phrasing, it does reverse the burden of proof and put the burden upon the citizen to explain to the judge why it was he didn't want to make the sale.

We think that is bad, but we are otherwise not opposed to that part of section 3 which would permit the across-the-counter demand.

Finally, we think the fines envisioned in this, of \$10,000 a day, is extreme and although there are some mitigating clauses in the legislation, well, if I may say so, I have observed that mitigating clauses in legislation that do not include the word, "not" don't have much effect on executive branch behavior or guidance for law enforcement agencies generally. So we think that lowering the fine, from \$10,000 to something less than that, and eliminating, or confining, the Post Office jurisdiction the restriction against any resumption through the mails rather than through any means of interstate commerce, would be appropriate.

We have a basic problem, overall. Perhaps it is a step behind all of that. That is, what's the Post Office doing in this business anyway? I can see that a postal inspector ought to be out apprehending wrongdoers who steal out of the mail or who commit crimes by assaulting letter carriers when they are delivering their social security checks or by apprehending postal employees who are stealing things out of the post offices. That is the basic function of a postal inspector.

But to transfer his powers into what's pretty much a field beyond the Post Office, the delivery of mail, to the apprehension of wrongdoers who are under the jurisdiction of State and Federal investigatory agencies, and the Federal Trade Commission, which has concurrent jurisdiction over fraudulent and misleading advertising, is an investment of power that we think is really misplaced.

I realize it is already there and the postal inspectors do this and they issue press releases quite frequently pointing out how many people were convicted last year, but I think you might think, is this really where this police power belongs? Does it belong here or does

it belong with the FBI or the Secret Service, which investigates counterfeiting, or some other law enforcement agency, or the FTC.

Do we really want to say to this almost unknown force of 2,000 inspectors that "You are going to be able to go this far afield from your basic function, which is to protect the mails, protect the security of the mails"?

Again, I repeat that is a little beyond the scope of the current bill but it is an issue which I think this subcommittee should reflect upon; certainly before you recommend to the full committee any legislation.

No man in the House is a greater champion of the rights of people, particularly the rights of elderly people, than Claude Pepper. He was defeated for reelection to the Senate in 1950 by the right wing, and certainly he deserves all of the accolades of civil libertarians for a distinguished career over the past half century.

If I had to guess, I might guess that Senator Pepper has not given the careful consideration to the civil libertarian issues that this legislation raises in allowing the Postal Service to acquire a broad police power in this bill. We hope that the subcommittee will reflect upon that, will consult with Senator Pepper, and will amend this bill substantially to correct what we view as abuses of basic constitutional rights of people.

With that, I will quit, and attempt to answer any questions you may have. I am at your pleasure.

Mr. LELAND. Let me thank you, Mr. Minton. We certainly appreciate your very experienced testimony.

Mr. Minton, in the light of the opposition of the Magazine Publishers to the legislation in its present form, do you feel the bill could be amended as you have implied in such a way that it could allow the Postal Service to more effectively combat mail fraud yet avoid the potential problems you have laid out before us?

Mr. MINTON. As I have mentioned, we are not opposed vigorously to section 3, which permits the Post Office to demand across-the-counter sales. We think that is an effective means of getting the device that the individual is trying to sell—when a doctor sells a drug and says "This drug is going to cure everything you have got wrong with you," the Post Office sends in its \$9.95 and never hear from him. They never have an opportunity to test that drug and determine whether it is good or bad; whether it meets any of the claims that are made for it.

In most cases, the drugs are fraudulent. They don't amount to anything; they are placebos, but the people lose their money.

If they could go to that man's office and say "Sell it to us" demand that; get it and test it and then determine the validity of his claim, that would be a weapon in their effort to curtail this kind of fraudulent practice that I know the Postal Service has advocated heretofore, in earlier legislation, which did not pass the last Congress or the Congress before it.

They wanted that authority; they never got it. It seems, of the remedies proposed in this bill, that that comes the closest to being a legitimate demand. I find it difficult to say that a businessman can rationally refuse to sell a product to a postal inspector that he would be willing to sell to others. It seems to be a legitimate exercise of government power.

We would support the enactment of that provision and some penalty provisions. You have got to discourage people from engaging in this and you can't just say, "Well, it is a dollar a day." It has to be a sufficient financial penalty to discourage or prevent the crime or the false business but \$10,000 a day is perhaps too much.

Mr. LELAND. Mr. Minton, you have had a lot of experience with this issue when you were working with this committee. Can you just share with us your views about mail fraud in general and what it is that we can do, aside from some of the things you have already referred to?

Mr. MINTON. Philosophically speaking, to get people to think more about what they read and send their money for, which is a part of the overall scheme of educating the American people. But beyond that, I don't know of any effective remedy. People who are dying of incurable diseases will probably grasp at any straw that they possibly can, whether it's laetrile treatments in Mexico or miracle cures they find advertised on the back of comic books.

I suppose that you would write that down as human nature. Other people are going to be engaged in the manufacture of commodities that may or may not work, that may or may not have any value and use. Laetrile is the most controversial drug of the time and you find a great many people who say it works and a great many people, including the American Medical Association, that say it doesn't work.

I think that is just one of the problems that we have, that people will do damned near anything to make money and law enforcement has to follow along trying its best, within reason, within the bounds of the law. You are not dealing with treason, you are not dealing with murder; you are dealing with scams and charlatans and knaves who are stealing money from the unwary and the unlettered.

I bought a set of miracle spark plugs—I was thinking on the way up here—I bought these spark plugs about 20 years ago, that were going to double my gasoline consumption. I sent in about \$18, which was a lot of money to me 20 years ago. I got the plugs but they weren't any better than any other set of spark plugs. I tried not to write myself off as the unlettered and the unwary at that time, but it, obviously, was a scam, like some other schemes.

I think, like many other social problems, we have to soldier along trying to resolve it without saying that a postal inspector can walk in your house and take everything you have and put it on a Xerox machine and have you show up in court.

Mr. LELAND. The Postal Service is pushing hard for this legislation.

In your experience again, you know in the past that they have pushed hard. Do you have any ideas about why it is that they would push so hard? Given your testimony today?

Mr. MINTON. Given my opposition to this bill how could the Postmaster General continue to pursue such a course of folly? No, Mr. Chairman, I can't understand that and I am shocked. It follows a long pattern on the part of several Postmasters General, however.

Mr. LELAND. Let the record show the Chair did not pose the question in such a manner.

Mr. MINTON. I am sure it is according to which side of the table you sit on. If I were the chief postal inspector I might be much more concerned with the prevalence of the problem and much less concerned with what evils might result from it.

I think if you give—I say in my formal statement here that the Postal Service, and this Postmaster General in particular, who is universally proclaimed as a fine man would say: Well, we are not going to do anything wrong and we are not going to bust into anybody's houses. We are looking only for bad guys who need to be convicted of crimes.

That is well and good, but experience of the last 5,000 or 6,000 years indicates that when you vest this kind of police power in people, they will abuse it. That is why we have the fourth amendment, because of the abuses of search and seizure. In a democracy you just have to balance the powers of the government versus the rights of the people.

As our President stated on the steps of the Capitol yesterday, we have to fight hard to preserve the individual rights of the people against the powers of government, which I suppose is his hint of a veto message on this bill.

I am sure that faced with hundreds or thousands of scams that come to the attention of the Postmaster General and his able officers every day, that this is a real problem and I do not in any way attempt to diminish the scope and nature of the problem, but it is, at its worst, made up of schemes that defraud people of relatively small amounts of money.

If it's major crime it doesn't belong to the Post Office; it belongs to the FBI, or some other law enforcement agency. For that reason, regardless of the merit of the proposal, we think that vesting this power in this agency is not the appropriate remedy.

Mr. LELAND. But you do believe that within reason, given the consideration that something has to be done and in fact by some inkling the Postal Service might truly be concerned about mail fraud and want to do something about it, you feel that this legislation can be amended to at least approach being a remedy for the problem.

Mr. MINTON. We are opposed to section 2, period. We are not opposed to section 3. If you want to demand an across-the-counter sales and enforce it, we agree. If you want to pass a law which has very serious constitutional implications, and in addition to that is in our view a very bad piece of legislation, we are opposed.

There isn't any way that I know of that I would recommend that my client favor the enactment of section 2. I don't believe in the police walking in anybody's business enterprise to investigate anything without a search warrant issued by a judge, period. It is just bad law.

That is why we have the fourth amendment, to protect people from that kind of abuse of their rights, whether they are engaged in scams or not. If they are engaged in a scam the judge can determine it and say, "Here's a search warrant, go get him"; and they can. What they want to do is go get him on their own volition, their own judgment, their own determination.

Mr. Chairman, without dwelling on the issue the postal inspection service heretofore has gone and gotten them, in cooperation

with the Central Intelligence Agency. It has engaged in search and seizure without search warrants in the past. It has engaged in the conduct of mail covers on a nationwide scale for a long period of time in cooperation with State and local law enforcement officers, down to the assistant deputy sheriff level for the last 25 or 30 years. Now, some of those problems have been cleaned up.

In closed hearings before this committee 5 or 6 years ago the problem of the CIA opening mail at the post office in New York was aired before some members of the committee. It is police power, and when you grant police power you have to—if you are at all enlightened as a citizen, you have to realize people with this police power, people who carry a gun, are a little tougher than people who don't. We are opposed to that in civil matters before the post office.

Vest power, lawfully, in the FBI, the Secret Service, the sheriff, or marshals, but not the Postal Service. We don't think it is the appropriate agency to exercise that kind of a police power.

Regardless of how section 2 might stay in the bill, we would not favor its enactment in any form without a judge issuing a warrant.

Mr. LELAND. The bill allows the Postal Service jurisdiction over any instrumentality of interstate commerce for the purpose of pursuing persons who have already been ordered to cease using the mails. How do you feel about that issue?

Mr. MINTON. Well, I am trying to think about any instrumentality of interstate commerce other than the post office these people would engage in and I don't know how they would do that. Again, it would seem to some other law enforcement agency or some other civil agency should be appropriately involved. Maybe if they are going to go to radio advertisements, or have it all shipped by United Parcel so that it doesn't have anything to do with the post office, well then my question is; why does the post office have anything to do about it? Why shouldn't the Federal Communications Commission or some other agency be concerned?

Again, it is an issue of jurisdiction and I think you have a very elementary threshold issue here of jurisdiction, at all. What's the post office doing in this business?

Mr. LELAND. We certainly appreciate all of your testimony. I would like to just comment on the earlier comment you made about Senator Pepper and his concerns and your concerns about his regard for the civil libertarian ideals. He has commented to us on record that their bill that we have is but an instrument to introduce the idea of how we remedy mail fraud and he very definitely is willing to deal with the amendment process and wants to work with us.

Senator Pryor also indicated this to us. What we are trying to do is come up with an instrument by which we present to the full House a bill that is constitutionally clean and with other considerations that you and other witnesses have given us so we are very definitely working on trying to develop a bill that would give us something that we cannot only be proud of but that would protect the civil liberties of all people.

Mr. MINTON. Thank you very much, Mr. Chairman.
[The statement of Mr. Minton follows:]

STATEMENT BY DAVID MINTON,
WASHINGTON COUNSEL, MAGAZINE PUBLISHERS ASSOCIATION,
ON S. 1407 AND RELATED LEGISLATION BEFORE
THE SUBCOMMITTEE ON POSTAL PERSONNEL AND MODERNIZATION

The Magazine Publishers Association is an organization representing the interests of nearly 200 publishing firms which publish consumer-oriented periodicals. Time, Better Homes and Gardens, and The Reader's Digest are among the more widely circulated, but hundreds of other periodicals, appealing to a wide variety of interest and avocations, are MPA members. The Atlantic, Harper's, Foreign Affairs, Bon Appetit, Fly Fisherman, Essence, Scientific American, and Southwest Art (of Houston, Texas), for instance, are among MPA's nearly 800 member magazines.

MPA has testified before congressional committees on issues of importance to the nation and the publishing industry for more than half a century and we hope that our contribution has been helpful. The Postal Service is a vital partner of the publishing industry, because without the effective means for a nationwide, reasonably-priced distribution system, the public -- which now has convenient access to magazine reading every where in the nation -- would not continue to enjoy that blessing of a marvelous public service. Nearly 250 million copies of each issue of MPA magazines are bought and read by the public. We value the service, and we strongly support its continuation.

It is with some reluctance, therefore, that we oppose the Postal Service's request for the enactment of S. 1407 or H.R. 3973 in their present form. We use the word "reluctance" because generally we support the Postal Service in its legislative and administrative programs, and we certainly support the goal of curtailing fraudulent or false representations through the mail, and the scams and con games by those who prey upon the unwary. No member of Congress is better known as a champion of the rights and needs of elderly citizens -- who are frequently the victims of these schemes - than Congressman Claude Pepper; no government agency has been more dedicated to wipe out these frauds than the Postal Inspection Service. But we question whether the sponsors of these bills have given sufficient consideration to the scope of the power they intend to give the Postal Inspection Service, or the real issue at hand. Because we believe the fundamental question to be decided is whether the Government should be permitted to infringe further upon the right of citizens to be secure in their possessions and papers by allowing the Postal Inspection Service the police power of subpoena, search, and seizure herein euphemistically described as "access at reasonable times." We believe that the citizens' rights should prevail.

Section 2 of S. 1407 says:

The Postal Service may require, pursuant to a written demand made under this section, that any officer or employee designated by the Postal Service be given access at reasonable times to inspect or copy any books, records, documents, or other objects that the Postal Service has reason to believe relate to any matter (except a matter pertaining to chapter 6 of this title or to the provisions of title 18 concerning the carriage of letters by private express) under investigation by the Postal Service pursuant to its authority under section 404(a)(7) of this title.

Except for the exclusion of matters relating to the private express, this power of search and seizure is virtually unlimited. This sentence contains the word "any" three times --

any designated employees of the Postal Service may inspect and copy;

any books, records, documents, "or other objects," are subject to inspection and copy;

any matter under investigation by the Postal Service is subject to this power to inspect and copy.

Section 404(a)(7) of title 39, United States Code, authorizes the Postal Service to investigate "postal offenses and civil matters." The issuance of a third class nonprofit mailing permit is a "civil matter;" the determination of whether a magazine publisher complies with various provisions of the Postal Manual is a "civil matter;" the conduct of mail classification and postal rate proceedings before the Postal Rate Commission is a "civil matter," and the discovery of evidence and data relating to proceedings in those cases are "civil matters."

Under section 2 of S. 1407, a postal inspector could walk in upon any citizen or business enterprise in the United States which uses the mail and demand to inspect and copy books and records. There are several hundred thousand religious, educational, scientific, philanthropic, labor and other organizations authorized by law to mail second and third class mail matter at preferred rates. This language would permit a postal inspector to demand to inspect and copy any named object in the possession of that church, or foundation, or society, or labor union on the grounds that the demand was pursuant to a civil investigation of the qualifications of the organization to mail at nonprofit rates or some other "civil matter" investigation related to the post office. The little Bible churches and evangelical groups who today enjoy absolute protection against the prying eyes of the Government would be subject to having their books opened, their membership examined, and further difficulties imposed upon them by the Government. That may be legitimate government investigation to ascertain the validity of mail permit holders who benefit from public subsidies, but it would represent a very radical departure from previous policy, and should be carefully weighed by the Congress before the risks of such impositions are undertaken.

Now, we recognize that the Postmaster General may scoff at these suggestions and reply "We would never do that."

And perhaps the Postal Service never would. But nothing in this proposed legislation ensures that they never would. And there may be some present here today who recall earlier "never would's": The misuse of the "mail cover," wherein postal officials all across the nation, in cooperation with Federal, state and local police officials and under no guidelines and virtually no central control, detained mail and supplied the names and addresses of the senders of mail, unbeknownst to the recipients. That "never would" led to extensive congressional investigation and subsequent reform. Others may recall the allegations of illegal search and seizure involved in the postal investigation of the mail robbery at Plymouth, Massachusetts. More recently, the Post Office Department shared the limelight in allegations of illegal detention and opening of mail by the Central Intelligence Agency. Perhaps all of those can accurately be described as one time and never-to-be-repeated "never would's." But to enact legislation to open the door even wider to the possibility of abuse at the expense of the citizen's constitutional right to be secure in his papers is to assume an unreasonable risk. The bulwark against the temptation for abuse is that historic and precious requirement that a judge determine in advance whether the citizen's door is opened.

Fifteen years ago, when this committee reported H.R. 1411, removing the requirement to prove criminal intent in mail fraud cases, four members of this committee, including the present chairman and ranking Republican member, dissented. In his dissenting views, Representative William D. Ford said,

"I do not believe the Post Office Department is the proper agency to concern itself with the content of mail and I believe that measures of this type, dealing with the sensitive determinations as to mail content, should never be placed for administration in the hands of the Post Office Department."

Edward J. Derwinski, in his individual views, said,

"I suggest that the desirability or undesirability of this legislation is not an issue, but whether it is necessary to the functioning of the Post Office Department, and I believe it is not."

We believe those views are as relevant and applicable today as they were in 1967.

We find the police powers in this legislation to be inherently objectionable and antithetical to the fundamental duty of the Postal Service to deliver mail. If subpoena powers, searches, and seizures are necessary to apprehend and prosecute mail fraud, we believe other agencies of the Government, the FBI, the Secret Service, or even the Federal Trade Commission in exercising its investigatory and quasi-judicial powers, are appropriate agencies to exercise those powers, under the watchful

eye of the courts, the Congress, and the Chief Executive. But granting police powers to an "independent establishment" in the Executive Branch of the Government would be unique departure from previous practice. At the very least, it is an issue for extremely careful consideration by the appropriate committees of the Congress and the law enforcement agencies of the Executive Branch.

The second major change proposed in S. 1407 is contained in section 3, which would authorize the Postal Service to demand the sale of any article or service offered for sale by mail. We understand that the Postal Service seeks this new authority because it is difficult, and sometime impossible, to investigate exclusively by use of the mails: By the time the Postal Service has sent in its order, the con artists have packed up and moved away. This new authority would permit the Postal Service to demand sale on the spot. If the individual refuses to make the sale, and if a United States district court determines that the refusal is unreasonable, the refusal constitutes "probable cause" to believe that the person is engaged in a false representation mail order scheme. That finding may lead to the detention of the individual's mail in order to prevent defrauding the public. This new provision also authorizes an "unreasonable refusal" test in the case of an individual who refuses to permit inspection and copying of papers. The unreasonable refusal is "probable cause" to believe that the individual is engaged in mail fraud.

We recognize that the Postal Service encounters difficulties in attempting to secure advertised goods and services exclusively by mail, and for that reason we support the demand sale provision of section 3. But we believe the committee should carefully weigh the advisability of reversing the burden of proof, by putting the burden to prove innocence upon the businessman to demonstrate this his refusal to sell is in good faith. The Common Law has placed the burden of proof upon the prosecution for several hundred years in the United States and Great Britain, and we believe that this committee should consider very carefully whether the circumstances in this instance justify changing that historic legal requirement.

Mr. Chairman, MPA would like to express its support for the proposal submitted by the Association of American Publishers, who have proposed that the "Mirror Image Doctrine" protecting advertising be incorporated into this legislation. That is a doctrine of long-standing recognition at the Federal Trade Commission and one which we firmly support. We view this as a clear First Amendment issue and one of great importance. We are alarmed by the Postal Service's attack upon controversial books and the recent conviction for false representation by mail of the author of a book whose medical theories were controversial. The post office is no place to ban books; it is a place to deliver books and magazines and newspapers to the American people.

We appreciate the opportunity to testify and will be happy to attempt to answer any questions the subcommittee may have.

Mr. LELAND. Mr. Minton, before you leave there are a couple other questions we might have for you. We will keep the record open and submit them. Thank you very much for your testimony.

We now have Mr. John Shattuck, representing the American Civil Liberties Union. We appreciate his coming forward today and welcome his testimony.

STATEMENT OF JOHN SHATTUCK, DIRECTOR, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON OFFICE, ACCOMPANIED BY MICHELE CHANDLER, LEGISLATIVE ASSOCIATE

Mr. SHATTUCK. Thank you very much, Mr. Chairman. I am very pleased to be here, particularly before you, Mr. Chairman. Your civil liberties views on many matters are well known to us and we salute you as always for your defense of civil liberties.

I am the national legislative director of the American Civil Liberties Union and accompanying me today is Ms. Michele Chandler, a legislative associate in my office. I have a relatively lengthy statement which I would like to summarize orally.

We share the concerns expressed in these hearings for victims of unscrupulous entrepreneurs who use the mail to engage in fraudulent commercial practices. But we are, as you can imagine, Mr. Chairman, equally concerned that efforts to deal with this problem be consistent with the Constitution.

The Postal Service, I think we should put in perspective, is the principal artery through which the business, social and personal affairs of the Nation are conducted and it is the preeminent vehicle for all of the people to use in exercising their freedom of communication protected by the First Amendment.

It is also a monopoly which is enforced by the absence of other authorized means to exercise first amendment rights in that way, so the Postal Service is as unique as it is extraordinary and it is a shining example of what the Government can do to facilitate the exercise of constitutional rights, particularly the most important right that we have, which is freedom of expression.

The Service is neither intended to be nor equipped to act as a general law enforcement agency nor as a judicial body. The power of the Service to police mail fraud activities arises from its general mandate to superintend postal business and execute postal laws. But this power, like all other powers under the Constitution, is subject to the limitations of the Bill of Rights.

We oppose the legislation pending before this subcommittee because it provides for a range of new enforcement procedures which may create serious constitutional problems under the fifth and fourth amendments, and beyond that in light of what I have just said about the origins of the Postal Service and its facilitation of first amendment rights, we also oppose the legislation because the record of the Service in its current investigations of mail fraud cases we think raises serious first amendment problems.

Let me turn right away to some of the particular provisions in the bill that concern us. At the top of the list is the broad search powers that this legislation in the current form would grant to the Postal Service. I think before I get into the specifics of that I would like to underscore something that the last witness said. I spent

many hours a number of years ago litigating a case against the Central Intelligence Agency for its activities in connection with the Postal Service in opening the mail matter of millions of Americans without a search warrant. I also spent many hours working on cases involving mail covers instituted on the mail matter of U.S. citizens who were engaged in what courts later held to be pure first amendment activities.

So I think when we look at this search authority we really have to bear very clearly in mind what the not-so-distant past has shown with respect to the use of the mails for broad intrusions on first and fourth amendment rights of American citizens, both by the Postal Service and by other agencies of the Government, particularly the CIA.

Now, section 413 of the bill would authorize the Service to inspect "any books, records, documents or other objects that the Postal Service has reason to believe relate to any matter * * * under investigation." Any matter; not just matters involving mail fraud, but any matter which the Service is investigating and presumably which it may be investigating in connection with a request coming from another agency such as the CIA.

The bill does not provide for any form of prior hearing before a neutral officer to determine if there is a sufficient evidentiary basis to justify the search, and it thus creates almost unbridled discretion for Postal Service officials out in the field, not in the hierarchy, to initiate searches when they feel that it is appropriate.

Now the Constitution is pretty clear on this subject. The target of an administrative search is generally entitled to full fourth amendment protection. Particularly in the area of industries or activities like the Postal Service that are not heavily regulated. When you are in a very self-regulated industry maybe the search powers of the Government can be a little bit broader but certainly not with respect to the mail activities of American citizens.

Persons who engage in mail transactions don't give up their legitimate expectation of privacy—not just their expectation of privacy with respect to things they put in the mail but moreover, materials that they don't put in the mail, that they hold in their homes or in their businesses which may not have anything but indirect relationship to how they use the mails.

Now because the Postal Service already has broad authority to continue both civil and criminal mail fraud investigations, a person who is initially a target of a civil investigation may subsequently become the subject of a criminal prosecution based on documents and materials that could be seized by this new power that would be created by section 413 of the bill. That would raise even more constitutional problems.

The Supreme Court has been very clear on this, most recently in *Marshall v. Barlow*, and has established that the warrant clause of the fourth amendment requires that prior to a search a neutral and detached magistrate should ascertain that the legal standard established under the fourth amendment is met.

This means except in emergency circumstances when you think the suspect is going to flee or the material is going to be destroyed and you can show that in a particular case a judicial warrant has to be obtained before any particular document can be seized.

Now, the kinds of questions that have to be answered before a search warrant is issued are whether the proposed search is relevant, reasonable, and necessary to the particular investigation, whether there exists administrative authority to make the search, whether the material bears a reasonable relationship to the kinds of information required to ascertain possible violations and whether the scope of the proposed search is too broad, for the investigation.

Now there is no mechanism in the bill as it is currently drafted for answering or even asking these questions before the Postal Service makes an inspection demand for books, records, documents or other materials in the possession of private parties. So there are really a series of major fourth amendment and first amendment problems that that section presents and as currently drafted, I don't think there can be much dispute—certainly in my mind there isn't—that it violates those constitutional provisions.

Now, the next section which concerns us is the amendment to section 3005 in existing law involving the new cease and desist authority for the Postal Service. This section raises an additional kind of constitutional problem under the fifth amendment due process clause.

Every person in the United States has a property right in the use of the mails for lawful purposes which cannot be taken away without due process of law. But the new power to restrain people from engaging in particular kinds of activities, which is created by section 3005, goes right to the heart of that constitutional right.

It is not any accident that under current law the Postal Service is really limited as to what it can do in terms of issuing orders to stop particular kinds of activities, because all it can do is stop, the mail.

But under this amendment to section 3005, what is being promised is that the Postal Service be given new authority, not to stop mail but to go out and stop people from engaging in particular kinds of activities which may or may not have any direct relationship to the mail.

That goes way beyond what's permissible under the fifth amendment. The 3005 proceeding as contemplated under the bill is a summary proceeding without the due process that would be required for stopping people from engaging in particular kinds of activities.

For example, if the Government wanted to go out and get a prior restraint against the publication of certain books, which it has sought to do from time to time, much too much for my taste and I am sure for yours, Mr. Chairman, it has to go through all kinds of procedural hoops to try to get that type of prior restraint order. Under 3005 there is none of that due process, yet the Postal Service under the bill would be given new cease and desist authority to stop all kinds of activity beyond use of the mails.

This brings me to a third set of problems in the bill and that is the statutory presumptions of wrongdoing which are attached to certain of the requirements in section 3005 by the new language in the bill. These presumptions fail to meet the constitutional standards that there be some rational connection between the fact proved and the ultimate fact presumed.

When a presumption of intentional wrongdoing is inferred from the mere fact that someone is not in compliance with certain regulatory requirements, in most cases the Supreme Court and the lower courts have held that that violates due process of law.

So where people are presumed to be intending to engage in mail fraud by the fact that they don't comply with certain regulatory requirements of the Postal Service really goes well beyond existing requirements of due process. We think those presumptions should be eliminated from the bill.

The final area in the bill that I wanted to address involves the proposed expansion of the Postal Service's power to reach any instrumentality of interstate commerce, the question that you raised with the last witness.

Now, the current authority of the service to protect the mail is derived from the power of the United States to designate by legislation what may be carried in the mail, and the specific power of the Postal Service to police mail fraud activities arises from this general mandate. As we read this new jurisdictional provision it would appear to us to authorize the Postal Service to go beyond the regulation of mail activity and instead to monitor such things as door to door sales, telephone advertising and a wide variety of other activities which have from time to time been held by the courts to fall within the interstate commerce jurisdiction, particularly the use of telephone advertising.

I think there have been good reasons in the past, basically to limit the Postal Service to the regulation of the use of the mails for particular purposes and we question whether this broad new interstate commerce authority is appropriate.

Now let me before I conclude my opening statement, Mr. Chairman, step back from the specific provisions of the bill and for a moment look at an additional reason why we think Congress should be very, very cautious before expanding the police powers of the Postal Service, and that is the Service's mail fraud record which I know has been brought out by other witnesses and I won't dwell on it at length except to discuss the constitutionality of it.

In making a determination as to whether an advertisement for mail order merchandise is fraudulent the Postal Service has been depicted by some of the critics as setting itself up as a board of review examining the validity or worth of ideas, opinions, beliefs, and theories expressed in books and other publications offered for sale to the public.

To the extent this is true—and we obviously don't sit before you, Mr. Chairman, as an expert on whether or not it is true, but there is plenty of evidence that it appears to be—to the extent that criticism is true there is a very serious first amendment question as to how the Postal Service is using its existing authority.

I would like to just mention two recent cases, one of which has been extensively discussed and I won't go into it in detail and another which I will cite because I don't believe other witnesses have—the recent cases of *Health Purifiers, Incorporated*, Public Docket 678, in 1979, and the *Magnolia Lab* case, which I know others have discussed, which both graphically illustrate what can happen in an overbroad Postal Service fraud investigation.

Both of these actions were brought by the Service pursuant to title 39 of the United States Code, section 3005. The *Health Purifiers* case, in that case the Service alleged respondent misrepresented opinion in its advertisements for a report concerning a proposed treatment for prostate discomfort.

The Postal Service offered the testimony of one medical expert to prove that the medical opinions expressed in the booklet that was being advertised through the mails were false. And relying solely on the testimony of that one witness, an administrative law judge in that case held that ideas and opinions expressed in the booklet were contrary to "current informed consensus." And would not achieve the claimed result.

The judge concluded that:

Even though an advertisement correctly describes the booklet, if the results represented in the booklet cannot be achieved by following the procedures outlined in the booklet, the advertiser is in violation of section 3005.

Now with all due respect to that administrative law judge, Mr. Chairman, who I think is very similar to the judge in the *Magnolia Lab* case, the analysis engaged in in that case, as well as the *Magnolia Lab* case, is contrary to the first amendment.

As has been interpreted by the Supreme Court, the first amendment mandates that speech restrictions on commercial advertising be very narrowly drawn and the authority to regulate advertising extends only to the authority to regulate fraud; in fact, actual fraud and not opinions.

So where the advertisement falsely depicts the content of a book, the Postal Service does have the authority to ban it. There is no question about it. If I advertise that I am going to put out a book that will tell you certain medical things that the book has no information about whatsoever and I send through the mails to get that book, or someone sends through the mails to get that book and it turns out that the information I sent forth in my advertisement is not in the book, there is no question the Postal Service has the authority to stop the mails and ban that book as far as the mails are concerned because it misleads the public.

But if the Service makes a determination that an advertisement, although not false, nevertheless has the potential to deceive or confuse the public, it can't go so far as to actually ban the publication. It can do certain other things. It can place restrictions on the ads, so long as they are no broader than reasonably required to prevent deception.

I think you have heard already from other witnesses about a statement of this policy by the Federal Trade Commission, the so-called mirror image doctrine, which I think accurately and reasonably reflects what the first amendment requires, and what should be done by the Postal Service.

What that doctrine says is, it allows the regulation of advertising to require that the advertising state that it only expresses the opinion of the author, or that it is only quoting the contents of the publication, that the advertising disclose the source of the statements quoted and the advertiser disclose the author to be the source of the opinions.

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In other words, putting the public on notice that, "These are just my views and they don't necessarily constitute prevailing medical opinion but I am going to put them into a book and I am going to sell them to you and if you want to buy them and try them out, that is fine."

That is a perfectly reasonable regulation, but banning that book violates the first amendment.

It is very clear, I think, that the Postal Service goes beyond this reasonable examination of the truthfulness of an advertisement and investigates the opinions expressed in the publication.

In the *Magnolia Lab* case the administrative law judge maintained that: "It is essential to explore the truthfulness of the claims made in the booklet which relate to the claims made in the advertisement in order to determine if the advertised claims are true or false"—and in other words to determine whether the book ought to be banned.

That just isn't sound first amendment law and it is very dangerous. Where the ideas purport to be only the opinion of the author, the Supreme Court has held, "There is no exact standard of absolute truth by which the Government can prove the assertion false and a fraud."

I think this point is consistent with another important first amendment principle and that is one involving the rejection of the view that the Government has complete power to regulate commercial speech. It doesn't. In a celebrated 1975 case the Court said it much better than I possibly could.

The Court said, "People will perceive their own best interests if only they are well enough informed and the best means to that end is to open the channels of communication rather than to close them."

That is why the kind of regulation that the FTC engages in with respect to the mirror image rule is perfectly reasonable in contrast to what the Postal Service does in this area.

In conclusion, Mr. Chairman, as I have said again and again, here, we are concerned about the broad new powers that these bills would give to the Postal Service. We understand the problem that you are addressing but when we put that problem beside the authority that the Postal Service now has, the authority which the Federal Bureau of Investigation and U.S. attorneys around the country have with respect to the enforcement of the mail fraud statutes which are on the books, we honestly don't see the need for this legislation and we see very serious dangers in pursuing it, particularly in the light of the record which the Service has unfortunately established, both with respect to the regulation of advertising and the even more unfortunate record I stated earlier in terms of the cooperation with other law enforcement agencies in a dark period in our investigative past where the CIA was able to persuade the Postal Service to perform the opening of mail in large numbers.

I think Congress ought to be very, very cautious before proceeding any further here. As always, Mr. Chairman, we stand ready to help your subcommittee and other committees of the Congress in trying to grapple with this proposal. We are not trying to be uncon-

structive and we certainly are prepared to assist you in pursuing and drafting amendments if that is the course you choose to take.

But frankly, our recommendation would be: Think twice, three times, four times before you even start walking down this path in terms of the kind of authority that is being created here.

Thank you very much.

Mr. LELAND. We certainly appreciate your testimony. This chairman is very much concerned about the issues that you have raised pertaining to the specific issue of mail fraud.

Mr. Shattuck, one of the arguments I have heard most often in support of this bill is that it only gives the Postal Service powers that inspectors generally have in other agencies. Would you please comment on that?

Mr. SHATTUCK. Well, the inspector general authority with respect to inspection of documents and materials contemplated by section 413 of this bill is generally limited to an inspector general authority to police the activities of that agency internally. Inspectors general are watching for internal fraud and abuse by employees of a particular agency.

When you get into an area such as very sensitive records, like records of private parties who are using the mails, I think a more appropriate analogy is the sensitive records held by the Internal Revenue Service. The Internal Revenue Service under current law has to follow a court ordered procedure very analogous to the one I was outlining in my testimony when it provides tax records to the Justice Department or to the other agencies of the Government engaged in investigations that don't involve the tax laws.

While there is no question that an inspector general would be an improvement over a Postal Service agent out in the field when it comes to determining when to initiate an inspection or search, I don't think the inspector general approach would solve the fourth amendment problems that I am outlining here and those problems have been encountered by the Congress before in other legislation, notably the Tax Reform Act of 1976, and when Congress saw that one it said, 'We'd better go the court-ordered route, or we will find ourselves in constitutional difficulty.'

Mr. LELAND. Do you think we could use the approach of establishing an inspector general office in the Post Office Department to alleviate some of the concerns you have expressed?

Mr. SHATTUCK. I think an inspector general would be an improvement over a Postal agent out in the field deciding to initiate a search but an inspector general would not be the same as a court making a determination that all of the requirements of the fourth amendment are met, that the search will not be overbroad, that it is relevant and essential to a particular investigative purpose.

I don't want to say an inspector general is as problematic as a Postal agent but I don't think it is a substantial kind of improvement. It would be some improvement.

Let me stress the fact, as I understand it, that inspectors general most often have the administrative search powers when the agency is engaged in internal investigations, to make sure that its employees are not engaged in fraud and abuse.

And here we are talking about regulating the activities of the entire American public. I question whether an inspector general

sitting in Washington or anywhere else is really competent to start issuing a lot of search orders for general members of the public who are not employed by or participating in the activities of the agency.

I would be glad to study the matter further, but I am afraid I don't see that as a solution to the problem that I have outlined.

Mr. LELAND. We would like, if you would, to have your comments on a further study of what you feel would be more appropriate, or further criticism if you have that.

Mr. SHATTUCK. Before we leave that point, Mr. Chairman, could I underscore, I do not think it would be either burdensome or complicated or expensive to initiate the kind of court order procedure that I am talking about. It works in other areas. It works in the area of Internal Revenue Service records. It does not involve hiring new inspectors general and it provides much more protection for fourth amendment rights.

At the same time, it would provide the Postal Service with a reasonable way of conducting its mail fraud investigation.

Mr. LELAND. Given that, Mr. Shattuck, and given the fact that you are an expert in civil liberties, you made a comment earlier that this legislation is not necessary. What would be your approach to solving the problem of mail fraud?

Mr. SHATTUCK. The first thing, I guess, I would do, is to put that mirror image principle right into statutory form, so it is clear to the Postal Service what it can and cannot do with respect to investigation of mail and issuance of orders prohibiting mail fraud activity.

Now, that is what should be done in terms of setting up a procedure for the Postal Service to follow in regulating mail matter that may be fraudulent. When you get to the investigative level—I confess I have not reviewed anything more than the record before your subcommittee, but that seems to be quite extensive at this level—I do not see a very compelling case for additional investigative power for the Postal Service.

I think they have adequate investigative power and I think that to the extent there is a criminal violation of mail fraud statutes, there are warrant procedures right now that are available through U.S. attorneys offices and there is no question that mail fraud investigations can continue.

As a personal reflection, I served as a law clerk to a U.S. Federal district judge for a year, and there were plenty of mail fraud cases that were brought before the court and in many instances, I became familiar with the warrants, judicial warrants that were used to get access to materials that were necessary to make out a genuine case of criminal mail fraud.

So I do not have any doubt that if there is a very serious criminal fraud problem that is going on, the Postal Service can get at it. What I am concerned about is, what they really want to do is engage in a much broader kind of regulation. Certainly the two cases that I have cited and others that have been cited by other witnesses would bear that out.

For that reason, I do not think any additional investigative power is necessary.

Mr. LELAND. Do you think in light of your statement just now, that the Postal Service holds legitimate or reasonable authority at this point, or do you think that some of the authority they have is too overbearing?

Mr. SHATTUCK. Well, I am not sitting here to comment on their existing authority. I am not urging you, although I know other witnesses have, to cut back on postal authority with respect to mail fraud. I am addressing this bill, particularly the bill that passed the Senate, which I know you are considering most seriously. That bill creates new power where it is not needed, particularly in the area of the inspection searches and the cease and desist authority, and the legislative presumptions that I talked about.

Mr. LELAND. Let me ask you a very, very serious and critical question if I may. Something that has been bothering me throughout this whole hearing process on this particular issue.

Some people say in the realm of politics one has to give up something to get something, and we have been particularly concerned about the ravaging of senior citizens by fraudulent schemes.

Do we at any point give up any measure of our civil liberties for the purpose of protecting the interests of senior citizens.

Mr. SHATTUCK. Well, it is a serious question and I treat it seriously, and I know that is a question that weighs most heavily on your mind and Senator Pepper's mind and the minds of others who are concerned about this.

I cannot help but conclude that if people are given proper information that the opinions expressed in a book are the opinions of the author alone and do not purport to be the prevailing medical opinion, that that kind of information will be enough for the public to decide, including senior citizens, whether they want to take a risk on a particular publication.

Now I think there are plenty of people, including senior citizens, who would be very upset if they suddenly realized that materials are being taken off the market and advertisements out of publication which they would like to take a risk on.

What you have to do I think, Mr. Chairman, is to protect people by giving them enough—make sure they get enough information so that they can assess that risk, and that is why I think the FTC mirror image rule makes so much sense, because what it allows the Postal Service to do, or the FTC to do in that instance and the Postal Service in this, is:

Here is a book and it is written by someone who has an idea, who has tried that idea out and that idea has worked for him, and maybe for a few other people. Maybe for many other people, but he is not claiming it is an idea that dominates the medical profession or is the prevailing opinion of all the medical profession.

That should be enough for people. If we do not allow that kind of idea to go forward, it is going to be pretty hard, (A) For there to be much progress in the area of medicine or any other area, and (B) for consumers, including senior citizens, to really make informed judgments about what they want to purchase.

When I go to a grocery store or some other place, the last thing I want to be told is, "You cannot purchase certain items because we in the government have determined that it is not good for you to purchase them."

Now there are some very dangerous substances that fall into that category and I think they properly fall into that category. Very dangerous drugs may be banned from the market because everyone agrees that they are dangerous.

But that is not the case with this mail fraud business and as I understand it, what is being investigated in most of these instances by the Postal Service is the kind of information that was contained in those two books in the *Magnolia* case, and the *Health Purifier* case.

Mr. LELAND. Let me ask you another very serious question— not that one is less serious than another. Is this legislation salvageable or is the idea of the legislation salvageable, or do you advocate killing the legislation outright?

Mr. SHATTUCK. As always, that is a judgment that you in the Congress are better able to exercise than we on the outside, but I will say that if this legislation contains any of the four problems that I identified, I think it should be killed.

If on the other hand it were scaled down so that the authority of the Postal Service to require that the mirror image doctrine be followed, and clear information be stated about the origin of certain ideas that are put into books and other things that are being advertised, then I think it would be salvageable. I do not have any real objection under current law to the Postal Service engaging in the kinds of reasonable investigations that comport with the first amendment, assuming you adopt the mirror image doctrine.

But if any of this other stuff stays in there, I am afraid there really is no real compromise with such issues as the fourth and fifth amendments.

Mr. LELAND. You made a statement on page 6 of your testimony:

This expansion of jurisdiction to control persons as well as mail matter is particularly objectionable because section 3005 appears to authorize the Postal Service to conduct summary and ex parte proceedings.

Can you expand on that for me?

Mr. SHATTUCK. What I meant by that was the proceedings that the Postal Service can conduct under section 3005 in the bill would appear to be less than a full kind of evidentiary proceeding, given all these legislative presumptions.

You are suddenly before the Postal Service and you are presumed guilty before you are put on trial. Some of the proceedings might even take place before you or be brought before the Postal Service. That is what I meant by ex parte.

The fact that these are summary, in that they do not involve the full evidentiary hearing on the basic underlying issue of mail fraud but they may basically determine whether or not someone should be presumed to be guilty because they have not followed the regulatory scheme is a summary and ex parte proceeding, which raises due process questions.

Mr. LELAND. Mr. Shattuck, we want to thank you very much for coming forward and giving your testimony. Please be available if you can for possible further comment if we pursue this matter any further.

Thank you very much.

The Chair would like to announce our last hearing will be this coming Thursday at 1:30 p.m.

[Whereupon, at 11:15 a.m., the subcommittee was adjourned, to reconvene on Thursday, July 22, 1982, at 1:30 p.m.]

[The prepared statement of Mr. Shattuck follows:]

STATEMENT OF JOHN SHATTUCK
DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you to offer the comments of the American Civil Liberties Union on H.R. 3973 and its companion bill, S. 1407. The ACLU is a nationwide non-partisan organization of more than 250,000 members whose sole purpose is the protection of individual rights and freedoms under our Constitution. In this regard, the ACLU is concerned about legislative efforts to enlarge the investigatory and enforcement powers of the United States Postal Service in the regulation of mail fraud activities.

Introduction

The ACLU shares the concerns expressed in the course of these hearings for victims of unscrupulous entrepreneurs who use the mail to engage in fraudulent commercial practices. The impact of this type of insidious activity on the elderly population is especially disturbing. However, we are equally concerned that legislative efforts to deal with this problem be consistent with the Constitution. In order to safeguard the protections afforded to individuals under the Constitution, it is necessary to insure that the societal interest in effective law enforcement not be advanced at the expense of constitutional guarantees.

The U.S. Postal Service is a principal artery through which the business, social and personal affairs of the nation are conducted. In this respect it is a preeminent vehicle for the exercise of freedom of communication protected by the First Amendment, which all Americans enjoy... It is also a monopoly

which is enforced by the absence of other authorized means to convey mail matter. The Postal Service was created to fulfill as its "basic function the obligation to provide postal services to bind the nation together through the personal, educational, literary, and business correspondence of the people." Title 39, United States Code, Section 101. It was neither intended to be, nor equipped to act, as a general law enforcement agency, nor as a judicial body. The power of the Postal Service to police mail fraud activities arises from its general mandate to superintend postal business and execute postal laws. It is clear, however, that the power of Congress over the Postal Service "like all other powers, is subject to the limitations of the Bill of Rights." United States ex rel. S.D. Pub. Co. v. Burleson, 255 U.S. 704, 717 (1920) (dissenting opinion of Justice Brandeis).

The ACLU opposes H.R. 3973 and S. 1407 because they provide for a range of new enforcement procedures which may create serious constitutional problems under the Fourth and Fifth Amendments. Moreover, because the Postal Service's current practices in enforcing mail fraud laws in cases involving advertising of literature pose a serious threat to First Amendment rights, the bill's broad grant of power will only serve to strengthen the Service's ability to engage in such constitutionally questionable enforcement activities. Accordingly, the First Amendment implications of the bill will also be discussed in our testimony. Following is a detailed analysis of the constitutional defects in H.R. 3973 and S. 1407.

Inspection Authority

Section 413 of the bill would authorize the Postal Service to inspect "any books, records, documents or other objects that the Postal Service has reason to believe relate to any matter. . . under investigation." The bill does not provide for any form of prior hearing before a neutral officer to determine if there is a sufficient evidentiary basis to justify a search and inspection, and to insure that the inspection complies with the "reasonableness" standard set forth in subsection (a). The absence of such a provision creates almost unbridled discretion for postal service officials, particularly those in the field, as to when to search.

"The essential purpose of the prohibition of the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials-- in order to safeguard the privacy and security of individuals against arbitrary invasions." Delaware v. Prouse, 440 U.S. 648 (1979).

The target of a federal administrative search is generally entitled to full Fourth Amendment protection. Persons who engage in mail transactions do not relinquish their legitimate expectation of privacy as to the sanctity of their personal and business belongings. Serious negative repercussions may be suffered by persons whose objects and documents are inspected by the Postal Service, including loss of customer privacy, loss of financial privacy, and loss of trade secrets. Moreover, because the Postal Service already has the authority to conduct both civil and criminal mail fraud investigations, an individual who is initially a target of a civil investigation

may subsequently be subject to criminal prosecution based on documents inspected under the new authority of the bill.

The judicial enforcement provisions of Section 413(b) are no substitute for a judicial warrant procedure. The Supreme Court has established that the warrant clause of the Fourth Amendment generally requires that prior to a search a neutral and detached magistrate should ascertain that the legal standard established under the Fourth Amendment is met. Terry v. Ohio, 392 U.S. 1, 20-21 (1968). See also Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). In the absence of emergency circumstances, a warrantless search is generally unreasonable. Id. A search warrant requires at a minimum, that the facts upon which the intrusion is based be capable of measurement against an objective standard, whether probable cause or a less stringent test. Id. In making a determination of whether a document inspection should be allowed, a neutral officer would be in the best position to determine whether the inspection is relevant, reasonable and necessary; whether there exists administrative authority to make the inspection; whether the material bears a reasonable relationship to the kinds of information required to ascertain possible violations; and whether the scope of the proposed inspection is overbroad.

These well-established constitutional safeguards apply to intrusions during civil as well as criminal investigations; to commercial buildings as well as homes. See v. Seattle, 387 U.S.

541 (1967). See also Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967).

A warrant provides assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Of equal importance, a warrant would advise the owner of the items to be inspected of the scope and objects of the search, beyond which limits the Postal Service representative is not permitted to proceed. Marshall v. Barlow's Inc., supra at 323. In the absence of emergency circumstances, the Postal Service would have adequate opportunity to obtain a search warrant once it has probable cause to believe that illegal mail activities are taking place.

Finally, the inspection provisions fail to establish procedures for proper service of the inspection demand or to provide an adequate time to oppose the proposed search.

"Stop Mail" and "Cease and Desist" Authority

The stop mail and cease and desist authority in Section 3005 of the bill raises constitutional implications under the Fifth Amendment Due Process Clause. Every person in the United States has a property right in the use of the mail for lawful purposes of which he or she cannot be deprived of without due process of law. See Burleson, supra at 712 (dissenting opinion of Justice Brandeis). The cease and desist powers created by Section 3005 represent a major expansion in Postal Service authority. Under current law, the Postal Service has jurisdiction to monitor and

control mail matter through the issuance of a stop mail order. The authority to issue cease and desist orders, however, goes far beyond control of mail matter and allows the Postal Service to issue orders forbidding persons from continuing to use the mails to engage in activity which the Service believes is illegal. This expansion of jurisdiction to control persons as well as mail matter is particularly objectionable because Section 3005 appears to authorize the Postal Service to conduct summary and ex parte proceedings. Such proceedings would deprive individuals of the requisite notice and opportunity to be heard mandated by the Fifth Amendment when legitimate property and privacy interests are at stake.

Legislative Presumptions

The statutory presumptions of wrongdoing attached to "unreasonable" noncompliance with certain of the requirements in Section 3005 fail to meet the constitutional standard that there be some rational connection between the fact proved and the ultimate fact presumed. Leary v. United States, 395 U.S. 6, 35 (1969). See also Mobile, J & K.C.R. Co. v. Turnipseed, 219 U.S. 35 (1910). A presumption of intentional wrongdoing inferred from the mere fact that there was a judicial determination on the narrow issue of non-compliance is a purely arbitrary mandate.

The effect of these provisions is to circumvent the safeguards of notice and opportunity to be heard mandated by the

Fifth Amendment. They are vaguely drawn, and fail to establish sufficient notice as to what conduct may constitute an "unreasonable failure" to comply with a Postal Service demand. Moreover, the judicial hearing on the issue of non-compliance will not give the party believed to be conducting fraudulent activities, or the court, an opportunity to engage in an evidentiary review of the Postal Service's claim of mail fraud. Yet, the procedural effect of the presumption will place a burden on the party against whom it is imposed to introduce evidence to rebut the presumption that he or she is engaging in mail fraud. A presumption which will have such a substantial impact on the outcome of the formal adjudication of the claim of fraudulent activities is procedurally defective.

Interstate Commerce

The expansion of the Postal Service's power to "any instrumentality of interstate commerce" is an overbroad delegation of legislative power. The authority of the Postal Service in the protection of the mail derives from the power of the United States to designate by legislation what may be carried in the mail and what must be excluded. The specific power of the Postal Service to police mail fraud activities arises from this general mandate. Section 3012 would appear to go far beyond this, however, by authorizing the Postal Service to monitor door-to-door sales, telephone advertising, and a panoply of other activities which employ instrumentalities of interstate commerce but are not connected with the mail.

Under current law the Postal Service properly lacks jurisdiction to police activities which are not connected with the mail. Whether the Service requires the powers of a general law enforcement agency to effectively police mail fraud activities should be a subject of close scrutiny of this congressional inquiry.

First Amendment Issues

The expansion of Postal Service police authority in H.R. 3973 and S. 1407 is particularly objectionable in light of the Service's record of constitutionally questionable enforcement activities affecting First Amendment rights under its existing authority. In making a determination as to whether an advertisement is fraudulent in nature, the Postal Service has been depicted as setting itself up as a "board of review examining the validity or worth of ideas, opinions, beliefs and theories expressed in books and other publications offered for sale to the public." (Rodale Press, Inc., 71 F.T.C. 1184 (ALJ), aff'd 71 F.T.C. 1222 (1967), remanded, 407 F.2d 1252 (D.C. Cir.) dismissed, 74 F.T.C. 1429 (1968); 71 F.T.C. at 1247-1256 (Commissioner Elman, dissenting).)

The recent cases of Health Purifiers, Inc., P.S. Docket No. 6/78 (1979), and Magnolia Lab, and Magnolia Laboratory, P.S. Docket No. 10/1232 (1981), graphically illustrate how the Postal Service's regulation of advertising may result in the censorship and suppression of literature. Both actions were brought

by the Postal Service pursuant to Title 39, United States Code, § 3005. In Health Purifiers, Inc., the Postal Service alleged that the respondent falsely represented the opinion in its advertisements "that the information in the documents identified as Dr. Morrison's confidential report, 'Natural Aids For the Prostate Gland', would enable the reader within 4 to 6 weeks to eliminate or substantially reduce a burning and painful urination, incontinence and frequent voiding of the bladder." The Postal Service offered the testimony of one medical expert to prove that the medical opinions expressed in the documents were false. Relying solely on the testimony of this witness, the Administrative Law Judge in that case held that the ideas and opinions expressed in the booklet were contrary to "current informed consensus", and would not achieve the claimed results. The Judge concluded that "even though an advertisement correctly describes a booklet, if the results represented in the booklet cannot be achieved by following the procedures outlined in the booklet, the advertiser is in violation of 39 U.S.C. § 3005."

The most recent case where the Postal Service has effectively been able to ban literature was in Magnolia Lab, which has been widely commented on by witnesses during the course of these hearings. In Magnolia Lab, the Postal Service alleged that the respondent, a publishing company, had made a false representation in a book advertisement that "the dietary regimen set forth in the book, Stale Food vs. Fresh Food, will effectively cleanse and clear blocked arteries." The book, by Robert S. Ford, presented

the author's opinion on the causes and cure of arterioscleroses. The gist of Mr. Ford's thesis was that "arteries can cleanse themselves without surgery by diet alone."

The Administrative Judge in that case upheld the Postal Service's complaint, holding that:

Although I found that the booklet contained some helpful suggestions and its author, Mr. Ford, is a knowledgeable and sincere person who thinks that he is performing a beneficial service, I found that the representations in respondent's booklet to be unproven and contrary to the weight of informed medical and scientific opinion.

The analysis engaged in by the Postal Service and the Administrative Law Judge in Magnolia Lab and Health Purifiers, Inc. is plainly contrary to the First Amendment. The First Amendment mandates that speech restrictions of commercial advertising be narrowly drawn. Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980). Authority to regulate commercial advertising extends only to cases of actual fraud in fact. In an analogous situation, the Supreme Court has established that a state bar rule regulating lawyers' advertising was violative of the First Amendment, absent proof that the regulated material was factually and materially inaccurate. In the Matter of R.M.J., 71 L.Ed 2d 64, 73-74 (1982). Where the advertisement falsely depicts the content of a book, the Postal Service has the authority to ban it, since the advertisement misleads the public. Central Hudson Gas & Electric Corporation, supra at 349.

If the Postal Service makes the determination that an advertisement, although not false, nevertheless has the potential to deceive or confuse the public, it may place restrictions upon such advertising so long as they are no broader than reasonably necessary to prevent the deception. Id. A statement of policy (The "Mirror-Image" doctrine) adopted by the Federal Trade Commission, appears to be in accordance with these constitutional principles. It allows the F.T.C. to regulate advertising only in a narrow set of circumstances. The F.T.C. may require that the advertising state that it only expresses the opinion of the author or that it is only quoting the contents of the publication; that the advertising disclose the source of the statements quoted or derived from the contents of the publication; and that the advertising disclose the author to be the source of opinions expressed about the publication. 36 Fed. Reg. 13414 (July 21, 1971).

Presently, the Postal Service goes beyond this examination of the truthfulness of the advertisement and investigates the opinions expressed in the publication being advertised. The Administrative Law Judge in Magnolia Lab maintained that "it is essential to explore the truthfulness of the claims made in the booklet which relate to the claims made in the advertisement in order to determine if the advertised claims are true or false." However, the Supreme Court has consistently rejected efforts to test the truth of claims or opinions especially by tests that put the burden of proving truth on the speaker. New York Times v.

Sullivan, 376 U.S. 254, 271 (1964). Where the ideas expressed in a book or publication only purport to be the opinion of the author, "there is no exact standard of absolute truth by which to prove the assertion false and a fraud." American School of Magnetic Healing v. McAnnulty, 187 U.S. 90, 94 (1902).

It is significant that Health Purifiers, Inc. and Magnolia Lab both dealt with literature concerning medical practices. The health area is especially vulnerable to Postal Service claims of false representation because of the lack of certainty of many medical theories advanced in Reilly v. Pinkus, 339 U.S. 269 (1949), the Supreme Court approved the McAnnulty decision, supra,

... as a wholesale limitation upon findings of fraud under the mail statutes when the charges concern medical practices in fields where knowledge has not yet been crystallized in the crucible of experience. For in the science of medicine, as in other sciences, experimentation is the spur of progress. It would amount to condemnation of new ideas without a trial to give the Postmaster General power to condemn new ideas as fraudulent solely because some cling to traditional opinions with unquestioning tenacity. (Emphasis added.)

at 273-275.

This view is consistent with another central principle of the First Amendment, namely the rejection of the "highly paternalistic" view that government has complete power to regulate commercial speech. "People will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1975).

Unfortunately, the Postal Service record of enforcement in mail fraud cases indicates substantial disregard of these important First Amendment principles. In a variety of recent cases documented in these hearings, once the Service has concluded that ideas contained in an advertisement are false, as is likely to occur in cases of unorthodox views, it has entered an order prohibiting sale of the publication via the mails. The effect of such an order is to prevent virtually all dissemination of the publication in question, because effective marketing of most publications requires use of the mails. Thus, while the Postal Service does not openly seek to suppress the publications themselves, it may effectively achieve this result by banning an advertisement which describes the publication. This runs afoul of the First Amendment.

Conclusion

The ACLU is concerned about the broad new powers that H.R. 3973/S. 1407 would give to the Postal Service. We do not believe that such sweeping legislation is necessary for the Postal Service to effectively combat mail fraud practices. We urge Congress to carefully examine the constitutional implications raised in the bill. It is especially imperative for Congress to exercise careful judgment in this area because of the difficulty under existing laws in obtaining judicial review of Postal Service abuses. Although we recognize the valid goal of H.R. 3973/S. 1407 to combat mail fraud, we strongly oppose the legislation's infringement of rights guaranteed under the First, Fourth and Fifth Amendments to the Constitution.

Thank you for this opportunity to present our views.

MAIL FRAUD/FALSE REPRESENTATION

THURSDAY, JULY 22, 1982

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON POSTAL
PERSONNEL AND MODERNIZATION, COMMITTEE ON POST
OFFICE AND CIVIL SERVICE,

Washington, D.C.

The subcommittee met, pursuant to recess, at 1:40 p.m., in room 311, Cannon House Office Building, Hon. Mickey Leland presiding.

Mr. LELAND. Good afternoon, ladies and gentlemen. Welcome to this fifth and final public hearing of the Subcommittee on Postal Personnel and Modernization on H.R. 3973 and S. 1407, which seek to enhance the Postal Service's ability to combat mail fraud through increased investigatory and enforcement powers. Today we will hear from representatives of the U.S. Postal Service.

I would like to acknowledge the presence—and am very much pleased to do so—of the chairman of the full committee, Mr. Ford. I am very happy that he could be with us, particularly for this hearing.

Our witnesses will be Mr. Charles Nelson, Acting Chief Postal Inspector, and Mr. Nelson will be accompanied by Mr. Louis Cox, General Counsel, and Mr. George Davis, Assistant General Counsel for Consumer Protection.

If I may, I would like to now recognize my chairman, Mr. Ford.

Mr. FORD. Thank you, Mr. Chairman. I have no comment at this time. I am looking forward to the testimony and will have some questions at the conclusion of the testimony.

Mr. LELAND. On balance, since this is the last hearing, I would like to show my favoritism toward bipartisan efforts and acknowledge the presence of my friend and colleague from the great State of California, Mr. Dannemeyer.

Mr. DANNEMEYER. Thank you, Mr. Chairman. I will just reserve my questions until the end of the testimony.

Mr. LELAND. Thank you.

Gentlemen, you may proceed.

STATEMENT OF CHARLES P. NELSON, ACTING CHIEF POSTAL INSPECTOR, ACCOMPANIED BY LOUIS COX, GENERAL COUNSEL; AND GEORGE DAVIS, ASSISTANT GENERAL COUNSEL, CONSUMER PROTECTION DIVISION

Mr. NELSON. Thank you, Mr. Chairman.

My name is Charles P. Nelson, and I am the Acting Chief Postal Inspector. With me at the table are the Postal Service General Counsel, Louis Cox, who sits on my right, and Mr. George Davis, his Assistant General Counsel for the Consumer Protection Divi-

sion. Mr. Davis has headed up this division for approximately 11 years, and it is the division that oversees the 3005-3007 type of efforts from the litigation and procedural standpoint for the U.S. Postal Service.

With your permission I will submit my complete statement for the record and cover a few highlights.

Mr. LELAND. Without objection.

Mr. NELSON. We are here today to express our support for the Mail Order Consumer Protection Amendments of 1982. Over the past several years we have found increasing public concern about the problem of mail order schemes built upon false advertising. Many of these schemes tend to prey most heavily on the elderly, the poor, and other more disadvantaged members of our society. The subcommittee has already taken detailed testimony on the scope of this problem in earlier hearings, including testimony from some of the victims. You know the injury which these schemes cause, and it is not my purpose to cover the same ground again today.

The legislation you are considering, which has already passed the Senate, represents a congressional effort to do something about this serious and growing problem. The Postal Service supports this effort. Any public perception that the mails are becoming a haven for deceptive merchandising schemes reflects unfavorably upon the legitimate mail order businessman and on the Postal Service as an institution. It tends to undermine confidence in the integrity of the mails which is necessary for the postal system to continue to grow and prosper in serving public needs into the future.

Because the public looks to the Postal Service for protection against this kind of scheme, we have another interest at stake, too. When our ability to deal with these problems does not measure up to the expectations of those who look to us to do something about them, the Postal Service may tend to be blamed unfairly for failing to prevent this type of illegal activity from flourishing and growing.

The fact of the matter is that the laws already adequately define what advertising is prohibited. No change is needed in this regard and we do not read this legislation to propose any. The problem we have now is that there are some very serious loopholes which make it possible for operators of these schemes to circumvent enforcement of the law. We believe that operators are gradually becoming more sophisticated in exploiting these loopholes in order to evade the effect of the statutory prohibitions.

It is important to keep in mind that the civil false representation statute has one purpose and one purpose only: that is to stop the victim's money from passing into the hands of the perpetrators of the scheme, so that the victim can get it back. As a practical matter, once the operator receives the money, whether or not there is a subsequent mail fraud conviction or other action against the false advertiser, the victims rarely get their money back, so speed is essential for civil enforcement efforts to be of practical use. The need for legislative action as we see it, and the purpose of the bill under consideration as we understand it, are to close the present loopholes which permit the civil mail stop order remedy, the only

remedy we have to safeguard the victim's money from being delayed or evaded.

One of the tools proposed by the bill to close these loopholes is the authority to obtain an advertised product or service upon tender of the purchase price. Most people who are concerned about deceptive mail-order schemes are surprised to learn that right now, the only way the law can be enforced against this type of scheme is for the inspectors to order an advertised product and wait for it to come through the mails like anyone else. More and more operators are finding that all they have to do to avoid the effect of the law is to postpone mailing advertised products until they already have most of the orders and the money they expect to receive. At that point the mail stop order is worth little and the Postal Service is powerless to help the victims of the scheme.

Under the procedure proposed by the legislation, an inspector who notices a possibly deceptive advertisement would be able to go right away to tender the advertised price in person, to obtain an example of the product to examine. While the advertiser could refuse to cooperate voluntarily, the Postal Service would then be able to ask the Department of Justice to seek a hearing before a Federal judge to show that if the operator continues unreasonably to withhold the product, then cause exists to stop mail addressed to the scheme pending further investigation. Without this kind of commonsense investigative tool, we fear the civil protection for mail order consumers which is now on the books may amount to little more than paper promises against the more ruthless and sophisticated schemes.

A second troublesome loophole at the present time is the absence of any requirement that advertisers come forward with the records backing up their advertising claims under investigation. The Postal Service must carry the burden of a formal evidentiary showing that an advertising claim is false before the victims' money in the mails can be returned but the operator need not produce any records concerning the amazing test results or thousands of endorsements touted in the ads, or even inventory records showing sufficient quantities of the product on hand to fill orders received. While the test purchase authority proposed by the legislation is an elementary need, it will be of little use if an operator acquires only enough of the product to sell one to the Postal Service.

As with the test-purchase authority, the written demand authority provided by the bill rests entirely upon voluntary cooperation by the advertiser, absent a court order. A Postal Service demand for access to records under the bill as we understand it is not intended to be a subpoena, which is self-enforcing unless the recipient goes to court for a protective order. No punishable violation would occur under the bill until there is a refusal to comply with a court order, which could be issued upon application by the Justice Department and only at the discretion of a Federal judge.

The written demand mechanism proposed by the bill would extend generally to all investigative matters under the Postal laws except, in the case of the Senate bill, matters under the private express statutes. This authority, which is similar to that assigned to inspectors general of Federal departments and agencies, would generally enhance the efficiency of efforts to investigate frauds and

depredations against the mails and the postal system, subject to necessary supervision and support from the Federal courts.

The test-purchase and demand authority together will permit the Postal Service to apply its limited investigative resources to act more quickly to safeguard consumers' money from schemes shown to depend upon false advertising before the money disappears forever into the hands of the operators of the schemes. However, there is another kind of loophole which needs to be addressed and is addressed by this legislation. Even after the evidence has been presented to support the issuance of a mail stop order, the scheme operators often can evade the effect of the order by resuming the scheme through a different address or by restricting the scheme to telephone credit-card orders. The use of a new address requires the administrative process to start all over, to obtain a new stop order.

Sophisticated schemes which switch addresses frequently can severely curtail the effectiveness of the stop-order remedy in protecting the consumer. Since these orders are about the only protection that can return the victim's money, their susceptibility to evasion is a shortcoming which is felt personally by the consumer. The bill proposes to attack this problem by authorizing the Federal courts to assess a civil penalty in amounts up to \$10,000, upon proper hearing and showing of evasion of a previously issued mail-stop order.

I have a few exhibits which illustrate the kinds of situations where this authority is needed.

The first exhibit relates to Braswell, Inc. or Braswell Industries, which has operated under at least 21 separate company names, selling numerous health-related products such as hair growth products, diet, weight-reduction, and other well-being products relating to skin care, bust enlargement, and so forth. The 21 company names used by Braswell have utilized 36 separate mailing addresses in Georgia and Florida.

The next three exhibits that we will put up relate to separate operations of Braswell. There are smaller blow-ups of these in the submitted testimony but they display how, when a mail stop order is presented, Braswell would next go to a telephone credit card system so the mails were not used. They found, so I am told, at this point that that is not a good means of advertising. The income is not as good as if it is by mail. They go back to another mail-order address in another State. That happened in all three cases that we have here, and the advertising is present and explanations of the advertising appear beneath the exhibits.

Mr. FORD. Excuse me, Mr. Chairman.

Mr. LELAND. The gentleman from Michigan.

Mr. FORD. I do not want to interrupt but would you keep that up there for a minute? I do not want to interrupt the witness but while that is there, these thoughts just popped into my mind. When you follow the first arrow to that second step where they are now on the telephone soliciting, am I correct that what you are suggesting is that you want to stop the dishonest solicitation? They are lying to somebody in the first exhibit up there. There is mailed material that is misleading or fraudulent and that is the scheme.

Mr. NELSON. And receipts are received by mail.

Mr. FORD. All right, but at that point what you are trying to intercept is misleading people.

Mr. NELSON. Yes.

Mr. FORD. Then they abandon the mail because you come after them, and they go to the second stage where they are now using the telephone.

Mr. NELSON. Yes.

Mr. FORD. What is the basis for our continuing interest in the post office once they have gone over to AT&T?

Mr. NELSON. I am going to address that a little later in my testimony.

Mr. FORD. Well, how do you make that jump? I do not follow, with my understanding of our mission and yours in the post office, some assumption that you can make the jump from the first to the second without some reason for doing so. What is it that links the post office to what they do with the telephone?

Mr. NELSON. The exhibit is to try to display that the mail-stop order is brought about, yet the operator goes on dispensing the same materials through a different medium.

Mr. FORD. All right, now, that is a serious concern for the U.S. attorney in prosecuting these people as scoundrels. What I want to know is, how does that concern us as a postal delivery system?

Mr. NELSON. It does not really relate to the postal delivery system. It is an avenue that addresses some means for the Department of Justice to address these firms who do circumvent the order by some other means.

Mr. FORD. All right. Are we going to be reimbursed by the Department of Justice for doing their job for them?

Mr. NELSON. Well, at this point we are just trying to portray the means of circumventing the order, the mail-stop order.

Mr. FORD. However, that second place that you have there could be handbills, radio advertisements. It could be anything that looks for suckers, couldn't it?

Mr. Cox. Mr. Chairman, if I may break in for just a second, in my own thinking about this, it is helpful to me to bear in mind that the core part of this statute—which has been in the books pretty much as it now is and as I am about to describe it for a long, long time, over 100 years—undertakes to slow down somebody conducting a scheme or a device for obtaining money or property through the mails on the basis of false representation. It is not the advertising through the mails necessarily that is drawn in question, it is just what I said, obtaining money or property through the mails.

Now I think what Inspector Nelson's testimony is intended to illustrate here is simply sort of factual background, a typical example of factual background that lies behind the provision in the Senate bill that talks about other means of interstate commerce, and we well understand your concern on that point. However, I think it is fair to look at what is depicted here as a natural outgrowth of something that very much did involve obtaining money or property through the mails by means of false representations, and in this particular example is about to involve it again. I suppose that you would want to think about whether it really makes sense to kind of leave a broad flank through which this protective

process that the Congress has set up can be readily circumvented, totally wide open, by allowing the use of 800 telephone calls and credit card transactions and that sort of thing as a different way of obtaining money or property. I believe that is all this testimony is intended to illustrate.

Mr. FORD. All right.

Thank you, Mr. Chairman.

Mr. LELAND. The gentleman from California.

Mr. DANNEMEYER. Would you please explain to me who invested any of you or someone working for you with the judgment to conclude that the South American diet product, as it is being advertised, was false and misleading? Who gave you that judgment?

Mr. NELSON. I have to defer to Mr. Davis for that, for the handling of the—

Mr. DANNEMEYER. Who gave you the right to say, as a matter of conclusion, that some advertised product by a promoter in our system was necessarily false and misleading, thereby enabling you to go after them?

Mr. COX. Sir, I think the Congress did that in the basic legislation.

Mr. DANNEMEYER. I admit the law says that.

Mr. COX. Oh, I misunderstood your question.

Mr. DANNEMEYER. Tell me how you went through the intellectual process of concluding that this product, among hundreds advertised in Christendom, was, on the basis of some intelligence you gleaned or something brought to your attention, false and misleading, so as to begin some process to stop it. Did you try the diet?

Mr. DAVIS. No; definitely not.

Mr. DANNEMEYER. Do you know anybody who did try the diet?

Mr. DAVIS. No; I personally do not.

Mr. DANNEMEYER. Well, how did you conclude that it was false and misleading?

Mr. DAVIS. I cannot tell you the details of that case. I am not that familiar with them. I can tell you in general how this type of case—and I think this one would undoubtedly follow the same route—

Mr. DANNEMEYER. I do not think your response would be all that helpful. I am asking, since you in your testimony, Mr. Nelson, are talking about the South American diet product, and I would be interested in your evaluation of how your system, whatever it is, concluded that this was a false and misleading product.

Mr. NELSON. I do not think our system, the Inspection Service's system, concludes that. I think there is something in the ad that, when the inspector saw it, indicated to him that there may be something suspicious about this, so a purchase was made of the material and it was examined by an expert. That then gets into the point where Mr. Davis' group takes off.

Mr. DANNEMEYER. An expert?

Mr. NELSON. Yes.

Mr. DANNEMEYER. Have you tried any lawsuits?

Mr. NELSON. No; I have not.

Mr. DANNEMEYER. Well, I have.

Are you a lawyer, Mr. Davis?

Mr. DAVIS. Yes; I am.

Mr. DANNEMEYER. Have you tried lawsuits?

Mr. DAVIS. Yes, sir.

Mr. DANNEMEYER. Have you had witnesses testify on behalf of your cause?

Mr. DAVIS. Certainly.

Mr. DANNEMEYER. Did you have witnesses testify on the other side?

Mr. DAVIS. Certainly.

Mr. DANNEMEYER. Concluding diametrically opposed conclusions to the witnesses that you presented?

Mr. DAVIS. No question about it.

Mr. DANNEMEYER. Yet you in your wisdom have concluded, based on some access to one expert that you have selected who may or may not have a bias, that the product necessarily is false or misleading, and you go after them?

Mr. DAVIS. Yes; but we do not make the decision. The decision is made by the judges.

Mr. DANNEMEYER. It is only 1982. We still have 2 years to go. Thank you, Mr. Chairman.

Mr. LELAND. The Chair would like some clarification on the "2 years to go" business.

Mr. DANNEMEYER. In 1984 the famous author says that we will arrive at a point where the all-knowing Government will make every relevant decision for man. We will be relieved of the necessity of any moral or ethical judgments because the nirvana will have arrived.

Mr. FORD. If the gentleman would yield, you see, we have to split the difference: The reason for 1982 is, I think 1984 started 4 years early and you are still waiting for it. If you have the time I will send you a copy of the Heritage Foundation blueprint for conservative government and you will find that 1984 is already blueprint-ed as early as October of 1980.

Mr. DANNEMEYER. You are saying 1980 but don't you mean 1976?

Mr. FORD. No; 1980. [Laughter.]

In 1976 we started working back toward the late 19th century.

Mr. LELAND. The Chair thought it was November of 1980. [Laughter.]

Mr. LELAND. Mr. Nelson, if you do not mind, you might proceed with your testimony.

Mr. NELSON. These three exhibits all portray the same type of thing I was trying to explain relating to the Braswell products. The next exhibit concerns a work-at-home, envelope-stuffing type scheme that took place in the West. The company in this particular case used 17 different names throughout 6 States—17 different addresses, I am sorry—under 9 company names, all to attempt to evade the mail-stop orders that had occurred.

The last exhibit concerns an organization called Brant Pharamcal. Brant is engaged in the sale of look-alike drugs, the amphetamine-depressant type. In Brant's case a mail-stop order was filed in February of 1982. Within days after that they started accepting and advertising telephone orders, requesting payments be mailed to a different address. That was stopped and a few weeks after that, as the exhibit will show, they went into telephone and common carrier type delivery of their products.

Some of the previous testimony received by the subcommittee has raised the issue of whether penalties for resumption of a scheme solely through credit card telephone orders would improperly extend the jurisdiction of the Postal Service into an entirely new arena of communications.

In our experience the use of mails continues to be an integral part of most such schemes, for publicity and for other purposes, except for transmitting the victim's money. Whether to try to deal with this kind of evasion as with the rest of the legislation is, of course, a policy decision which Congress must make. Our own view is that U.S. attorneys should be able to seek and Federal judges to assess the civil penalties proposed by the bill when the Government can show that the scheme is in fact a continuation and resumption—and I emphasize the word "resumption"—which is a test established by the bill of the activity covered by a previously issued mail-stop order.

The areas I have described are the areas of significant opportunity to improve administration of the present law by closing the loopholes which permit scheme operators to delay or avoid action safeguarding the victims' money.

We have noted the general concern which some have expressed in previous testimony that some of this proposed authority might be abused. In a free country such as ours, the avoidance of law enforcement abuse is an abiding concern which must permeate all our efforts to protect the public against unlawful activities. Both under present law and under the amendments proposed by these bills, the civil false representation statute has built into it the highest safeguard which our system of justice affords; namely, participation and oversight by the impartial Federal judiciary.

No one who prefers to refrain from voluntary cooperation with the Postal Service under this legislation can be subjected to any penalty or disruption of his business except upon order of a Federal judge after an open hearing in court. The Federal courts have always maintained the closest supervision over the administration of the mail-stop order procedure and that will continue to be the case under the amendments proposed by these bills.

The bills also require ongoing and detailed reporting to the Congress on the Postal Service enforcement efforts. We hope that the attention which Congress has devoted to the mail order deception problem over the last 2 years will continue in the future through close oversight of the progress of the enforcement effort. We want you to know what we are doing, what is being accomplished, and what is not being accomplished.

People understandably can be apprehensive about the implications of legislation when they are not close to the everyday problems being addressed and see only the necessarily general language of the proposed legislation itself. We believe that any fears on the part of those who are not targets of the present law will be put to rest when the Postal Service publishes the detailed procedures which will be required to implement these amendments. These regulations will spell out exactly how and when the written investigative demand authority will be used and what we will be looking for.

I want to emphasize as strongly as I can that the Postal Service support for this legislation extends only to closing loopholes which hinder us from doing a job we have already been assigned to do. We most affirmatively do not have the interest or the resources to get into any new or different kinds of investigations or to go after anything other than the kinds of schemes with which we have been dealing for years. It is our firm belief that the enforcement tools for helping people to recover their money before they are cheated by these kinds of schemes can be significantly improved without posing any threat to the interests of law-abiding citizens or to the rights of persons under investigation.

One further issue which has been raised, which concerns the administration of current law rather than these amendments, also warrants brief comment. It has been alleged that the mail-stop order procedure currently places the Postal Service in the business of passing judgment on the merits of books and pamphlets, in violation of the right of free speech. This is not correct. The law and the courts see to it that the Postal Service investigations focus on the truth of the advertising claims, not the truth or merits of the protected speech and the product which is offered for sale.

The Federal Trade Commission "mirror image doctrine" which has been mentioned as a suggested remedy is a statement of what we believe is already the law today. It summarizes principles which apply to the Postal Service under the case law which assures that administrative action respects constitutional and other legal bounds. Since the Postal Service already must apply these principles or be reversed in court, this is not an area where legislation is needed in our view.

In summary, Mr. Chairman, the Postal Service supports this legislative effort and looks forward to working with you and your staff to make any improvements which need to be made to these bills. Afterwards we also hope to receive your ongoing help in making this program do the job it should be doing for the American public.

We will be pleased to try to answer any questions at this time.
[The prepared statement and exhibits follow.]

STATEMENT OF CHARLES P. NELSON
BEFORE THE
SUBCOMMITTEE ON POSTAL
PERSONNEL AND MODERNIZATION
ON
H.R. 3973 and S. 1407

Mr. Chairman my name is Charles P. Nelson, and I am the Acting Chief Postal Inspector. I am accompanied by Mr. Louis A. Cox, General Counsel of the U.S. Postal Service and by Mr. George C. Davis, Assistant General Counsel, Consumer Protection Division, Postal Service Law Department.

Over a century ago, Congressional concern to protect the public from marketing schemes conducted by mail -- where the prospective purchaser has little opportunity to conduct a pre-purchase inspection of matter offered for sale -- led to the enactment of the criminal mail fraud statute (18 U.S.C. § 1341) and the civil false representation statute (39 U.S.C. § 3005).

As direct mail marketing has grown, a small segment of the industry which fails to adhere to the high standards of candor and honesty followed by the industry as a whole has, regrettably, also grown. Consequently, these consumer protection statutes are, perhaps, more important today than in the past.

Not only has the number of civil and criminal cases involving deceptive mail marketing increased over the years but so also has the sophistication of many deceptive mail order promotions. The civil false representation statute in particular is becoming increasingly ineffective in dealing with this problem.

This statute has a very simple mandate -- that persons selling goods or services by mail refrain from the use of advertising which will mislead prospective purchasers in any material respect. Unlike the criminal mail fraud statute, its purpose is not to punish intentional deception. Rather, its purpose is to preclude consumer losses caused by misrepresentation, whether or not deception was intended.

The principal sanction authorized by the statute is an administrative "mail stop order" which prevents the consumer's money from reaching the operator of the scheme and requires its return to the sender. The underlying expectation is that if the operator of the scheme is cut off from his profits, he must either reform his promotion to avoid misrepresentation or cease marketing his product by mail. This expectation is often not realized.

The proceedings which may lead to these orders are conducted pursuant to the Administrative Procedure Act (5 U.S.C. Chs. 5 and 7). A formal complaint is filed with the Postal Service's Judicial Officer. A copy of the complaint, a notice of hearing and our rules of practice are served on the promoter -- called the "respondent" in our cases. The complaint is assigned to a federal Administrative Law Judge who has no stake in the outcome of the proceedings. He or she presides over a formal evidentiary hearing where the respondent may be represented by counsel, present testimony, and cross-examine our witnesses. The Administrative Law Judge renders an "Initial Decision" which recommends, or not,

the issuance of a mail stop order. The entire record, including a transcript of the hearing, is reviewed by the Judicial Officer. If he concludes that the Postal Service has proven by a preponderance of the evidence (5 U.S.C. § 556(d)) that the statute is being violated, he will then issue a mail stop order. If he does so, the respondent may seek judicial review of that decision in a federal district court.

In practice, however, approximately half of our cases do not follow this entire course of litigation but are informally settled through consent agreements in which the respondent agrees to discontinue misrepresentation of his product or service.

Regrettably, the protection intended by the statute can readily be frustrated, and some major deceptive marketing schemes cannot be effectively challenged under it. S. 1407 would deal with these deficiencies by enacting four major changes in the present statute.

First, the bill would authorize the Postal Service to obtain, upon tender of the advertised price, any article or service being offered for sale by mail. An unreasonable failure (as determined by a United States district court) to provide the article or service would, for purposes of 39 U.S.C. § 3007, constitute probable cause to believe that section 3005 is being violated and authorize the court to issue a temporary mail retention order. The purpose of this provision is to counter a practice whereby unscrupulous promoters, by means of false advertising, induce people to send

orders for items that are not as advertised and then postpone filling the orders until after the advertising has run its course or, in some cases, forever. Proceedings under section 3005 typically turn on a showing by the Postal Service of a significant discrepancy between what is stated in an advertisement and what is actually offered for sale. To show this discrepancy, the Postal Service generally must be able to obtain a sample of that which is offered for sale. The longer a promoter may keep us from obtaining a sample of his product, the longer we must defer our proceedings and the less mail will ultimately be "stopped" if a mail stop order is issued. In our experience the time required to obtain the product often exceeds one month. The bill would reduce this source of delay by making the advertiser's unreasonable failure to sell us the advertised product or service a sufficient ground for a federal court, in its discretion, to take injunctive action under section 3007. Under Rule 65 of the Federal Rules of Civil Procedure, the courts are required to attempt to give notice to the defendant before issuing a temporary restraining order, which may last only ten days unless extended for 10 additional days, and are required to provide notice before issuing a preliminary injunction which, in these cases, normally extends until termination of the administrative proceedings. In our experience it is extremely rare for a court to issue any order under section 3007 without the defendant's being notified and having an opportunity to present his defense.

Second, S. 1407 would explicitly give the Postal Service the same kind of authority to inspect books and records relating to matters under investigation by the Postal Service that Inspectors General of other Government agencies currently possess. This authority would be particularly useful in investigating schemes involving apparent false representations that may be very difficult to prove under the current statute because the promoter is able to contend that the few consumer complaints we have received at the time the case is presented represent mere aberrations. We have no authority to subpoena witnesses or records to verify the respondent's allegations. For example, a scheme in which people are billed for goods or services they have not ordered can perhaps best be revealed by access to the promoter's records of pre-existing contracts. Similarly, schemes in which the promoter has no intention or capacity to provide the advertised product can best be exposed by allowing access to the promoter's shipping and inventory records. In many typical misrepresentation cases the written demand would seek to verify advertising claims that scientific studies validate the claims for the product. Here again, no administrative sanction or penalty would be authorized. If the promoter refuses to allow access to his books and records following a proper demand, the Postal Service would have to obtain a federal district court order requiring compliance. And, again, requiring judicial control over the imposition of sanctions, the bill would provide that unreasonable refusal to allow access to records may provide a basis for injunctive action under section 3007.

We have noted the concern which some have expressed in previous testimony that this proposed authority might be abused. In a free country such as ours, the avoidance of law enforcement abuse is an abiding concern which must permeate all of our efforts to protect the public against unlawful activities. Both under present law and under the amendments proposed by these bills, the civil false representation statute has built into it the highest safeguard which our system of justice affords, namely intimate participation and oversight by the impartial federal judiciary. No one who prefers to refrain from voluntary cooperation with the Postal Service under this legislation can be subjected to any penalty or disruption of his business except upon order of a federal judge after an open hearing in court. The federal courts have always maintained the closest supervision over the administration of the mail stop order procedure and that will continue to be the case under the amendments proposed by these bills.

We recognize the concern that has been expressed in these proceedings over the need for care in framing the procedures to implement this authority in order to prevent abuse. We favor the bill's present requirement of establishing detailed procedures in regulations resulting from public participation rather than writing these details in the statute. We anticipate that any procedures will be tested in litigation, and that administratively established procedures could more easily be modified to accord with the courts' decisions.

We have studied the rules adopted by federal agencies exercising similar authority and plan to propose a rule which would contemplate the following procedures:

The demands may only be issued by a limited number of managing postal inspectors. They must: state the nature of the alleged violation being investigated and the provisions of the law involved; describe the documents to be produced with sufficient certainty to permit their identification; prescribe a reasonable return date; identify the custodian to whom the material is to be made available; state the location at which the documents shall be made available; and, state, the rights of the recipient regarding compliance and note that upon failure to comply the Postal Service may seek a court order.

The rules would provide how service of demands may be made, allow for modification of the demands, establish limits on the use of the documents, and provide for their return to the owner.

The rules would provide that demands may not be served upon third parties unless an informal request has first been made and refused unless there is reason to believe the documents may be destroyed. No demand could be issued to a news or communications media to obtain sources of newsmatter.

I should like to stress that our thinking in this area is open-minded. We fully intend to be guided by the comments we would receive both from the Committee's deliberations and in response to our proposed rulemaking.

Third, the bill would remedy a weakness in the existing law resulting from the fact that it has little or no deterrent effect. The mail stop order that may eventuate from a current section 3005 proceeding is directed at blocking remittances responding to a particular false advertisement using a particular trade name and

address. Only mail so addressed is affected. So far as the current statute is concerned, a promoter who wishes to continue the same false advertising scheme need only change his trade name and address and thereby escape the consequences of the outstanding mail stop order until we can complete additional administrative proceedings. We have had cases where promoters have employed this tactic many times, and in each case the public is injured in the interim between the resumptions of the scheme and our completion of additional proceedings.

To illustrate this point, in the case of one promoter who peddled phony aphrodisiacs by mail, 55 different trade names and addresses were employed to evade the effects of 25 administrative actions. After each action, he simply moved on to new addresses establishing the same promotion under different names.

S. 1407 would allow the Postal Service to order the promoter to cease and desist from continuing the scheme and would authorize the federal courts to impose a civil penalty upon those who resume a scheme previously determined to have been in violation of section 3005. Once again, the sanction could be imposed only upon court order obtained through the assistance of the Department of Justice. We believe authorization to issue a cease and desist order is necessary to place the respondent upon fair, advance notice that his resumption of the scheme could result in the imposition of a penalty. The order authorized by the current statute places no direct obligation on a respondent -- it is directed only to a postmaster.

Fourth, S. 1407 would remedy another shortcoming in existing law. We have seen in recent years a number of instances where after a promotion has become the subject of a mail stop order, the promoter will continue to gather the fruits of false advertising by modifying his advertising to have gullible purchasers use a toll free line and credit card in lieu of the mails to remit payments or perhaps an alternative C.O.D. delivery service. In such cases, the bill would allow the federal courts to impose the civil penalty authorized upon resumption of the same scheme after the issuance of a mail stop order, even if in the resumed scheme, the promoter seeks to obtain remittances through an instrumentality of interstate commerce other than the mails.

The exhibits appended to this statement illustrate this point. In each case the promotion reflected in the comparative advertisements is substantially identical. The principal difference to be noted is that in the later advertisements -- following action by the Postal Service -- the promoter is seeking to obtain remittances for the product by telephone and credit card rather than through the mails.

Some of the previous testimony received by the subcommittee has raised the issue whether penalties for resumption of a scheme solely through credit-card telephone orders would improperly extend the jurisdiction of the Postal Service into an entirely new arena of communications. The exhibits appended to this statement illustrate how a promoter who previously seeks remittances by mail may shift to telephone/credit card receipts after action by the Postal Service. In our experience if the mails are used

initially to deceive the public regarding the product, in the resumed scheme the mails continue to be used for publicity and other purposes except for transmitting the victim's money. Whether to try to deal with this kind of evasion, as with the rest of the legislation, is of course a policy decision which the Congress must make. Our own view is that U.S. Attorneys should be able to seek, and federal judges to assess, the civil penalties proposed by the bill when the Government can show that the scheme is in fact a continuation and "resumption," which is the test established by the bill, of the activity covered by a previously issued mail stop order. Similarly, the provision authorizes no sanction to be applied by the Postal Service. Our only obligation under this provision would be to bring the resumed scheme to the attention of the Justice Department, which could then ask the federal courts to act if it felt that would be justified.

The bill does not authorize any additional regulation of activities in the private sector or impose any new recordkeeping or reporting requirements on any segment of the public. It does not authorize the Postal Service to impose any additional sanction or penalty. All provisions of the bill providing new sanctions or penalties vest that authority in the federal courts. We believe the bill, in this respect, is a carefully limited measure to fill in what experience has shown to be important omissions that have impaired the effectiveness of the false representations statute while avoiding the expansion of administrative powers.

I should like at this point to address several additional concerns which have been expressed in the course of this committee's consideration of the bill.

First, my testimony thus far has dealt with the effect of the bill upon the false representations statute. As we view the bill, its major significance will be to improve our enforcement of that statute. But one aspect of the bill -- the written investigative demand authority -- extends to all statutes enforced by the Postal Service except the Private Express statutes for which adequate authority already exists.

The intent of Section 413(a) in this regard seems to be to provide the Postal Service statutory authority similar to that conferred upon the Inspectors General of federal agencies to investigate false claims, fraudulent practices, embezzlement and similar offenses. The authority could also be used in the enforcement of criminal statutes for which the Postal Service has investigative responsibility, including the mail fraud statute (18 U.S.C. § 1341). With regard to the mail fraud statute, it should be noted that at the outset of an investigation of a deceptive mail marketing scheme, it often is not clear whether the civil misrepresentation statute, the mail fraud statute or both have been violated.

I should also note that to maintain comparability with the Inspector General statutes, the Postal Service would be required by the bill annually to report to the Congress on our activities in this area.

Secondly, I would like to comment upon our enforcement of the false representations statute in cases where the product being falsely advertised consists of a publication or other matter presumptively entitled to protection from government restraint by the First Amendment.

Although the First Amendment narrowly limits our authority to proceed against false and deceptive advertising of publications, the proscription is by no means absolute. Clearly, the opinions or ideas of an author are entitled to absolute protection from government interference, and their truth or falsity is not at issue in our cases. As long as there is no material discrepancy between what is advertised and what is delivered, Section 3005 is not applicable.

The concern of Section 3005 is "...a scheme or device for obtaining money or property through the mail by means of false representations...." Typically the "false representation" is in a product's advertising. Accordingly, our proceedings do not seek to prohibit the dissemination of false ideas but only of false advertising.

The Supreme Court has held that the regulation of deceptive commercial advertising is not proscribed by the First Amendment. ^{1/} And, in the case law that has evolved in Section 3005 cases, no distinction is drawn between advertising that falsely describes publications and advertising that falsely describes other products. ^{2/}

^{1/} See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770-771 (1976).

^{2/} See Hollywood House International, Inc. v. Klassen, 508 F.2d 1276 (9th Cir. 1974).

Accordingly, our administrative cases have held that if an advertisement for a written product falsely promises the results that can be achieved by following the procedures described in a publication, Section 3005 has been violated. To date, none of the challenges to our position have been sustained by the courts.

Cases involving products which consist in whole or in part of written matter -- such as pamphlets, diagrams, memoranda -- comprise a larger percentage of our cases. For example, in the typical work-at-home scheme, the product consists of a memorandum or pamphlet telling the buyer how to operate a similar scheme.

The Supreme Court recently denied certiorari in a criminal mail fraud case where the Fifth Circuit court of appeals held that the First Amendment did not bar prosecution of the promoter of a work-at-home scheme.^{3/} Our cases involving publications invariably involve a material disparity between the results the advertisement promises will be revealed and the results that are, in fact, achievable. Our recent cases, for example, have involved:

- advertisements promising to provide plans for building an automobile carburetor that will yield 200 miles per gallon, a result that cannot be physically achieved by the device described;

^{3/} Shano Franklin Tague v. U.S., 663 F.2d 105 (5th Cir. 1981), cert. denied, 50 U.S.L.W. 3695 (March 1, 1982), (No. 81-1403).

- a method of obtaining operable government surplus jeeps for under \$200 when, in fact, the government disposes of such property only as dismantled junk;
- a method allowing anyone to obtain \$500 and a free automobile from the government when, in fact, only persons meeting the qualifications of particular entitlement programs may expect to receive any semblance of the promised benefits;
- a method of clearing the body's arterial system of accumulated plaque through diet when, in fact, the diet plan furnished could at best only prevent somewhat the initial build-up of plaque;
- a method of obtaining high-salaried employment in Alaska when, in fact, employment of the types described was not available;
- a method of picking winning race horses which, when tested, was found valueless.

Perhaps the most troublesome cases in this area have involved advertisements for the sale of methods of treating various medical disorders through procedures that are not recognized by the consensus of informed medical experts as being efficacious or, in some cases, safe. As in all cases, it is our burden to prove by a preponderance of evidence that the advertisement is false. In these cases, the issue typically is drawn between scientific experts presented by the Postal Service who testify that, based upon controlled scientific testing or established medical principles, the method

will not yield the results claimed by the advertising, and lay witnesses who support the method based upon anecdotal results or theories that are not accepted by the scientific community. Of course, it is the function of the presiding judge to determine the qualifications and credibility of the witnesses in the proceeding and to weigh the evidence accordingly.

Again, we are not concerned with the truth or falsity of the method or views related in the book itself. Our concern is limited to the advertising, and, most commonly, the deficiency in the advertising is the express or implied claim that the material has established scientific validity rather than merely being the views of the author.

If the advertising accurately describes the content of a publication as being merely the views of the author or expressly states that the author's views may not be consistent with the consensus of informed scientific opinion, the fact that the procedures described in the book are inconsistent with current scientific opinion does not constitute false advertising. The right to disseminate views inconsistent with current scientific opinion is clearly in the public interest and clearly protected by the First Amendment. Where the advertising expressly or impliedly misrepresents that the method is consistent with current scientific opinion, the public not only fails to receive, as advertised, a scientifically established method but may be misled into failing to seek effective medical treatment in reliance upon the falsely advertised procedure.

In regard to our enforcement of Section 3005 against false advertising for publications, it has been suggested that the bill be amended to include the Federal Trade Commission's "Mirror Image Doctrine" -- an enforcement policy statement, adopted by the FTC in 1971 (36 Fed. Reg. 13,414) to guide the Commission's staff with respect to false advertising cases against publications. We believe the "doctrine" represents a reasonable balancing of the constitutional right of publishers to exercise a free press and the public's right to be free from false advertising in the sale of publications. We believe that in the enforcement of the postal false representations statute any decision of the Postal Service which is inconsistent with the "doctrine" and the case law upon which it is based would be overturned by the courts. We, accordingly, see no need to incorporate the "doctrine" into Section 3005 and intend to follow the "doctrine" in any event.

In conclusion, I would respectfully suggest that the American public widely believe that they have a significant measure of protection against fraud and deception when they use the mail system to purchase merchandise or service, to make investments, or to seek employment. Sections 3005 and 3007 are among the important guarantors of that protection. And they are effective when not undermined by loopholes.

In recent years these statutes have been enforced with positive effect against false advertising of drug products that closely resembled well-known amphetamines and other controlled substances. Such "look alike" drugs are widely offered to youngsters as real "speed" and can themselves cause serious and sometimes fatal effects.

Numerous schemes purport to offer, and to pay handsomely for, simple at-home work that appeals to older citizens, the disabled, and the recently out-of-work. Before the applicant finds out that most of the work is to recruit others who are as gullible as he, the promoter has extracted a \$15 or \$20 payment for a "starter kit."

The ever-prevalent cosmetic ads with their exaggerated claims have developed a new sophistication. In recent years the promoters of these multi-million dollar enterprises have come to rely on slick presentations of apparently scientific "proof" that a pill or potion will grow hair on a genetically bald pate, rejuvenate cells, improve memory or intelligence, and rid the body of cell-destroying free radicals.

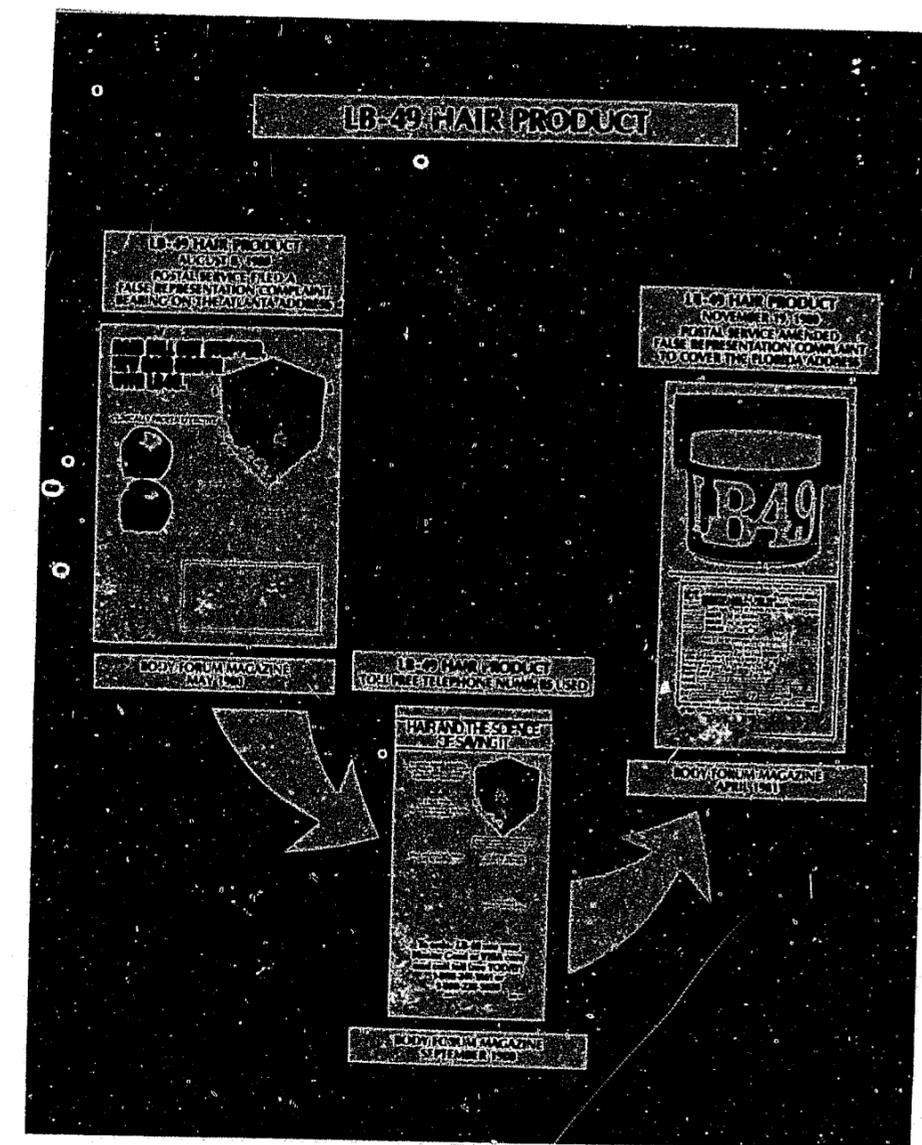
Businesses, schools, banks, even law firms are perennially victimized by false billing schemes that involve photocopy supplies, cleaning chemicals, light bulbs, and advertising for non-existent or falsely described directories. If people believed they had no recourse against deceptive mail order practices, the integrity -- and the revenue from use -- of the mail system would suffer serious harm.

For over a hundred years, the Nation's Postal Service has been charged by the Congress with the faithful execution of the false representations statute (although the detail of the statute has been modified from time to time). This responsibility is fairly assigned to the Postal Service. If false advertising were prevalent in the mails, public confidence in direct mail marketing would suffer with consequent inroads into mail volume. The

national postal system runs on volume. Moreover, Postal Service investigators and attorneys have developed substantial experience and skill in making the false representations statute work. The bill would simply make the statute more effective by closing the loopholes that we have described.

BRASWELL/COSVETIC LABS ET AL
TIME FRAME (JULY 1980 - JULY 1982)

TRADE STYLES	21
ADDRESSES USED	36
COMPLAINTS FILED	136
FALSE REPRESENTATION ORDERS	18
CONSENT AGREEMENTS	15
NUMBER OF PRODUCTS INVOLVED	50
FINAL DECISIONS PENDING	70



FORMULA 40 HAIR PRODUCT

FORMULA 40 HAIR PRODUCT
AUGUST 8, 1980
POSTAL SERVICE FILED A
FALSE REPRESENTATION COMPLAINT
BEARING ON THE ATLANTA ADDRESS



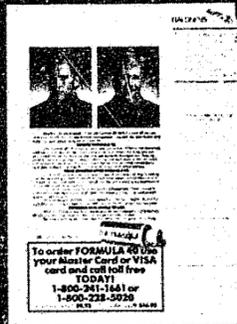
BODY FORUM MAGAZINE
JUNE 1980

FORMULA 40 HAIR PRODUCT
NOVEMBER 19, 1980
POSTAL SERVICE AMENDED
FALSE REPRESENTATION COMPLAINT
TO COVER THE FLORIDA ADDRESS



BODY FORUM MAGAZINE
APRIL 1981

FORMULA 40 HAIR PRODUCT
TOLL FREE TELEPHONE NUMBERS USED



BODY FORUM MAGAZINE
SEPTEMBER 1980

SOUTH AMERICAN DIET PRODUCT

SOUTH AMERICAN DIET PRODUCT
OCTOBER 21, 1980
POSTAL SERVICE FILED A
FALSE REPRESENTATION COMPLAINT
BEARING ON THE ATLANTA ADDRESS



BODY FORUM MAGAZINE
JUNE 1980

SOUTH AMERICAN DIET PRODUCT
DECEMBER 19, 1980
POSTAL SERVICE FILED A
FALSE REPRESENTATION COMPLAINT
BEARING ON THE FLORIDA ADDRESS



BODY FORUM MAGAZINE
APRIL 1981

SOUTH AMERICAN DIET PRODUCT
TOLL FREE TELEPHONE NUMBERS USED



BODY FORUM MAGAZINE
DECEMBER 1980

PHILLIPS WORK-AT-HOME ENVELOPE STUFFING SCHEME

TIME FRAME (JULY 1978 THRU JULY 1981)

TRADE STYLES	9
ADDRESSES	17
CIVIL COMPLAINTS FILED	17
FALSE REPRESENTATION ORDERS	17

CRIMINAL ACTION

INDICTED 2-17-82
CONVICTED 4-19-82
SENTENCED 6-17-82

VICTIMS 43,000
ESTIMATED LOSS \$500,000

LOOK ALIKE DRUGS
BRANT PHARMACAL AND B&M LABS
PERIOD OF MAIL ORDER OPERATION
AUGUST 1979 THRU MARCH 1982

LEGAL STIMULANTS

CIVIL COMPLAINT FILED - JULY 2, 1981
FALSE REPRESENTATION ORDER - FEBRUARY 25, 1982

LATEST ADVERTISEMENT

NOTE STATEMENT:
"ALL ORDERS C.O.D.
ONLY VIA UPS"

Mr. LELAND. The Chair would like to thank you for your testimony.

You told us that over the last several years you have found increasing public concern about the problem of mail-order schemes built upon false advertising. You also referred to the possibility of there being a public perception that the mails are becoming a haven for deceptive merchandising schemes. Can you tell us how that public concern has been expressed or how it has come to your attention?

Mr. NELSON. It is generally expressed in complaints from the mail-order consumer, in written complaints, in verbal complaints about failure to receive items, receiving items that are not what the buyer thought they would be when they ordered, that type of effort.

Mr. LELAND. At the beginning of the hearings we also heard that people had gone to the Better Business Bureau and other agencies, a few agencies similar to the Better Business Bureau, and posed their complaints also. Have you heard anything from the Better Business Bureau or other agencies that might be advocates for consumers?

Mr. NELSON. Yes; we hear frequently from Better Business Bureaus around the Nation. We have close contact with them about this very thing.

Mr. LELAND. What is their concern, and how do they or do they presume to collaborate with you at all on these matters, or have they offered any kind of suggestions to you as to how you should proceed to resolve the problems without the legislation?

Mr. NELSON. I do not believe we have received any such suggestions from them. Their concern and what they try to do is evaluate the complaints they receive and, if they think they involve mail order, get them to the Postal Service.

Mr. LELAND. You say that mail fraud is a serious and growing problem. Can you tell us what evidence you have encountered that the problem is growing?

Mr. NELSON. Again, I think it is by complaints from the public, from other regulatory agencies, basically in that area.

Mr. LELAND. You told us that the time required to obtain a product often exceeds 1 month. If you had the authority to purchase a product or service that this bill would provide, then you could increase the speed of your proceedings by that amount of time. Is that not correct?

Mr. NELSON. That is correct, yes.

Mr. LELAND. What would be the effects of your being able to move against fraudulent promoters in this much speedier manner?

Mr. NELSON. I think it would benefit us greatly. I cannot tell you in numbers but it would be, as you say, from 5 weeks to possibly 1 day. We could move that much faster to resolve these situations.

Mr. LELAND. Chairman Ford?

Mr. FORD. Thank you. Several witnesses during the hearings have asked us to amend the legislation to include the mirror image doctrine. And toward the end of your statement today you say that the Postal Service already abides by this doctrine and intends to continue doing so. And for that reason you do not think it is necessary. Even if you think it might be superfluous, am I correct in as-

suming that you would have no objection if we were to amend this bill by an amendment reflecting the "mirror image"? I would even tender a public offer to have the proposed language gone over by Mr. Cox and his folks before we agreed on its final form. If it seems that we have some consensus to the wisdom of the doctrine, there is no reason why it could not be in there. I say this because there are several groups advocating this, it seems to me, who have a longstanding interest in the integrity of the mails: The book publishers, the magazine and newspaper publishers, the direct mail marketing association, and the ACLU. If we can do a little something to reassure them that there is a positive side to this bill, it might be helpful. Would you have any objection to cooperating with us in putting a mirror image amendment in the bill?

Mr. NELSON. Not at all.

Mr. FORD. Mr. Cox, do you have any objections to that?

Mr. Cox. I have certainly no objection to cooperating and indeed a real eagerness to cooperate.

Mr. FORD. Would you assist me in drafting a suitable amendment that we could mutually support with a clear conscience?

Mr. Cox. I would sure be happy to give it a good try.

Mr. FORD. All right.

Mr. Cox. Can I add one thing on the mirror image doctrine? It seems to me that, sure, it might be reasonable to put the thing in the bill but there are a couple of points that may suggest themselves to you which point the other way, and I think they are worth your careful consideration. One is that the mirror image doctrine itself is a general statement of policy by the FTC. It starts off, "The Commission, the FTC, as a matter of policy ordinarily will not proceed against advertising in certain circumstances," so that the FTC's own mirror image doctrine is not at the moment cast as some kind of an ironclad, rigid rule that never admits of exceptions.

The second point is the one that I think we have tried to make in our testimony, that as we understand it this is no more than a reading of wise—and we fully agree with it—case law, or a sort of distillation of that case law which we think probably should apply to our affairs whether or not it is stated in the bill. However, since it is case law, possibly there may be still further developments which would make a still better doctrine, and if you freeze it into a statute perhaps you are not as open to the benefits of those developments as you would otherwise be.

One possible other thought which I would put forward to you, without taking away one bit of my first and most important thought of wanting to cooperate, would be that perhaps the Postal Service should do exactly what the FTC does and adopt this as a matter of policy in its regulations and be bound by them, which would still leave us with the prospect of, if there should be further judicial case law developments, we could take advantage of those.

However, the most important point is, you bet we want to cooperate.

Mr. FORD. Well, thank you very much. I would like to discuss that other possibility as well. I have spent enough years working with and representing law enforcement interests to know that law enforcement officers have enough to do without trying to interpret

court decisions, and that they are very strong respecters of the pragmatic rule book. I feel that I would like to afford the Postal Service that kind of protection and assistance.

The second question I have, really, is to solicit from Mr. Nelson something that is, to the best of my knowledge, so far missing from this record. Everybody talks about the Postal Inspection Service in this room as if everybody knew what the Postal Inspection Service is, who they are and what they do. Could you in a rather short way give us a quick history? How did we get a Postal Inspection Service and what historically has been the role of the Postal Inspection Service? What is the mission of the Postal Inspection Service? Just sort of generally, what kind of people do you have and what kind of professionals do you employ and what kind of categories of people do you have? Then, finally, who do you find yourself directly accountable to?

Mr. NELSON. The Inspection Service began in the late 1700's and what we call postal inspectors, at that time I think they were called postal surveyors but the duties were there to investigate crimes involving the U.S. mails.

Mr. FORD. Well, wasn't the original focus of the Postal Inspection Service to guarantee that the postal employees protected the integrity of the material that came into their possession?

Mr. NELSON. Yes, and held to account for receipts.

Mr. FORD. We used to build post offices with the little galleries and peep windows that created a constant impression with the employees that they were being watched and so it was wise not to steal, one of the most insulting things I think we have ever done to anybody. I do not think we do that anymore, do we?

Mr. NELSON. In very large facilities we may; in most smaller ones we do not.

Mr. FORD. However, until fairly recently in the history of the Inspection Service your primary concern was over the actions of the employees of the Post Office, the proper accounting for funds by postmasters and special delivery messengers and rural carriers and things of that kind. About when did we start imposing on you duties to go outside of the actions of postal employees?

Mr. NELSON. Well, I think from the onset we had duties that involved burglaries of post offices which did not necessarily involve employees. I am not that current on all the legislation. In the late 1800's of course we had the mail fraud statutes enacted and the civil statutes enacted that took us into the areas of fraud and lotteries and other aspects of it.

We have about 1,895 inspectors. We devote probably between 25 to 30 percent of our time to audit work, financial audits, operational-type audits. About 60, 65, to 70 percent is in criminal work which is made up of internal crimes such as you have alluded to—employees who are dishonest, who embezzle, who steal mail—mail fraud, nonmailable-type investigations such as bombs in the mail and other dangerous and nonmailable items in the mail, robberies, holdups and robberies of postal carriers, postal employees, and postal facilities, and thefts of mail from carriers' vehicles or collection boxes, whatever it may be, and various security items, protecting high-value mail, protecting our employees, that type of effort.

We have—and I cannot give you the specific numbers—we have a number of attorneys, we have CPA's, a good mix, I think, of blacks and Latins in our regular EEO-type efforts.

Mr. FORD. Do you still have scuba divers?

Mr. NELSON. No, we do not have scuba divers.

Mr. FORD. Dog handlers?

Mr. NELSON. We have two dog handlers in the country, and they are with the security force, the uniformed security force.

Mr. FORD. What happened to that pretty scuba diver you had a few years ago?

Mr. NELSON. I think she resigned.

Mr. FORD. You put her picture in the annual report—

Mr. NELSON. That is right.

Mr. FORD. And that was what brought my attention to the growth of the Postal Inspection Service. I took a renewed interest in your activities ever since then. [Laughter.]

That was about half a dozen years ago.

Mr. NELSON. Yes, about 7 years ago, I think, something like that.

Mr. FORD. I do not think you put her picture in again after that committee hearing.

We also had great cooperation from you in alleged safety violations over in Secaucus, where the postal inspectors were really the ones who blew the whistle on the employees who bypassed safety devices. That would not be in the nature of a criminal investigation but it was your department that conducted the most meaningful, specific onsite investigation to find out what had happened over there. What other kinds of functions like that do you perform?

Mr. NELSON. Well, we have those accident investigations where death or very serious injury does occur. We have, again, the civil proceedings that we have talked about today insofar as misrepresentation is concerned. We have other efforts that relate strictly to the Postal Service, such as recruitment and training of postal police officers and postal inspectors.

Mr. FORD. I am looking at a list of the civil administrative actions running from 1975 through 1981 and I notice that the number of cases presented to the USPS law department in 1975 was 170. And it went along for a while and in 1980 went up to 227; in 1981 it went up to 371 and it looks like it is headed there again because you had 162 by some time in the second quarter. When one looks at the number of complaints filed, 112 in 1977, 454 in 1981—the FRO's issued were only 80 in 1977 or 157 in 1981 and the number of consent agreements signed, only 52 people did that in 1977 and 177 did it in 1981—that on its face shows a tremendous increase in your activity in this particular area and it presumably also shows a very high success rate, because almost half of them are copping a plea, if you will, by those consent agreements. Why do you need more authority in the face of this kind of success pattern established over these several years?

Mr. NELSON. Well, a few years ago we purposely changed the direction of a great deal of our fraud work. We backed away from some of the fraud cases that involved credit card companies, for instance, who would mail out credit cards without request, various insurance-type things where they had their own inhouse policing of these crimes, and we developed the position that we should direct

our basic attention to fraud-type efforts that involve the postal consumer, to maintain the integrity of the mail.

We went so far as to—we trained, I think, 15 attorneys about 2 years ago in Mr. Davis' shop and put them out in the field to get a better handle on what was going on, and we have purposely tried to increase that to give the consumer better protection.

Mr. FORD. Well, that both pleases me and concerns me. We have a surplus over there right now. I was recently in Michigan with a postmaster where we were both proudly telling the chamber of commerce about the great success story reflected in the operation of the post office, and how you develop by better utilization of manpower—it is a labor-intensive business—the kind of productivity increases the post office has been showing. I am a little bit concerned lest we undermine Mr. Bolger's exceptional record by draining off resources, and for other reasons as well. I was concerned to see that we were going to start registering people for the draft. I am not satisfied yet that we get paid adequately for that. They have not yet asked us to go out and find the people who do not register but somebody will get that idea before long.

I go through long lines in my district office, which is located in a post office, of people waiting for food stamps, to get to my office, and if you wanted to mail a package you would not be able to get to the window to mail it, not because they do not, when you once get to the window, have the clerk handling that segregated from the clerk handling the food stamps, but because the entire establishment is full of unemployed auto workers getting food stamps.

Over the years everybody has sort of used the post office as a handy place to put things. They have nice lobbies, so let's put the 10 most wanted men up there and raise hell with the postmaster if he forgets to change the pictures. Every time somebody gets a bright idea of a better approach to get at a nagging problem, there is a temptation to use the Postal Service to do it.

I have become quite defensive of the institution. It suffers from enough attacks, it seems to me, from the outside so that we ought to really be concerned above and beyond the kind of concerns that have been expressed by, special attention given by people who have been at these hearings.

Mr. Chairman, I feel that this committee has a special duty to protect the post office against being used by everybody that wants to use it. No matter how well-meaning people who advocate a broader role in consumer protection for the Postal Service, I am concerned that we are able to expand into this kind of added activity without further draining away the resources.

How do we pay for the Postal Inspection Service? Doesn't that come out of the general revenues of the post office?

Mr. NELSON. Yes, that is true.

Mr. FORD. Have you made any projection of what your manpower needs would be over the next 5 years for the expanded activity that you would have with this expanded ability?

Mr. NELSON. We do not foresee any additional manpower to accomplish this. We are doing the job now. What this will enable us to do is a more efficient job faster, and if anything I could see a reduction.

Mr. FORD. Well, presumably you are going to increase the number of prosecutions by these more efficient ways to get at the problem, aren't you? Wouldn't it be reasonable to expect that there would be some substantial increase in the number of prosecutions that would result from your activity?

Mr. NELSON. That is probably correct, and I would defer to Mr. Davis to take care of that since he oversees the prosecution of these types of cases.

Mr. FORD. Well, let's assume it for a moment, that you are going to increase by, say, 20 percent the number of cases that are successfully developed to the level where the U.S. attorneys would go forward with prosecution. Your people have to be there as witnesses and to provide backup at every stage of this thing. I am mindful of trying to represent a police department when I had 20 percent of my cops tied up testifying in traffic cases every Monday morning and we had difficulties with that. There is a point of diminishing returns on this in terms of your personnel. Isn't it reasonable to assume that if we are not careful we are going to put a strain on your personnel requirements?

Mr. NELSON. I suppose it is reasonable to assume that but I do not foresee that occurring. From the prosecution, if you will, of the administrative cases, I cannot speak to that insofar as the attorney requirements to handle these before the administrative law judges.

Mr. FORD. Well, let's call your attention to one of the things the ACLU mentioned in their testimony. They said Tuesday that the bill would give the Postal Service the authority to monitor door-to-door sales, telephone advertising, and a range of other activities which employ instrumentalities of interstate commerce but are not connected with the mail.

Mr. NELSON. Well, I do not think that is true. Getting back to what we talked about earlier on the resumption of activities and the 800 telephone number and the credit card—

Mr. FORD. Let me see if I understand you. You say, "I do not think that is true." Is it your understanding that the bill would not give you the authority to do that?

Mr. NELSON. I believe that is my understanding of the bill. We do not intend to monitor anything else.

Mr. FORD. Therefore, if we changed the bill so that you did not have the authority to monitor door-to-door sales, telephone advertising, and other activities which employ instrumentalities of interstate commerce, it would not affect the bill from your point of view in terms of what you are trying to achieve?

Mr. NELSON. I do not read the bill that way. I would prefer to have Mr. Cox or Mr. Davis, maybe, respond to that.

Mr. FORD. I am not really trying to trap you—

Mr. NELSON. I realize that.

Mr. FORD. But there are some bothersome parts of this bill and, to the extent that we can get rid of them because of the people who are concerned about them and raise really serious—

Mr. NELSON. The "other instrumentality" part of it again gets to what we talked about earlier on usage of an 800 telephone number and credit cards, or Western Union, whatever it may be, in resuming these activities. We have no authority there. If we learn that the activities are resumed, and we frequently learn of it through

organizations like Action Line in the newspapers, radio stations, and television, in my view the bill indicates at that point we would advise the Department of Justice that this has occurred and they have the authority to go on with it, not the Postal Service.

Mr. FORD. All right. Suppose that—and I see this on my television set—they advertise a set of knives and they give you \$50 worth of free equipment to go with them and a full place setting of everything, and when they get up to about \$1,000 worth of material they sell it to you for \$19.95—“write down this number, 800-some”—and you call it in. Then you find out that it is lousy stuff and it is not what you thought you would get.

However, you order it by telephone; the ad comes by television; and they deliver it by UPS. There are some people who believe that under this bill you would have to entertain a complaint like that and investigate it. Do you think that is correct or not?

Mr. NELSON. No, I do not think that is correct.

Mr. FORD. What would have to happen in that sequence to make it subject to your view of what the bill would cover?

Mr. NELSON. In my view what would have to happen is, that company would have previously had to have been the subject of a mail-stop order, and when they resort to the TV advertising and the 800 telephone number the Postal Service would presumably be advised by consumers or newspapers or other media that, “Hey, we saw that this was stopped but they are doing the same thing again.” At that point we would notify the Department of Justice.

Mr. FORD. Respectfully, I have to remind you of what you said a little while ago in response to Mr. Dannemeyer about how that particular case, the South American diet plan or whatever it was, that you had up there, how did that come to your attention. When he asked you about that you said that one of the postal inspectors saw the ad and suspected that it probably was advertising something that was a phony, so he sent away for the material, then had that analyzed and determined that indeed it was not what it was represented to be.

Now what you are saying to me is that if that outfit was reached by one of your mail-stop orders and they switched over to using television to advertise, the 800 number to order, and the UPS to deliver, that because they had previously been violating the postal law you would use that as a reason for continuing to pursue them into these other avenues of interstate commerce.

Mr. NELSON. In my view, we would use that if it came to our attention simply to notify the Department of Justice that they have resumed activities.

Mr. FORD. Well, that is where I guess we have a problem. I do not understand why we should pay out of the revenues of the post office for you to pursue them beyond the point where they are using your delivery service.

I sense that you feel that once you are onto a scam that is bad for the consumer, that you have some kind of a continuing responsibility that goes beyond their use of the mails.

Mr. NELSON. I think we feel the Department of Justice has some kind of responsibility because—

Mr. FORD. Oh, I completely agree but they can get all the money they want when they come over here and ask Congress for it, and I

am fighting like a tiger to get a couple of pennies in supplementary money for the Post Office. I cannot even get my own committee to vote unanimously for that. It is hard to get money for you folks in the Post Office, believe me, it is hard, but I can get all the money for law enforcement that the Justice Department wants. All they have to do is say they need some more money and they get it. That is part of the problem we have here. Shouldn't they be coming up here looking for law enforcement money to pursue this course of action, instead of the Postal Service?

Mr. NELSON. I understand your concern and I accept that. The portion of the bill I think is simply to address, if you will, recidivism, when the order is issued and they circumvent it by going to the television and the 800 phone number and the credit card purchases.

Mr. FORD. Well, Mr. Chairman, you and the other Members have been very generous. I have used more than my time. I will come back if we have a chance after the other Members have talked to you and I thank you for your answers.

Mr. LELAND. The gentleman from California.

Mr. DANNEMEYER. Thank you, Mr. Chairman.

After the hearing the other day I wrote a letter to the Postal Service and asked for information concerning the *Magnolia Laboratory* case. Mr. George Davis, I would assume, who is one of the three witnesses before the subcommittee now, responded and he was kind enough to do so. In his response he set forth the process of how this particular prosecution commenced.

It seems there was an inspector by the name of Michael P. Flynn who apparently, in accordance with his assigned duties, was reading the *National Enquirer*, and as a result of having read the *National Enquirer* on October 14, 1980, he noticed an ad for a book entitled, “Stale Food Versus Fresh Food.” Suspecting that what he read was a violation of the law, in that in the opinion of the reader, Mr. Flynn, it was false and misleading, Mr. Flynn caused a process to come into existence which resulted in an expert, a medical doctor, reading the book and rendering the opinion: What do you know, “Yes, it fits within the purview of false and misleading,” so the prosecution commenced.

The defect in this whole process was the beginning. One of the rudimentary things you learn in law enforcement is that you must retain your objectivity. When you lose your objectivity and become a partisan, you are not performing law enforcement; you are performing advocacy. Law enforcement works best, it seems to me, when a citizen complains to the existing authorities and comes in and says, “Something is amiss.” Then a person who has the responsibility and the judgment to determine if something indeed is amiss can begin to use the prerogatives of public office, and everything that that entails in our system, one of which is respect for law and order and due process. Only at that point can you hope to maintain your objectivity.

I am deeply disturbed by the practice of a Federal employee whose supervisor has instructed or tolerates such a person on public salary reading the *National Enquirer* to determine if somebody is violating the law, and I hope in the course of these questions to peruse that.

Now any of you on the panel can feel free to answer these questions: How many USPS employees are actively engaged in reviewing ads in magazines in the manner that I have described?

Mr. NELSON. I cannot give you the exact number. I would say it is probably 20 to 25 people.

Mr. DANNEMEYER. Are they located in different places in the country?

Mr. NELSON. Yes, that is right.

Mr. DANNEMEYER. Can you just give me an example of the geographical distribution of these readers?

Mr. NELSON. Well, the country is split up geographically into 17 divisions, and we have a division specialist who works, addresses this type of thing, reviews ads in various publications.

Mr. DANNEMEYER. How many publications does the Postal Service subscribe to for the purpose of reviewing?

Mr. NELSON. I do not want you to pin me down to this number but it is probably very close to about 140 or 150.

Mr. DANNEMEYER. Do you include the American Medical Association Journal in that list?

Mr. NELSON. I do not have the list with me; I cannot tell you.

Mr. DANNEMEYER. Well, wouldn't it be logical? It would appear probable that certain claims about drugs or remedies are published in the American Medical Association Journal, and by what stretch of the imagination are we to conclude that just because establishment medicine in the United States of America asserts that a certain drug will alleviate a particular symptom, that they are correct?

Mr. NELSON. No, no. I do not agree with that at all but I think what we try to monitor are those publications which experience shows us have advertisements of this type. Now I do not know if the American Medical Association publication carries advertisements. I cannot give you that answer.

Mr. FORD. Would the gentleman yield to me?

Mr. DANNEMEYER. Go ahead.

Mr. FORD. I ask you not to leave our union out. One of the things I find interesting in the American Bar Journal is the constant flow of advertising for cheap but fun trips all over the world, and group insurance of all kinds, new, super-duper computer systems so you do not have to remember anything about the law, you can push a button and get the answer to any question. I hope you watch them, too. Do you?

Mr. NELSON. Again, I cannot answer if we watch the American Bar Journal publication or not. We—

Mr. FORD. I think I join the gentleman. I would like to observe that any time somebody can come before this committee and cast a net wide enough to catch Mr. Dannemeyer and me in the same cast, you really are shooting with a blunderbuss. [Laughter.]

However, I think he and I are thinking at least in part along the same lines. What criteria could we use that would exclude the ABA Journal and the American Medical Association but would include some other kind of publication.

Mr. NELSON. I think the criterion is a publication that carries numerous advertisements. That is what we look at. Some publications have no ads, they accept no ads. We look at, I believe, between 140

and 150 that carry multiple advertisements for any number of things.

Mr. DAVIS. Mr. Ford, I know of one case we had where the advertisement did appear in the American Bar Journal. It was a lovely little device called a truth detector which you could set on your desk and, while you were interviewing someone in your office, this machine would light up if the person lied. I guess it was quiet if the person was telling the truth. That was the subject of one of our cases.

Mr. FORD. I want to see that because in my years in law practice, the light must have been on all the time.

Mr. DAVIS. In my business it would be very, very useful.

Mr. FORD. The last person anybody tells the truth is their own lawyer. [Laughter.]

Mr. DANNEMEYER. If I may continue, please explain approximately a 46-percent drop in total number of convictions between fiscal year 1980 and 1981. The drop was from 9,576 total in 1980 to 5,410 in 1981. What is the explanation for that?

Mr. NELSON. Well, the big explanation is, again, a change in our program direction. Probably about 3,500 of those would be under the category of external crimes, and for a number of years we addressed external crimes by identifying individuals who cashed or possessed checks or credit cards or other items of stolen mail. We looked at our program long and hard and decided this really is not helping us curtail theft that much. We could just pour inspector, inspector, and inspector in, and continue to arrest the possessors or the forgers of the checks stolen from the mail.

Therefore, we developed a program where we are putting the greater share of our resources into people who fence these items, into gang activities where they break into numerous postal vehicles, or collection box activities, into the organized part of it in an effort to stem the tide. We realize those are down; we expected those to be down.

Mr. DANNEMEYER. We talked earlier about health-related cases. Aren't many of these health-related cases such as "Stale Food Versus Fresh Food," initiated by the Postal Service without any consumer complaints?

Mr. NELSON. Yes, that is true.

Mr. DANNEMEYER. USPS has apparently refused numerous Freedom of Information Act requests for its guidelines on choosing matters for investigation and prosecution. Doesn't the public have a right to know which cases you go after and why?

Mr. NELSON. I am not that conversant with the refusals of any FOIA requests. I think, you know, we have a section in the USPS and in the Inspection Service that reviews all these requests, and if the determination is made that the material is exempted because it is an internal working manual or whatever it may be, we generally refuse to release that material.

Mr. DANNEMEYER. The USPS has repeatedly said it needs cease and desist authority because defendants can simply use new addresses and you must start a new administrative action each time. Isn't it true that under your rules of procedure in section 3005 you may amend the stop order to allow for any new name or new address?

Mr. DAVIS. That is correct but only after a full administrative procedure. You know, we do not do it ex parte or unilaterally. You would have to file an action with the administrative law judges, with a judicial officer of the Postal Service, and the matter would be heard by the judicial officer to determine whether or not, for example, it is the same person. The mere fact that you see an ad that is identical to the one you have had before does not mean it is the same person. I mean, anyone can copy an ad and run it, so the amended order results through the process of a second administrative case.

Mr. DANNEMEYER. You say that is burdensome?

Mr. DAVIS. Well, it is preferable to not having people start the second scheme. I mean, if people were dissuaded from coming back again and again and running the same fraudulent advertising, we would not have to bring those cases and we could concentrate on other cases. That is the intent of the penalty provision.

Mr. DANNEMEYER. If the initial action which results in a—what do you call it, a stop order?

Mr. DAVIS. Yes, sir.

Mr. DANNEMEYER. Then you contend that the stopee will move. You contend that you have to get a new stop order in order to reach that person at a new address?

Mr. DAVIS. Yes, sir, that is correct.

Mr. DANNEMEYER. What is wrong with that?

Mr. DAVIS. Well, there isn't anything wrong with that. It would just be better if they did not come back and we would not have to do it again.

Mr. DANNEMEYER. Do you have many instances where these culprits will, having received a stop order, vacate their place of origin and then move to another location and again resume their nefarious activities?

Mr. DAVIS. Yes, sir, we certainly do.

Mr. DANNEMEYER. Examples of fraud the USPS has brought here to testify are victims of real fraud under title 18, United States Code, section 1341, yet this bill mainly expands powers under a false representation statute, title 39, United States Code, section 3005, a separate matter. Isn't it misleading to present a victim of one crime and try to use them to justify expanding your powers in another area?

Mr. DAVIS. I am not sure what examples are alluded to. The examples that Inspector Nelson presented today were entirely civil cases. To what cases are you referring or what victims?

Mr. DANNEMEYER. Can you imagine a factual situation that fits within the purview of the sections I have described?

Mr. DAVIS. Yes. The cases that Inspector Nelson, for example, showed the committee a few moments ago on the placards were all cases under the administrative statute.

Mr. DANNEMEYER. Section 3005 proceedings have been termed "kangaroo courts" in light of the approximately 99-percent conviction rate in 3005 cases and approximately 100-percent conviction rate in health-related cases. Do you maintain that these proceedings are an impartial process?

Mr. DAVIS. No question about it.

Mr. DANNEMEYER. You claim they are impartial?

Mr. DAVIS. They certainly are.

Mr. DANNEMEYER. Have you heard anyone contend otherwise?

Mr. DAVIS. Yes. A lot of the people that have lost the cases contend just that.

Mr. DANNEMEYER. Can you cite any health-related section 3005 case out of the last 200 or so which the USPS did not find for the USPS?

Mr. DAVIS. I cannot off the top of my head. We do lose some cases. We do not lose very many. I think our win record has to be something approaching 96 or 97 percent but the reason for that is the selectivity that goes into the cases. We do not bring weak cases; we bring winning cases, cases where the advertisement is blatantly false and the evidence is clearly in our favor, and the administrative law judges and the courts find that. We would be losing cases if we were bringing cases against advertisements that are just somewhat misleading or wishy-washy or full of puffery or what have you. Our cases are selected on the basis of our perception that they are just plain, blatantly false, and to date our winning record has reflected the accuracy of those determinations both in the agency and the courts.

Mr. DANNEMEYER. When you have a matter involving nonorthodox health products or books, do you consult experts in that area of health practices or just mainstream doctors?

Mr. DAVIS. We consult only mainstream doctors, and the reason for that is, that is the source that the judge accepts as valid in these cases. The ultimate determination, Mr. Dannemeyer, of who to believe in a hearing and who has the correct knowledge and who has the most expertise is not ours. It is the judge's, and the judge in any case might accept the word of a holistic practitioner over a doctor of medicine or a chiropractor over a doctor of medicine but I have not seen a case where they have done that. In most of our cases in the health area the respondents could produce those practitioners as witnesses and they do not. Now they must have a reason for not doing so. My suggestion to you is that the reason is, they do not believe they would be believable.

Mr. DANNEMEYER. You know, in the history of western civilization there was a time when science believed the world was flat. Do you know what we did to scientists who advocated that it was round?

Mr. DAVIS. No, but I am sure it was not funny.

Mr. DANNEMEYER. We put them to death because of heresy. There was a time in the history of our Republic when we burned witches because we believed they were possessed of the devil.

Mr. DAVIS. It has not been long since we put leeches on people's arms to cure them of disease or drilled holes in their heads to release evil spirits.

Mr. DANNEMEYER. Do you really think it is the function of the Government to set itself up as an arbiter between what a free people have a right to claim in terms of what they believe can alleviate human suffering, and what a free people, educated, in our democracy have a right to read and believe for themselves?

Mr. DAVIS. I do not.

Mr. DANNEMEYER. Well, then, are you uncomfortable with your current job?

Mr. DAVIS. Certainly not. What you have just expressed is, in my opinion, totally protected by the first amendment; the right to express any idea, no matter how unorthodox, no matter how unfounded, unreasonable, unscientific, or un-anything else you can think of is clearly protected by the first amendment without any doubt in my mind or in any court's mind.

However, when you get into the realm that we deal in of advertising a product that says that it is valid, that it has been proven, that it will work, and you deliver that to people and it does not work, then you are in the realm of false advertising of your view. You can express your view but do not falsely advertise it. Tell people, "This is my idea. I think stale foods are better than fresh foods, and I think they will work, and I think they will keep you from having arteriosclerosis," but do not tell them, "This is a startling new discovery that has cured all sorts of people."

Mr. DANNEMEYER. Don't you think people are equipped with enough intelligence to evaluate the dignity of claims that are made?

Mr. DAVIS. No, sir; I am afraid I do not.

Mr. DANNEMEYER. I disagree with you, sir. I think you are underestimating the ability of the American public to read, understand, assimilate, and act intelligently, and I suspect one of the reasons you have come to this conclusion is that your self-interest is involved because you have to protect your job.

Mr. DAVIS. Well, I think my conclusions are based upon a little more than that. I think my conclusion is based upon now having lived through somewhere between 1,500 and 2,000 of these cases where you have, in virtually all of them, a record that says that the advertising is just absolutely false, that they will not work, it has no validity, yet people, thousands of people, bought it. They used it. They were cheated. Their perception of the advertising when they read it obviously was not that accurate, and if it had been, they would not have bought it.

Mr. DANNEMEYER. Well, I have additional questions but there may be other members who would like to ask some. I thank the Chair for the indulgence and the time you have extended to me.

Mr. LELAND. The Chair will certainly recognize the gentleman in another round of questioning if he cares to ask the other questions he has.

The Chair would now like to recognize the gentleman from New York, Mr. Gilman.

Mr. GILMAN. Thank you, Mr. Chairman.

Mr. Nelson, on page 5 of your statement you indicate that the written demand mechanism that has been proposed by the bill is similar to that assigned to inspectors general of Federal departments and agencies. Would you explain how the inspectors general of these departments and agencies exercise that authority now?

Mr. Cox. I cannot give you a really complete explanation of that. I have read the Inspector General Act. It is probably more intrusive—to use a slightly loaded word—than anything that is proposed in this bill. I cannot tell you how the HHS and the Department of Education and other departments and agencies that have inspectors general under that act, how they actually operate. I would have to go outside to learn that.

Mr. GILMAN. Could you give us—

Mr. DAVIS. I can supplement that a little bit. The Inspector General Act, unlike a number of other statutes which give to agencies, for want of a better general term, agency subpoena power, is an act that just creates a blanket authority to examine records relevant to violations against the agency that the Inspector General is responsible for.

Under that statute those agencies, each agency that is covered by the act, have promulgated definitive regulations to govern how their subpoena power will be utilized in the investigation of their cases: Who can use it, when they can use it, how they can use it, what they can get, what they cannot get. To date there has been some litigation under the statute, not much. There have been probably a half a dozen or fewer cases involving the exercise of that authority. They have thus far been in favor of the inspectors general who have exercised the authority.

It is, as Mr. Cox says, a somewhat more intrusive authority than the one we have here. It is broader. They can generally interview people. It is a subpoena which carries with it much more of a connotation of "you had better comply or else" than you have under this written demand authority under this bill which is a more voluntary process. If people do not choose to honor it, then it is our obligation to satisfy the Justice Department and, in turn, the Federal district courts that we have a reasonable basis for getting the information and it should not be withheld.

Mr. GILMAN. I thank you.

The Senate bill, S. 1407, directs the Postal Service to issue regulations concerning reasonable conditions for compliance with written demands. Could you discuss these procedures that you contemplate and that you outline on page 7 of your written statement?

Mr. DAVIS. Yes, sir. We are still, I guess, in the process of refining what we would propose to publish in the Federal Register as a rule to govern this. It is largely, what we have to date is largely lifted out of title 18, United States Code, section 1968, which is a statute that governs how the Department of Justice may exercise similar authority under different legislation. It sets forth who may issue the investigative demand, what the return time may be, what sort of documents you can get and not get, and what do you do when you are told, "We are not going to comply."

We will need to promulgate regulations that are as extensive as that. They will have to delineate who within the Postal Service would have authority to issue this. Our present thinking is that that would be limited to the same managing postal inspectors who at present have authority to issue mail covers: That is the inspector in charge of each of the 17 divisions that Mr. Nelson mentioned and one of his assistant inspectors in charge.

In the area of written demands that would go to third parties, that is, persons who are not the direct subject of an investigation, the rule as we are now dealing with it would not allow assistant inspectors in charge to issue the subpoena, the written demand. It would have to be issued by the inspector in charge, to put a little more control on it. The rule provides, consistent with the Supreme Court's decisions upholding administrative subpoenas as being not in violation of the fourth amendment, that no civil demand may be

issued in any matter after the case has been presented to the Department of Justice for criminal prosecution. It provides that no written demand may be issued for any document which could not be constitutionally claimed by a grand jury or under the Federal rules of discovery. I think that is the substance of it as it now stands.

Mr. GILMAN. Mr. Cox, did you want to add anything to that?

Mr. COX. No, sir.

Mr. GILMAN. Mr. Nelson?

Mr. NELSON. No.

Mr. GILMAN. Several of the witnesses who testified have raised the concern that the Senate bill violates the fourth amendment because of the written demand authority which the bill provides the Postal Service. Would you care to comment on those criticisms?

Mr. DAVIS. Yes, sir. I think that they are baseless. The statements that I have read that deal with the fourth amendment area—the American Civil Liberties Union statement and the statement of the Congressional Research Service, in particular—are statements that follow the law of the Supreme Court in the area of administrative searches, not in the area of administrative subpoenas.

The Supreme Court, as early as 1946 and consistently since then, has carved out an area, has delineated an area in which administrative subpoenas may validly be issued, exercised, and enforced consistently with the fourth amendment. If you would bear with me for one moment, I would like to read one paragraph from a Supreme Court decision that I think summarizes the law in this area, if you would like.

I am quoting from the case of *See v. City of Seattle*, title 387, United States Code, section 581, pages 544-545, and it is a 1966 decision.

Mr. GILMAN. Would you repeat that annotation for us?

Mr. DAVIS. Yes, sir. *See v. City of Seattle*, title 387, United States Code, sections 541, 544-545, 1966.

Mr. GILMAN. Thank you.

Mr. DAVIS. The quotation is:

"It is now settled that when an administrative agency subpoenas corporate books or records, the fourth amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute but it must delimit the confines of a search by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply."

In other words, the administrative subpoena is valid if it is reasonable, if it is specific, if it is understandable, and if the courts enforce it, not the agency. Our bill, I believe, satisfies those conditions.

Mr. GILMAN. Would the panel have any further comments with regard—

Mr. NELSON. I do not have any comments.

Mr. COX. Just to underscore that in a nutshell, as I understand it, the fourth amendment is protective of people and their papers

and possessions and so forth against unreasonable searches and seizures, and there is no search or seizure of an unreasonable kind involved in this legislation.

Mr. GILMAN. I want to thank the panel.

Thank you, Mr. Chairman.

Mr. LELAND. Mr. Nelson, do you feel that the written demand authority is valid without specific standards to control its use?

Mr. NELSON. Oh, no, not at all. I think specific standards are needed.

Mr. LELAND. What is the intent behind expanding the mail-stop order to include cease and desist orders?

Mr. NELSON. Cease and desist, I think, in the terminology of the legislation may be poor wording. What we are trying to say is that the respondent or the individual operating the business should somehow be put on notice, "If you resume this activity and it comes to our attention, an appropriate notice will be given the Department of Justice."

Mr. DAVIS. Mr. Leland, could I add to that just briefly this thought: The order that is authorized by 39 U.S.C. 3005, the so-called mail-stop order, is an order which is defined by statute. It is an order that is directed only to a postmaster, a specific postmaster. It does not order the person who has conducted the false advertising scheme to do anything; it does not order him to stop, start, modify, or anything else. It simply tells the postmaster, "Do not deliver any mail to this man in response to that advertisement."

Now when we were dealing with this legislation in the last session of the Congress, someone in the Senate spotted that and said, "I do not like it. This business of issuing an order to a postmaster and telling him to do something and then coming along a year or two later and socking an advertiser with a penalty when you have never told him to stop doing anything seems basically unfair, and we think you have to change the penalty provision in the bill"—as it then stood—"to put the person who might suffer a penalty on notice that he might suffer a penalty." The phraseology they suggested at the time was the cease and desist order.

The concept is simply notice. That could be handled as well by saying that the mail-stop order shall include notice to the respondent that if the scheme is resumed, he may be subject to the penalties provided by statute.

Mr. LELAND. If the court says so.

Mr. DAVIS. Well, of course the penalty provision is enforced only by the courts. There is no authority, contrary to a number of statements in these hearings to date, in the Postal Service to assess any penalty. The penalty authority is totally in the courts.

Mr. LELAND. Thank you. I appreciate that.

Let me ask you, Mr. Nelson, you have a poster campaign in the post offices warning people against mail fraud; to what extent has that been effective?

Mr. NELSON. I think it has been effective in bringing this to the attention of more of the mail order consumers, which has in turn brought more attention to us from them regarding cases or poor business dealings they have had with various businesses. It is part of an overall prevention program. We would like to stop these things if we could. If we could somehow magically put a stop to

misrepresentations and mail fraud, that is what we would like to do and that poster is one little part of preventing and advising the public.

Mr. LELAND. In your closing remarks, you said you look forward to working with me and my staff to make any improvements which need to be made to this bill. What kind of improvements did you have in mind?

Mr. NELSON. Possibly one would be the cease and desist thing we just talked about; maybe that should be reworded in some fashion. In reading the testimony of the past few hearings, there are other areas that may be by the wording or something there is an intent there that was not, in my view, really originated by the framers of the legislation, and I think we could work on those things.

Mr. LELAND. The Chair has no further questions.

The gentleman from Michigan.

Mr. FORD. Well, to pick up on your very last comment on what was really intended by the framers of this legislation. Heretofore the Postal Service has indicated that they are sort of spectators, that this legislation was initiated one night when the star was shining brightly in the East and they have disclaimed paternity but Mr. Davis refers to it as our bill. Isn't it time for us to find out, if the Postal Service initiated this legislation and drafted it?

Mr. NELSON. To the best of my knowledge the legislation was initiated and drafted by the Pepper staff.

Mr. FORD. Well, now, that is the common perception that we had. Why, Mr. Davis, do you refer to it as "our bill"?

Mr. DAVIS. I can explain that, I think. It is not an accurate statement.

I have lived with this proposed legislation for 3 years. Its principal effect will be to greatly improve the efficiency of the office I manage, and I guess in my thinking it has become my bill or our bill.

Mr. FORD. You are not responsible for the paternity but you are willing to claim adoptive status? [Laughter.]

Mr. COX. To be the benevolent godparent.

Mr. DAVIS. Yes, in this case I certainly am.

Mr. FORD. I would like to go back to something that Mr. Gilman came close to. It has been suggested that we should amend the inspection authority provisions of the legislation in either of two ways: to require you to obtain a warrant prior to making any demand, or to build in safeguards and procedures similar to those contained in the FTC's civil investigative demand statute. How would you react to those alternatives?

Mr. NELSON. I am not that familiar with the FTC civil investigative demand statute. Perhaps one of these gentlemen can comment better than I from that standpoint.

Mr. DAVIS. Yes, I have some comments I would make on that. It is beyond any doubt that very definitive, clear, and specific standards governing the exercise of this authority must exist before it is first exercised or it is going to be shot down in the first court that sees it. It would clearly violate the fourth amendment if we went out without any kind of standards, willy-nilly, to exercise this type of authority.

In one line of legislation, typified I guess by the inspector general statutes, the Congress simply granted the authority to subpoena books, records, and persons, left it up to the agency to adopt regulations to manage those details consistent with the Supreme Court's decisions, and they have done so. So far, since 1978, they have fared very well in the courts.

In another line of legislation, including the FTC Act, including title 18, United States Code, section 1968, including the antitrust civil investigative demand authority of the Justice Department and some others, the Congress has written the standards into the statute. From my perspective, I would prefer to have the standards in the regulations because I expect that these things will be litigated and will be litigated fully for a number of years. As the courts interpret the law we may need to modify our procedures accordingly. It is easier to do it by regulation than to do it by coming back to the Congress but, whichever way the controls come about, they have to come about. If you want to write them into the bill, that is fine.

I think, as a particular example, the FTC regulations as I recall them are probably—they deal with enforcement of very broad statutes that are sometimes used for very extensive examination of records: All pricing records over umpteen years on a product, memorandums of meetings with competitors' boards, and on and on under the antitrust and the pricing statutes that the Federal Trade Commission administers. I do not think that for the kinds of investigations the Postal Service would be using this that you need that kind of detail. I think that the detail in the 2- or 3-page statute which governs the Justice Department's authority, title 18, United States Code, section 1968, is much closer to the kind of investigations we would be dealing with, and our regulations that we have been developing are pretty much copying title 18, United States Code, section 1968. There are some other precedents around. I mean, you can look at a number of them but I think you may find the FTC thing just covers a lot more than—

Mr. FORD. Yes, but what you have said does not reassure me all that much because I cannot think of a statute that the FTC—at least quickly—would be enforcing that parallels the provision of the law that you are enforcing here, that does not require the proof of intent to defraud.

Mr. DAVIS. The FTC statutes do not involve any proof of intent to defraud. There is no intent element in section 5 of the FTC Act whatsoever, or in any false advertising statute that I am aware of. The intent element is an element, typically, of criminal statutes, not of the civil statutes.

Mr. FORD. I see.

The provisions with respect to this very general and broad language on page 2 of the bill—"The Postal Service may require, pursuant to written demand made under this section, that any officer or employee"—any officer or employee—"designated by the Postal Service be given access at reasonable times to inspect or copy any books, records, documents, or other objects that the Postal Service has reason to believe relate to any matter except a matter pertaining to chapter 6 of this title or the provisions of title 18 concerning the carriage of letters by private express, to wit, first class mail,

under investigation by the Postal Authority pursuant to its authority under section 404(a)(7) . . .”—this gives you the authority to investigate everything. “Any written demand under this section shall describe with reasonable particularity the items sought to be examined and shall specify a reasonable time and place for making the inspection. No written demand issued under this section may impose an unreasonable burden on the party to whom the demand is issued. The Postal Service shall, after reasonable notice and opportunity for interested parties to comment, issue regulations providing procedures and conditions for exercising its inspection authority under this section.”

What do you think the average small businessman is going to do when a postal inspector walks in and flashes his credentials to him and says, “I want to see your books.”

Mr. DAVIS. He is going to have to flash a lot more than that. He is going to have to serve upon that person—

Mr. FORD. Well, can't I walk in with the letter making the demand and hand it to you and say, “I am here”?

Mr. DAVIS. No. No. You could not, consistent with the fourth amendment, do anything like that. That would be clearly outside the scope of the permissible use of an agency's subpoena power as delineated by the court.

Mr. FORD. How should we protect you from, as you described it, being kicked out on your tail by the first court that sees it? Your inspectors are just like all other law enforcement people. Somebody is going to do that unless we tell them not to do it or that they cannot.

Mr. DAVIS. That is correct. The type of standard that has to be enunciated somewhere in the statute or in administrative regulations implementing the statute has to narrow that down. I mean, it has to be narrowed down to the constitutional limits that the Court has set. The document would have to give the people fair notice. In our view the thing should have right on the front of it, right on the face of it, a simple English statement: “Your compliance with this is voluntary. If you do not comply with, the Postal Service has authority to go to a Federal court and seek an order requiring you to comply.” No mumbo-jumbo, just a simple, straight declaration of what the case actually is under the law.

Our regulations as we have been developing them address that but it has to be delineated, either in the regulations or in the statute. It has to be somewhere. You cannot just leave it wide open.

Mr. FORD. Well, who in your view is outside the parameters of that kind of demand?

Mr. DAVIS. Outside the parameters of the demand?

Mr. FORD. There is nothing to define or limit, except what you believe is important to your investigation. If you decide that it is pursuant to section 404(a)(7), then it is a reasonable demand on its face under this provision of the bill.

Mr. DAVIS. No. No, sir. That does not follow. The fact that it is pursuant to a statute would not mean that the demand itself is reasonable. The demand could exceed the scope of the statute.

Mr. FORD. Suppose on line 11 of page 2 of the bill we removed section 404(a)(7) and put section 3005, which is the false representation provision of the statute, limit it to that?

Mr. DAVIS. I think we would have a problem with that. At the initial stages of an investigation of what is believed to be a false advertising practice by mail, it is generally not possible to know whether you are dealing with a criminal fraud violation or you are dealing with a civil misrepresentation violation or both. At that very early stage of the investigation, too little is known to know that. It may not be until you get the books, records, documents, advertisements, whatever you are seeking, that you can make that kind of judgment.

Now if you have limited the statute to the civil statute, to section 3005, and if it were used and an inspector went in and got hold of records that show that the guy never ships anything, never intends to ship anything, has never shipped anything and is just flat out cheating people, you would have a case of criminal intent to defraud but we might not be able to pursue it because the way we got the evidence was under authority of the civil statute, limited to the civil statute. We might be thrown out when we get into the Federal criminal courts for having obtained the evidence without authority.

Mr. FORD. You might be thrown out for the use of the specific evidence but—

Mr. DAVIS. You might be able to back and fill, you might be able to.

Mr. FORD. The Justice Department would not be precluded from using all the information that you in good faith were gathering, assuming you were dealing only with the matter of a civil penalty, and then in the course of it developed what is clearly a criminal violation and I, in complying with your request, have given all sorts of evidence against myself, haven't I?

Mr. DAVIS. Yes, you may have.

Mr. FORD. Now my limited understanding of my protection is that I can prevent you from using in my prosecution a specific document that came to you out of my possession when you were doing this without advising me of my rights and protecting my rights. But I cannot prevent you from using all of the information contained therein to develop a case against me.

Mr. DAVIS. Yes, or in another example, if the document is served on a corporation rather than an individual.

Mr. FORD. The Magazine Publishers Association testified this week. They point out that under section 2 of the bill, a postal inspector could walk into any citizen or business enterprise in the United States which uses the mail and demand to inspect and copy books and records. They go on to say, “There are several hundred thousand religious, educational, scientific, philanthropic, labor, and other organizations authorized by law to mail second- or third-class mail matter at preferred rates. This language,” they say, “would permit a postal inspector to demand, inspect, and copy any named object in the possession of that church or foundation or society or labor union on the grounds that the demand was pursuant to a civil investigation of the qualifications of the organization to mail at nonprofit rates or some other civil matter investigation related to the post office.” Now how do you respond to their suggestion that that is made possible.

Mr. DAVIS. There are internal regulations in the Postal Service, I think specifically in the Domestic Mail Manual, which address ex-

actly what you have just read to us. The burden of proof is upon the mailer. If he has a second-class permit or a third-class permit or a permit to give him a reduced rate, he has to satisfy the Postal Service that he is complying with those directions.

For instance, he prepares his mail and takes it to the post office and has his mail preparation forms and the mail. He gives that to us. We have the records right there, as a matter of course, that we can look at. We can examine the mail as a matter of course.

Mr. FORD. Do you remember what happened in this country a few years ago when one of our colleagues on this committee brought forth a bill that would require people who solicited money for charitable purposes through the mail to disclose the amount of the proceeds that were actually dedicated to charitable purposes?

Mr. DAVIS. I have some recollection of that, yes.

Mr. FORD. The roof fell in on us. Every church in the country was upset. What triggered it, I think, was one particular religious group that had raised so much money that they were lending somebody their divorce proceeding money or something of the kind. It was close by here and everybody read it, and it seemed logical. Why not? If they are getting a special postal rate to solicit this money, find out whether it indeed inures to the benefit of a charitable objective or it goes into a pot that is spent for a whole lot of other reasons.

The revulsion to the idea that we would open charitable organizations to that kind of scrutiny was so great that it was overwhelming. It became politically very, very sensitive, as an understatement, and so the gentleman was persuaded not to put us on the spot by bringing forth that great idea again.

I am again coming back to the idea that if we have in here the kind of prospect that can be described as the Magazine Publishers have described it, as the ACLU and other groups have described it, that is going to trigger that kind of reaction out there. We may have you busy doing nothing except responding to harrassment of one kind or another.

Mr. DAVIS. Well, there is a difference here, I think, between the charitable disclosure legislation you are mentioning and this bill, at least one clear difference in my mind. That effort sought to have a very up-front, specific kind of disclosure in any solicitation letter telling people where the money goes. The churches viewed that as an invasion of privacy and, as you say, it died.

This seems to me to be really quite different in that if we were to use one of these written demands as that organization fears, it has to be backed up by the courts. We have no authority under this legislation to force people to comply with one of these things. It has to be taken to a judge and the judge has to find that we have reasonable grounds for doing what we are doing, that we are doing it in a reasonable manner. You know, those are awfully broad standards. Now what is reasonable or what is unreasonable from the viewpoint of a judge is just about as broad as you can get. If he does not like what we are doing, that is the end of it. That is what it boils down to in my mind, and as Mr. Minton pointed out, "The Postal Service will say, 'We would never do that,' so I do not need to say it but it is a very farfetched example.

As Inspector Nelson testified, we already have about all the authority you could ask for in these special rate mailings to require people to prove they are entitled to them. We do not have to demand anything or go to a court, or anything like that. We just say, "You say you are entitled to the rate. We do not believe you. Prove it." They have to come forth with the records or they do not get the rate or they do not keep the rate. You know, if you have that kind of authority, why would you use this? I do not know what you would get out of it. I mean, what record would you get out of a church or a labor union or whatever that would tell you about the use of the mailing privileges that you do not already know? They are bringing the mail to us; they have to demonstrate to us that they qualify for the rate. What would you ask for? What kind of information would you ask for? I mean, if we went in and said, "We want all of your love letters to your girl friend," would a judge back us up on that?

Mr. FORD. Well, you mentioned your commitment to this legislation and your concern for it, and therefore I assume that means that you want to protect the legislation for its ultimate passage. But aren't you concerned that communicators like Time magazine, Newsweek, Reader's Digest, some of the above respected by virtually everyone in this country as valuable sources of information express the kind of serious concern they are expressing? Doesn't that mean it is time to back off and have another look?

Mr. DAVIS. Sure; I think there is some communication problem with this legislation that we have not mastered. It was a real disappointment to me to read that statement. It is so farfetched—

Mr. FORD. It goes beyond his statement. There have been direct communications to the members of the committee by people whose expertise one has to respect, indicating that their concern is not superficial but is genuine and rather straightforward and forcefully presented. Therefore, that is why some of us have taken another look at what this thing was that came from good old Claude Pepper and started running through here. When you look at the—

Mr. DAVIS. Sure; have you asked the question, when people raise these concerns: Why isn't the protection of the courts adequate? That is my personal confusion on these very legitimate statements that have been filed, is why—

Mr. FORD. Let me answer it only partly facetiously: I thought Mr. Dannemeyer would catch you when you cited a Supreme Court decision from the Warren court. If that does not connote to you why there is something less than universal acceptance of the tender mercies of the court, then you have not been in town as long as I thought you were.

Mr. DAVIS. That is a good point.

Mr. FORD. You will never make a whole lot of people happy if you say, "Just trust the court." You and I might be willing to take that as lawyers, up to a point, but the public is not going to accept that and these groups are not going to accept the idea that they should be subjected to the tender mercies of the court, if they think that the rules of the game are being changed from a situation where they are not now subjected to that threat and they have a new threat.

Mr. DAVIS. Yes.

Mr. FORD. What we have to do is find a way to answer those concerns in a legitimate way, or it is going to be very difficult to get the legislation and even more difficult to keep it on the books after it goes there.

Mr. DAVIS. Yes.

Mr. FORD. Thank you, Mr. Chairman.

Mr. LELAND. Thank you.

It is the intention of the Chair to recess now for another 20 minutes. We have a 15-minute quorum call that is on right now, in the last 10 minutes, and a 5-minute vote pursuant to that quorum call.

[Recess taken.]

Mr. FORD. The Chair would now like to recognize the gentleman from California.

Mr. DANNEMEYER. Thank you, Mr. Chairman.

I would like to postulate a case if the proposed section 413, found on page 2 of the act, S. 1407, would become the law:

The Bible contains 66 books, The first 4 books of the New Testament contain an account of a man describing himself as the Son of God. Jesus Christ is His name. Jesus Christ claims to have lived on this Earth about the beginning of Christendom. He claims that He was crucified for blasphemy, hung on a cross, and He rose again from the dead. The claim is that people who have faith in Him can attain eternal life.

Now from the standpoint of an atheist, what I have just described is poppycock. It is false and misleading to an atheist, so an atheist comes in to you or you have an atheist who works as one of your 17 inspectors, and among the publications you peruse to protect the public interest, you select the Bible one day. You conclude that, in the atheist's eyes, the claims of Jesus Christ are false and misleading. Anybody suggesting that there is a hereafter based on faith must be out of their mind, and we must stop that insult to the intelligence of the American public.

So, if this section becomes the law you show up at, say, the Catholic diocese headquarters in Chicago; you and your inspector ask to look at all of the books and records that are extant in that office in order to determine how that particular diocese has been administering its affairs as one who claims to have a belief in Jesus Christ, therefore false and misleading in the eyes of the atheist. As I see it, you would be required to prosecute anybody who attempted to mail a Bible through the U.S. mail because it contained false and misleading information in the eyes of the atheist worker for the post office. Couldn't that happen?

Mr. DAVIS. What were your last words, sir?

Mr. DANNEMEYER. Couldn't that happen?

Mr. DAVIS. No, sir.

Mr. DANNEMEYER. Why not?

Mr. DAVIS. Well, there are a number of reasons.

First of all, the statutes that we are concerned with apply not to the truth or falsity of matter mailed; they apply, rather, to the truth or falsity of advertising which seeks remittances of money through the mail.

Mr. DANNEMEYER. Well, the church collects a lot of money.

Mr. DAVIS. By false advertising?

Mr. DANNEMEYER. In the eyes of an atheist it must be false.

Mr. DAVIS. Well, let's go to the next step. The next step is: The first amendment would most clearly protect any speech in the religion area from any kind of Government intrusion of that sort.

Mr. DANNEMEYER. Oh, would it really?

Mr. DAVIS. Yes, it would.

Mr. DANNEMEYER. You say it protects religion. How about speech? What about the guy who claims that there is a difference in this book publication, the difference between stale food and fresh food? Why wouldn't the first amendment free speech rights protect him in his ability to spread his propaganda as he sees the light?

Mr. DAVIS. Well, he would not come within the religion protection of the first amendment.

Mr. DANNEMEYER. Just plain speech.

Mr. DAVIS. Well, his claims are subject to scientific validation.

Mr. DANNEMEYER. Scientific validation?

Mr. DAVIS. Yes, sir.

Mr. DANNEMEYER. Would we call an expert witness to determine whether or not the claims of Jesus Christ fit within the—

Mr. DAVIS. The first amendment would bar the case. You could not have the case.

Mr. DANNEMEYER. Well, what I am suggesting to you is that I think you people are on very dangerous grounds when you come up and make a serious suggestion that your agents, in an advocacy sense, would have the right to come in to a businessman and say, "Give me your books and records because we want to start perusing them to determine whether we can find something on which to hang our case."

Mr. DAVIS. I could not agree with you more.

Mr. DANNEMEYER. We do not live that way in this country and I pray we never will.

Mr. DAVIS. I agree with you completely.

Mr. DANNEMEYER. However, this is what you are asking for.

Mr. DAVIS. No; a written demand would not, could never be so broad as you have just stated. It would have to be—

Mr. DANNEMEYER. Listen to the language.

Mr. DAVIS. I know the language. I know the language well.

Mr. DANNEMEYER. I will read it. Listen, please.

The Postal Service may require, pursuant to a written demand made under this section, that any officer or employee designated by the Postal Service be given access at reasonable times to inspect or copy any books, records, documents, or other objects.

It does not say with a court order. It just means that a postal agent would come in with his identifying data and say to the businessman or citizen of the United States., "Let me see your books."

The citizen says, "The door, sir, is there. See you later." The postal inspector says, "Sir, you do not understand. If you do not get me these books and records now, I am going down to court and get an order and compel you to do that and you will have to hire a lawyer, you will have to pay that lawyer, and we will see who is going to get these books and records," and he walks out.

The next thing you know, here comes a process server from the court telling this businessman that the postal fellow was right; he is going to have to go to court and defend himself. About that time

he is going to come flying into his Congressman's office and say, "What are you people doing? Just what are you doing?"

Mr. DAVIS. A couple of comments: First of all, the section continues to say, " * * * which the Postal Service has reason to believe relate to any matter under investigation by the Postal Service pursuant to its authority." Secondly, the demand must be reasonable and must be specific, by statute.

Mr. DANNEMEYER. In a civil proceeding in our court system, if a lawyer wants to conduct discovery he has to serve a subpoena duces tecum on his opponent. If it is in proper order it will be honored. If it is not, you file an objection. There is a court hearing on the efficacy of whether it is indeed or proper discovery or a fishing expedition.

Mr. DAVIS. Yes, sir.

Mr. DANNEMEYER. That is due process.

Mr. DAVIS. Yes, sir, I agree.

Mr. DANNEMEYER. I understand that; I respect that. What you are suggesting here, sir, is not due process; it is ex parte.

Well, maybe we do not understand the law, but in the opinion of this lawyer and this Member of Congress, sir, you are seeking authority that I hope you never get.

Mr. DAVIS. Well, what you just stated is exactly now I see this operating. You would go in with your subpoena duces tecum.

Mr. DANNEMEYER. No, I do not want any official walking into a businessman's office or a private citizen's office under the cloak of authority of an agent of the U.S. Government, on his unilateral action on a complaint initiated as a result of perusing some documents on his own when he is acting under the concept of advocacy, and saying, "If you do not give me this stuff, I am going to go to court." No, sir.

Mr. DAVIS. That is precisely a Federal discovery document you just described; exactly what you described would apply.

Mr. DANNEMEYER. We do not run our system that way. I want to have the intervention of some judicial authority before anybody working under the cloak of authority can move into a private citizen's place of business or home and say, "Fork over something."

Mr. DAVIS. That is a respectable point of view.

Mr. DANNEMEYER. A major percentage of your section 3005 cases relate to health products. How would you answer critics who accuse the U.S. Postal Service of conducting a vendetta against the natural food and health field?

Mr. DAVIS. Conducting a vendetta?

Mr. DANNEMEYER. That is the term, vendetta.

Mr. DAVIS. Well, I guess the one word that comes first to mind is "nonsense."

Mr. DANNEMEYER. You do not admit that you have been conducting a vendetta?

Mr. DAVIS. It is hard to do when you have not been.

Mr. DANNEMEYER. Well, would you agree that a major percentage of your section 3005 cases relate to health products?

Mr. DAVIS. Yes, sir, no question about it.

Mr. DANNEMEYER. Well, how is that?

Mr. DAVIS. A major portion of them relate to work-at-home schemes, too.

Mr. DANNEMEYER. What?

Mr. DAVIS. A major portion of them relate to work-at-home schemes. A major portion of them relate to false billing schemes. Now we may be conducting a vendetta against false advertising, but it is not limited to any particular area unless the people who are selling products in that area concentrate more on false advertising than in other areas.

Mr. DANNEMEYER. Title 18 United States Code, section 1341, essentially lets the U.S. Postal Service involve itself in any supposed scheme where mails are used at all. Isn't this overbroad? Would you favor restricting 1341 so that use of the mails must be the major part of the scheme?

Mr. DAVIS. I think the Supreme Court has restricted 1341 in a little different way. They have restricted the use of the mail fraud statute to cases where the use of the mails is an essential part of the scheme, not some tangential and minor part of the scheme. It has to be a major part of the scheme, the use of the mails, not just that one letter was mailed somewhere along the line.

Mr. DANNEMEYER. You contend that that is already the law right now?

Mr. DAVIS. Yes, sir, that is right.

Mr. DANNEMEYER. The impoundment of mail under section 3007 obviously imposes great hardship. It would kill a mail order company by stopping its income. Isn't it true that U.S. Postal Service will not expedite proceedings when such impoundment is in effect? Doesn't the impoundment preempt the legal factfinding and due process? Doesn't the holding of mail itself bleed the company to death?

Mr. DAVIS. Well, let's see. Let's go through that. The section 3007 order is not an order that determines the merits of the section 3005 case; it is a determination by a Federal district judge that there is probable cause to believe that the agency ultimately will find that section 3005 has been violated.

As far as expedited proceedings, that is a term of art. The Administrative Procedure Act requires that these cases be heard by a Federal administrative law judge, who is appointed by the Office of Personnel Management, selected by them, screened by them, independent of the agency.

Mr. DANNEMEYER. We should all understand here, so that nonlawyers present may understand, that in these Federal administrative proceedings, there is never a jury; right?

Mr. DAVIS. That is correct.

Mr. DANNEMEYER. These judges here are assigned by the administrative agency and some of them get a little hardened after a while, don't they?

Mr. DAVIS. I suppose they do. That is correct.

Mr. DANNEMEYER. They are appointed and they serve in good behavior.

Mr. DAVIS. Yes, sir.

Mr. DANNEMEYER. If they manifest a bias toward the prosecution, that is just tough, isn't it?

Mr. DAVIS. Well, I would suspect if you could demonstrate that, they would be removed.

Mr. DANNEMEYER. Do you have the privilege of disqualification in the proceedings?

Mr. DAVIS. Oh, sure.

Mr. DANNEMEYER. How many times can a litigant exercise it?

Mr. DAVIS. A litigant exercise it?

Mr. DANNEMEYER. That is right. What if a litigant comes in who has been caught in your net and says: "I do not choose to submit my cause to the administrative judge that has been assigned." Does he have a preemptory right to excuse that administrative judge?

Mr. DAVIS. Well, the judge would have the right to excuse or recuse himself if he felt that—

Mr. DANNEMEYER. No. The question is, does the accused have the preemptory right to excuse the judge?

Mr. DAVIS. No.

Mr. DANNEMEYER. Why not?

Mr. DAVIS. I do not know of any case under any system of law where that is the case.

Mr. DANNEMEYER. Have you practiced law in California?

Mr. DAVIS. What?

Mr. DANNEMEYER. Have you practiced law in California?

Mr. DAVIS. No, sir, I have not.

Mr. DANNEMEYER. Let me suggest to you that in California, in the State civil court proceedings, that a civil litigant has the right to preemptorily excuse the first judge to which a matter is assigned, as a preemptory matter.

Mr. DAVIS. I did not know that.

I did not complete the answer. I think there were some other parts of your question that I did not answer.

Mr. DANNEMEYER. Go ahead, sir.

Mr. DAVIS. As I was saying, the Administrative Procedure Act requires a hearing before an administrative law judge. Under our rules of practice, the term "expedited hearing" is a hearing that bypasses the administrative law judge. You go directly to the judicial officer of the Postal Service; he hears the case; he decides it finally. There is no hearing by an administrative law judge.

Now the only way in our opinion that can be done consistent with the Administrative Procedure Act is if both parties agree because if just we could apply that, the party on the other side would lose their right under the Administrative Procedure Act to a hearing before an impartial administrative law judge.

Mr. DANNEMEYER. In light of past USPS abuses of privacy such as mail covers, mail opening, and other matters, why should we believe that the USPS would not try to misuse inspection authority?

Mr. DAVIS. When did I stop beating my wife?

Mr. DANNEMEYER. You asked the question. I will ask you: When did you stop?

Mr. DAVIS. Well, as a matter of fact, I have not. [Laughter.]

I do not know of any abuses that justify that statement, that would support it, but if there are in your opinion such abuses, I think the answer that is provided by this legislation is that there is not a single penalty, there is not a single power, a single sanction vested in the U.S. Postal Service under this bill. Every power that is created, every sanction that is created, is in the Federal courts. If you want to back up a penalty or a subpoena, you go to a judge to

do it, and if the judge thinks you are unreasonable, or biased, or what have you, the judge can deny you the right to exercise that authority.

Now I do not know what better safeguard you can build in than that.

Mr. DANNEMEYER. Well, if you have the inspection authority, if that power were to be granted, shouldn't it be limited only to criminal matters and only by court order?

Mr. DAVIS. No, sir. Under the mail fraud statute, the power of the grand jury to issue subpoenas for books and records already exists, and it is more extensive by far than the written demand authority under this bill. The power has been there for a long time. There is no similar authority in any degree under the civil statutes at the present time. That is the need for this bill.

Mr. DANNEMEYER. Some people have said that section 3005 proceedings are kangaroo courts.

Mr. DAVIS. We have heard that today here.

Mr. DANNEMEYER. Sir?

Mr. DAVIS. We heard that today here.

Mr. DANNEMEYER. Would the USPS object to the availability of a district court trial or a trial de novo at a defendant's request?

Mr. DAVIS. Would we object to trial de novo, retry the case in the Federal district court? I guess my off-the-cuff answer would be no; I would not object to that. I think the courts might because it would place quite a burden on the courts to rehear an entire case rather than review a record and find out whether it is supported by substantial evidence.

Mr. DANNEMEYER. Well, you and I both know that in the review of an administrative proceeding certain presumptions take place with respect to the evidence and it is almost impossible to overturn an administrative judge.

Mr. DAVIS. Well, I don't know. I wish it were almost impossible. I do not think that is quite right. It does happen.

Mr. DANNEMEYER. Very rarely.

Mr. DAVIS. Well, if your administrative case was well-founded, well-trying, based upon substantial evidence, it should not have been overturned.

Mr. DANNEMEYER. Would USPS favor a provision that a money-back guarantee would remove any USPS cause for action under section 3005?

Mr. DAVIS. No, sir. The problem with money-back guarantees—and they are prevalent in advertising, they are in many, many ads—there are several problems with it. One of them is, Where is the promoter when you go to exercise the money-back guarantee? Where is he? Can you find him? Can the citizen who wants the refund track this guy down? I mean, you have his last mailing address but you do not have his new mailing address. What has he done with his money? Has he created another set of books? Has he spun the money off? Has he put it in some new scheme?

Suppose the citizen writes and says, "I want a money-back guarantee. This law says I have a right to it," and the guy ignores it or he says, "No, I am not going to give it to you." Then the citizen goes to a Federal court, hires a lawyer, files a case to get back the \$2.98 that they are owed under the statute? Not real practical.

Mr. DANNEMEYER. Is this \$20,000 fine that is postulated in this legislation—how did you arrive at that? Doesn't that seem a little excessive?

Mr. DAVIS. Well, we did not arrive at it, I guess is the first answer I would give you. My understanding of it is that it is sort of based upon the penalty provisions of the Federal Trade Commission Act which are both more extensive and less extensive, if you can believe that.

The Federal Trade Commission Act provides that for each violation of an order you can be fined \$5,000. I will tell you how that works or can work. In one recent case a large mailer made a bulk mailing of mail that violated the order of the Federal Trade Commission. The Commission sat down and multiplied the number of pieces of mail by \$5,000 and handed them a bill for a couple of million dollars. It went through the courts, and the last I saw of the case the second circuit had approved the Federal Trade Commission's methodology.

Now that is one reason why I say it is more extensive but on the other hand it is less extensive in that the same statute says, in the case of a continuing violation of the FTC order, the penalty shall be limited to \$5,000 per day. Comparing just that part with ours, ours is more extensive.

Mr. DANNEMEYER. Well, is there a provision in civil Federal law which makes it actionable by a victim who is injured or has sustained damages as a result of the dissemination of false and misleading advertising?

Mr. DAVIS. No, sir, not to my knowledge. I think you would bring a civil action to recover on a breach of contract.

Mr. DANNEMEYER. It is a civil action, isn't it, under our law to make a false and misleading claim in connection with a commercial product, under I would suspect the Uniform Commercial Code?

Mr. DAVIS. Sure.

Mr. DANNEMEYER. Why couldn't our system of justice permit the bringing of a class action on behalf of some victim of buying a book that has ridiculous claims in it?

Mr. DAVIS. I think the law permits that right now. I think you could have a class action by the victims of one of these schemes to recover their losses.

Mr. DANNEMEYER. You see, I believe that this system of justice should permit a remedy for a wrong, and if somebody engages in false and misleading advertising, I think the perpetrators of that advertising should have the privilege of answering for their culpability. Where I think you and I differ is the involvement of an existing agency of Government carrying the mantle of authority to begin the process whereby somebody is brought to the bar of justice.

Mr. DAVIS. Yes.

Mr. DANNEMEYER. I am a little sensitive about that because I happen to be a former prosecutor, and I have also handled a lot of defense matters on the other side. I have seen both sides.

Mr. DAVIS. So have I.

Mr. DANNEMEYER. As I said when I began questioning, I am very reluctant to countenance a process whereby a public agency, under color of authority, can initiate a complaint and become the com-

plainant because in my judgment they lose their objectivity and become an advocate for a cause, and that is dangerous for a free people, and I want no part of a continuation of that.

Mr. DAVIS. Well, maybe this will make some sense to you. I know exactly what you are saying and I think the way I see the problem is something like this: In many areas of commercial deception—breach of contract cases—you know, if you sell me your house and you do not have title to it and I have lost \$150,000 or \$200,000, obviously I am going to be able to afford a lawyer and I am going to be able to track you down and sue you and get my money back. I think, as I said a minute ago, there is authority in existing law to have class actions to recover damages for breach of contract under mail fraud schemes.

How do you get together—have you ever had a class action, in your experience?

Mr. DANNEMEYER. Yes, I have.

Mr. DAVIS. OK. That is my problem.

Mr. DANNEMEYER. Don't underestimate the ability, the imagination, and the perspicacity of lawyers.

Mr. DAVIS. Well, try putting together a class action of people who have lost \$2.98.

Mr. DANNEMEYER. I thank the chairman for his indulgence. I have concluded my questions. Thank you very much.

Mr. DAVIS. Mr. Dannemeyer, I might add I have some more information on the case you asked me about earlier. I could give it to you either on the record or privately, whichever you would prefer.

Mr. LELAND. Why don't you just hand it to him?

Mr. DAVIS. I am sorry, sir?

Mr. LELAND. Why don't you just hand it to him?

Mr. DAVIS. Well, if I hand you what I have you are probably going to hit me because it is barely legible but I can translate it for you, I think, or I can give it to you later in something approaching English.

Mr. DANNEMEYER. I appreciate that. Thank you.

Mr. DAVIS. I will be happy to do it.

Mr. LELAND. I thank the panel for its indulgence and I thank all of the parties who have contributed to the hearings to date. It has been quite an experience, to say the least. We have had anyone who wanted to testify to come before us and have their day in court, so to speak, Mr. Dannemeyer, and I think that the matter is serious enough for us to pay very close attention to this matter, really closely, with as much meticulous scrutiny as possible.

We intend to have some kind of instrument to confer on with the full committee. At some point in the near future this committee will hold a markup session on these bills.

Thank you very much, Mr. Davis and Mr. Nelson.

Mr. DAVIS. Thank you, Mr. Chairman.

Mr. NELSON. Thank you. I just want to reiterate that we certainly are available to work on any matters concerning the bill with the subcommittee.

Mr. LELAND. Well, let me assure you that the Chair feels that you have been most responsive. Thank you.

This concludes our public hearings on H.R. 3973 and S. 1407. I am satisfied that we have heard from all interested parties and

that we have thoroughly investigated every aspect of this proposed legislation, in addition, we have received written comments from a number of other interested parties.

I want to thank everyone who has come before us for their contributions to our deliberations.

Our consideration of this proposed legislation has been focused on the following subjects: (1) Any reasons for enactment of this legislation; (2) the legislation's grant to the Postal Service of access to books, records, and documents—section 2 of S. 1407; (3) the Postal Service's "stop mail" and "cease-and-desist" authority, and related questions of procedure and burdens of proof, pursuant to section 3 of S. 1407; (4) the civil penalty authority granted the Postal Service by section 4 of S. 1407; and (5) the provision of section 4 of S. 1407 which specifies that the resumption through use of any instrumentality of interstate commerce of any activity with respect to which a cease-and-desist order has been issued shall be considered a failure to comply with such order.

It hurt greatly when I heard from some of our witnesses, about the terrible tragedies that had befallen them as the result of mail fraud schemes.

However, it also bothered me greatly to hear from others of our witnesses, about the potential for the abuse of constitutional rights protected by the first, fourth, and fifth amendments that this proposed legislation contains.

Now that our hearings are concluded, we are going to make every effort possible to produce legislation that will enable law enforcement officials to fight these frauds more effectively, but also remove the potential for the abuse of constitutional rights.

[Whereupon, at 5:20 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

May 17, 1982

Dear Committee,

The vending machines I bought were through an ad in the Rochester Post Bulletin newspaper Rochester, Minnesota September 1977. The machines advertized were faulty merchandise and were falsely represented. When machines were put on location they didn't vend properly. They would jam so many times I spent more time on repairing them than on my other job. They were so bad the accounts asked to have them removed from their property. The customers continually lost money in them.

I tried to get help from many people. The manufactures of the machines and the salesmen. Once they received money for the machines (7,000 dollars) they were of no help. The promise made was the machines would vend enough profit to pay for themselves in less than one year. This was a lie.

The \$7,000 I purchased the machines with was barrowed at 7% interest. I was going to use the profit to pay off this debt. I still do not have this debt payed off. At 7% interest the debt has grown larger. It has caused much frustration in my family. An additional \$450.00 was spent for plane fare to Pennsylvania to settle legal matters with my attorney and debate with manufactures attorney. To this day all I have to show for a fraudulent ad is a \$7,000.00 debt, due September 1982, 7% interest for 5 years, \$450.00 plane ticket plus additional expenses. Constant anxiety in my family, and I don't even have the machines. The manufacture has my money, the machines and that's wrong.

These people should be punished for leeching on fellow Americans. And be made responsible for the debts and anxiety they have caused.

As I write this letter to your committee I feel a great deal of frustration well up inside me once again. I sincerely hope progress will be made in this area. Thank you for hearing me out.

Sincerely,

Jay F. Smith

JAMES JACKSON KILPATRICK
WHITE WALNUT HILL
WOODVILLE, VIRGINIA 22749
(703) 987-8289

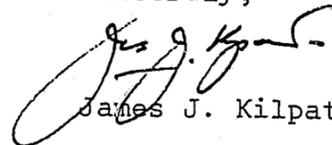
16 May 1982.

Dear Mr. Ford:

Let me thank you for your invitation to testify before your committee on H.R. 3973 and S. 1407, but let me beg off. Over the years I have made it a rule to limit my personal appearances before congressional committees to those issues dealing directly with journalism--the Freedom of Information Act, a proposed "shield law," the Failing Newspaper Act, and so on. Otherwise, I think it best for me to comment on pending legislation through the medium of my syndicated column.

My interest in the Postal Service, as you may recall, was prompted by a stop order recently obtained against a fellow in Mississippi who was selling a book--an inoffensive if mildly heretical book arguing that uncooked vegetables will keep one's arteries clear. It seems to me an intolerable violation of First Amendment rights for the government to suppress the circulation of an idea. I pass this thought along for whatever it may be worth to you.

Sincerely,


James J. Kilpatrick.

Mr. William D. Ford,
House of Representatives,
Committee on Post Office and
Civil Service,
Washington, D.C. 20515.

The following page (271) contain material protected by the
Copyright Act of 1976 (17 U.S.C.) "MAIL SERVICES vs 'SEX PILLS'
(from marillo Daily News, April 9, 1982, Amarillo, Texas
Author James J. Kilpatrick

U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

Honorable William D. Ford
Chairman
Committee on Post Office and Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in reference to your letter of May 11, 1982, inviting the Small Business Administration to appear before the Post Office and Civil Service Committee on the need for legislation to strengthen the U.S. Postal Service's investigatory and enforcement powers pertaining to mail fraud.

The Administrator has requested that I inform you that he feels SBA's involvement would be too limited to warrant an appearance at this time. As you recommended, we would like to consider the bills, H.R. 3973 and S. 1407, in more detail and will provide our comments for the record at a later date.

I do appreciate your consideration and invitation to participate in this hearing.

Sincerely,

Marshall J. Parker
Assistant Administrator
for External Affairs

U.S. House of Representatives
SELECT COMMITTEE ON
NARCOTICS ABUSE AND CONTROL
ROOM H2-234, HOUSE OFFICE BUILDING ANNEX 2
WASHINGTON, D.C. 20515

COMMITTEE PHONE 202-226-3040

July 19, 1982

Honorable Mickey Leland
Chairman
Subcommittee on Postal Personnel
and Modernization
Committee on the Post Office and Civil
Service
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

It is my understanding that your subcommittee is currently holding hearings to consider H.R. 3973 relating to the Postal Service's authorities in dealing with false and misleading mail order promotions. I wish to call your attention to testimony the Select Committee has received concerning a drug abuse problem which involves the use of the mails and pertains to this legislation. A copy of our hearing record is enclosed.

Last fall, the Select Committee held a hearing on the growing problem of "look-alike" drugs. These capsules and tablets contain substances that have been approved for over-the-counter use, but they are made to closely imitate commonly abused controlled substances such as amphetamines. They are often advertised and sold through the mail. Advertisements for these products frequently refer to them as "black beauties," "yellow jackets," "white crosses," or other street terms used for illegally obtained prescription drugs, and they are touted as body stimulants, alternative energy sources and the safe, legal way to get high. Some ads also include implicit or explicit suggestions of the profits that can be made by reselling the drugs.

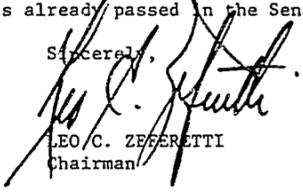
The primary market for these products is young children and college students. These pills are anything but safe as a number of deaths and injuries have been reported in connection with their use. Look-alikes serve no legitimate medical purpose but are merely intended to encourage drug abuse while making huge profits for manufacturers and distributors. The potential for fraud in the promotion and sale of these articles is obvious.

Because of the widespread use of the mail in advertising and distributing these products, the Postal Service has been actively engaged in investigating look-alike distributors. The Postal Service has taken the position that look-alike drugs are a potentially serious health hazard and should be considered dangerous when sold and advertised in the manner described above. As a result of its investigations, the Postal Service has initiated stop mail proceedings against a number of distributors under 39 U.S.C. 3005 charging them with misrepresenting their products as safe. These actions have succeeded in forcing many of these distributors out of business.

A major concern of the Select Committee has been whether present Federal statutory authorities are adequate to control the burgeoning look-alike problem. In its testimony before the Committee last fall, and in subsequent written responses to certain additional questions, the Postal Service urged the adoption of H.R. 3973. Postal Service officials indicated that provisions contained in that bill, including the investigative demand authority, the authority to make test purchases, and the authority to impose civil fines of \$10,000 per day on persons who violate false representation orders, would greatly enhance the Postal Service's effectiveness in dealing with false and misleading mail order promotions such as look-alike drugs. While the Postal Service's authority with respect to the look-alike trade is limited to the mail order aspects of this business, their administrative actions are an important part of a comprehensive overall Federal response to this problem.

We strongly encourage your subcommittee to approve expanded investigative and enforcement powers for the Postal Service to deal more effectively with the insidious practices of look-alike vendors. I note that nearly 300 members of the House, including 24 members of the Select Committee, have co-sponsored H.R. 3973 and that similar legislation (S. 1407) has already passed in the Senate.

Sincerely,


LEO C. ZEFFERTTI
Chairman

LCZ:ggc

Enclosure

cc: Congressman Benjamin A. Gilman

Congressman William D. Ford

LEE H. HARTER
ATTORNEY AT LAW
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SAN FRANCISCO, CALIFORNIA 94109

(415) 673-6300

July 12, 1982

THE HONORABLE MICKEY LELAND
Chairman, Postal Personnel and Modernization Subcommittee
United States House of Representatives
Washington, D.C. 20515

RE: H.R. 3937/S. 1407
Hearing dates: July 15, 20

Dear Chairman Leland:

I write as an interested and concerned citizen; I am not offering the following on behalf of any client; however, I have spent almost nine years either prosecuting or defending postal fraud cases under 39 U.S.C. §3005, and there are few attorneys as experienced in this field. I see two major problems with application of the proposed bill, which I believe the committee should address prior to consideration of this bill:

- 1) The infringement upon a publisher's Constitutional rights of freedom of the press; and
- 2) The scheme of unbridled administrative censorship created by this bill.

The Senate in its report on S. 1407 cited with approval the so-called "Mirror Image Doctrine" as promulgated by the Federal Trade Commission (36 Fed.Reg. 13414, July 21, 1971). (S.Rept. No. 97-392.)

The Mirror Image Doctrine provides:

The Commission as a matter of policy, ordinarily will not proceed against advertising claims which promote the sale of books and other publications: Provided, the advertising only purports to express the opinion of the author or to quote the contents of the publication; the advertising discloses the source of opinions expressed about the publication. Whether the advice being offered by the publication will achieve, in fact, the results claimed for it in the advertising will not be controlling if appropriate disclosures have been made. The policy does not apply, however, if the publication, or its advertising, is used to promote the sale of some other product as part of a commercial scheme.

Thus, the Mirror Image Doctrine provides protection for unorthodox, unpopular opinions and ideas in book form as long as 1) the advertising only purports to express the opinion of the author or to quote contents for publication; 2) the advertisement discloses the source of statements quoted or derived from the contents of the publication; and 3) the advertising discloses the author to be the source of opinions expressed of the publication. In the Senate Report, it is stated that "in the view of the Postal Service its policy regarding enforcement against false advertising in the sale of publications is consistent with the 'Mirror Image Doctrine'." S. Report 97-392 at 8. However, a recent case before the Postal Service suggests strongly that the Postal Service does not follow the Mirror Image Doctrine, and the committee should insist that the doctrine be included within the law.

Attention is invited to the Postal Service case of Magnolia Laboratory, P.S. Docket No. 10/123 (Initial Decision July 28, 1981; Final Postal Service Decision February 11, 1982). Robert Ford of Pascagoula, Mississippi believes that a diet principally of properly cooked vegetables cleans arteries. He wrote a book including his theory, plus diet suggestions, and has revised it so that it is now sold as a 48-page booklet entitled "Stale Food vs. Fresh Food." The book sells for \$5.00 a copy. There is no question whatsoever that he clearly advertises that his product is a book, representing his own opinions and his own "discovery." (See enclosed copy of ad.) Even though it was clearly disclosed that this was a book, the Postal Service

charged Ford falsely represented that the dietary regimen in his book will effectively cleanse and clear blocked arteries.

Mr. Ford is selling no other product but his book; his advertisement discloses that he is the original discoverer. While it is arguable that Mr. Ford did not technically comply with the Mirror Image Doctrine (because he included anonymous testimonials), importantly, the material cited by the Postal Service in support of its findings of false representations was not contained in the testimonials. The Postal Service went after the sum and substance of the book as expressed by author Ford. The administrative law judge concluded that Ford's booklet was "unproven and contrary to the weight of informed medical and scientific opinion." Because Ford's book was found to be falsely represented on its substance, he was effectively barred from using the mail; his advertisement wasn't false, but the substance of his book was found to be false.

Thus, the Postal Service is banning opinions and ideas expressed in booklet form if the Postal Service finds them to be "unproven" and "contrary" to "informed" opinions. Worse yet, the administrative law judge continued and found "a danger of this publication." Shades of book burning! When can "dangers" be found in publications? Is this a seditious idea? Was this a book advocating violent overthrow of the government? Was it urging any unlawful act? No! The supposed danger of Ford's ideas are that they "will deceive people who have arteriosclerotic problems into believing they can cure these problems by diet alone instead of seeking medical help." Ideas and opinions,

however unpopular, are protected speech. Overzealous government prosecutors should be prohibited from stopping the dissemination of ideas which they perceive to be against "informed opinion" or cause a "danger" to the readers. The ludicrous position of the Postal Service was cogently observed by nationally syndicated columnist James Kilpatrick in the attached article.

For the aforesaid reasons, it is strongly recommended that the Mirror Image Doctrine be included within the proposed amendments to 39 U.S.C. §3005.

The second major problem with the bill as proposed would be the creation of a scheme of administrative censorship over what is and what is not carried through the U.S. Mail; e.g., Mr. Ford's book was effectively barred from the mail. With expanded authority, application of 39 U.S.C. §3005 could likely result in considerable abuse.

Application of §3005 is confined principally to the printed media, e.g., newspapers, magazines, direct mail pieces. Mail stop orders against the spoken word are extremely rare; fully 98% of the litigated cases initiated by the Postal Service involve the printed media, and not the spoken word.

* Therefore, some of the examples cited in testimony presented before the Senate could not be corrected by passage of this bill; e.g., Mrs. Bayard Moore's false representations were from a face-to-face meeting; for Sidney Marcus, representations were made on the telephone; the many complaints of franchise fraud would not, under current policy, be solved, since in the last nine years, there have probably not been more than two or three (if that many) cases against alleged franchise frauds:

There are real problems of interpretation of advertisements when applying §3005. For example, an advertisement is to be construed by its effect upon the mind of the ordinary person viewing the advertisement in its entirety, considering what is expressly stated and what is omitted. Donaldson v. Read Magazine, 333 US 178 (1948). This determines the representation made to the prospective customer.

However, this decision is left up to two persons -- the administrative law judge and the Postal Service judicial officer. There is never any testimony by persons of the "ordinary mind," nor does the government put on any other evidence of what the advertisement means to the person of the ordinary mind. Obviously, with an express misrepresentation of fact, it should not be required that experts or consumers give evidence on the meaning of the advertisement. But what about the cases where there is only a so-called "implied representation," i.e., the representation is not made directly but only by implication. How do we know how the person of the ordinary mind construes the advertisement? For example, consider the following language from an advertisement challenged by the Postal Service:

Dr. Lester L. Morrison, in a recent project, found that Lecithin produced a decrease of as much as 30% in cholesterol of the body.

The Postal Service alleged that this language represented:

that the lecithin in the product, in the doses provided therein, will cause a decrease of 30 percent in the cholesterol level of the average person.

With no evidence, other than the advertisement, the Postal Service found the advertisement made the alleged false representation.

CONTINUED

3 OF 4

While the Postal Service mail stop order was upheld on judicial review, the concurring opinion of Circuit Judge Clark is instructive:

The typical shopper in 1977, who often marches into the market place armed with a current consumer report, would not be led astray by this assertion. One is hard pressed to find advertisements today that fail to extol how well various products have fared in recent independent tests . . . I say the mind of the ordinary reader says maybe so and maybe no when it notes an advertiser report of favorable tests or studies. Although the Postal Service's expert could not be classed as an ordinary reader, he testified he would not expect such a result. I don't either. More importantly, I cannot accept the quoted portion of the advertisement would leave an ordinary reader with the impression that a 30% reduction of his body cholesterol will necessarily result from taking [the product]. Peak Labs. v. U.S. Postal Service, 556 F.2d 1387 (5th Cir. 1977), concurring opinion at 1390-91.

With no evidence of any sort, other than the advertisement, how does anyone know the effect on the ordinary mind? The Postal Service says one thing; Judge Clark, another. Such a system of interpreting advertisements leads to easy abuse when the Postal Service decides to bring its vast resources against a product; the situation will worsen if the Postal Service gets this authority to issue cease and desist orders as proposed.

Cease and desist authority now rests with the Federal Trade Commission, which also protects consumers by bringing actions against unfair and deceptive trade practices.

The contrast between the Postal Service and the FTC should be noted prior to giving cease and desist authority to the Postal Service. Consider the difference in the institutions. With the FTC, there are five full-time commissioners, politically balanced, appointed by the President and confirmed by the Senate. The

commissioners serve staggered terms. Compare that governmental process with that of the quasi-independent Postal Service, wherein eleven part-time members of the Board of Governors select a Postmaster General; the Postmaster General then selects a "judicial officer" who serves at the Postmaster General's pleasure. The judicial officer is a high level Postal official, roughly equivalent to an Assistant Postmaster General. There is probably not one member of Congress who has ever met, will ever meet, or have any occasion to even know the name of the judicial officer of the U.S. Postal Service. Personally, I question the wisdom of giving one person, the judicial officer, the role of censor within an agency whose job is to move the United States mails.

Additionally, the FTC has the authority to institute industry-wide regulations, if indeed there is a substantial problem in protecting consumers; the Postal Service must go on a case-by-case basis entirely. This case-by-case approach heightens the problem of administrative discretion -- some, but not all, persons using false representations will be charged, and possibly face \$10,000 per day penalties; others will not! Unbridled discretion in bringing charges coupled with almost non-existent evidence of the meaning of any advertisement, with the court composed of two levels of Postal Service-paid administrators, is hardly a model of due process, especially in light of the severe penalties being proposed.

Unfortunately, I believe Congress was not adequately apprised of the workings of the Postal Service prior to the bills' rush through the legislative halls. It is difficult to vote against something called "consumer protection"; whether an administrative agency's censorship of ideas and opinions ordered by the customer is "consumer protection" is open to question. I trust Congress will consider the wisdom of its policy.

Yours truly,

LEE H. HARTER

Attachments:

- 1) Magnolia Labs ad
- 2) Kilpatrick's column

LHH:lb

AMERICAN RETAIL FEDERATION

1616 H STREET, N. W. WASHINGTON, D. C. 20006 (202) 783-7971

LOYD HACKLER
PRESIDENT

May 21, 1982

The Honorable William D. Ford
Chairman
Committee on Post Office and Civil Service
House of Representatives
Washington, D. C., 20515

Dear Mr. Chairman:

Thank you so much for showing an interest in our postal views.

Since the first of the year our postal and transportation experts have been going over policies and recommended changes in our postal policies. We sincerely believe that there is a great need for some changes but we do not want to act precipitously.

Our committees are reconsidering these policies again this week at the Western Traffic Conference in Seattle, Washington. As soon as we have something definite to say I will forward you a copy of those policies and recommendations.

Sincerely,

Loyd Hackler
Loyd Hackler

LH:WKD:asl

NBC

National Broadcasting Company, Inc.

1825 K Street, N.W.
Washington, D.C. 20006 202-833-3600Sallie H. Forman
Director, Government Relations

May 18, 1982

HAND DELIVERED

The Honorable
William D. Ford, Chairman
Committee on Post Office and Civil Service
U.S. House of Representatives
Washington, D.C. 20515

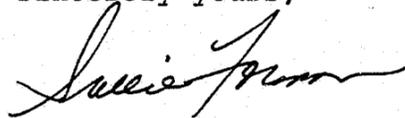
Dear Mr. Chairman:

I am in receipt of your letter of May 11, 1982 requesting an analysis and comments on HR 3973 and S. 1407 for the hearing to be conducted beginning on May 20, 1982.

The issues dealt with in the proposed legislation are not at all familiar to me nor am I expert in matters pertaining to the Postal Service. Neither do I see where NBC would have a direct interest in the provisions of the two bills.

Therefore, it would appear that any analysis, comments, or appearance I would make before your committee would be inappropriate and would not benefit the committee in providing the kind of expert testimony you require. I have discussed with Louis Delgado, Staff Director for the Subcommittee on Postal Personnel and Modernization, the reasons why I believe I should not be involved and he agreed.

Sincerely yours,



SHF/KG

cc: The Honorable Mickey Leland

National Association
of ManufacturersJAMES P. CARTY
Vice President and Manager
Government Regulation and Competition

May 17, 1982

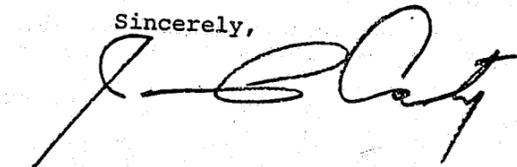
The Honorable William D. Ford
Chairman
Committee on Post Office and Civil Service
U. S. House of Representatives
239 Cannon House Office Bldg.
Washington, DC 20515

Dear Mr. Chairman:

Thank you for your letter of May 11, 1982 inviting the National Association of Manufacturers to appear before your Subcommittee to testify on two proposals to strengthen the investigatory and enforcement powers of the U. S. Postal Service.

Presently, the NAM does not have a position on either of these proposals. As a result we are unable to participate in hearings on these two bills. Thank you for your invitation for us to appear before your Subcommittee.

Sincerely,



JPC/edr

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 WEST 44TH STREET
NEW YORK 10036

OSCAR M. RUEBHAUSEN
PRESIDENT
299 PARK AVENUE
NEW YORK 10017

May 14, 1982

William D. Ford, Chairman
Committee on Post Office
and Civil Service
Mickey Leland, Chairman
Subcommittee on Postal
Personnel and Modernization
House of Representatives
Washington, D.C. 20515

Re: H.R. 3973 and S. 1407

Gentlemen:

Thank you so much for your letter of the eleventh, inviting us to comment and testify in connection with the above two bills.

Unfortunately, we do not have a substantive position to communicate to you in time for your hearings beginning next week.

Your letter and its enclosures have been referred to Mr. Jack David, the Chair of this Association's Committee on Federal Legislation, with the request that he communicate to you and your colleagues such comments with respect to the above bills as he or his Committee may believe useful to you.

I am sorry that we can not accept your invitation to appear on May 20, but you will hear from Mr. David in the near future.

Sincerely yours,



cc: Jack David

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

July 28, 1982

The Honorable Mickey Leland
Chairman, Subcommittee on Postal Personnel
and Modernization
Committee on Post Office and Civil Service
House of Representatives

Dear Mr. Chairman:

This responds to your request of May 11, 1982, for our views on S. 1407, a bill entitled, "Mail Order Consumer Protection Amendments of 1982."

S. 1407 is designed to strengthen the U.S. Postal Service's investigatory and enforcement powers. The bill's key provisions would grant the Postal Service authority to issue written inspection demands relating to matters under investigation, issue cease and desist orders regarding fraudulent activities conducted through the mail, and commence civil actions to obtain penalties of up to \$10,000 per day for certain violations. */

We have not conducted any recent reviews of the mail fraud matters addressed by the bill, and, therefore, are not in a position to comment on the problem of mail order fraud or the extent to which enactment of S. 1407 would combat it. However, we do have several recommendations for clarifying those provisions of S. 1407 that deal with Postal Service inspection demands and cease and desist orders.

Inspection Demands

Section 2 of the bill would authorize the Postal Service to require, pursuant to a written demand, the production of records deemed relevant to investigations of postal offenses and postal civil matters. This inspection demand authority apparently would be available to the Postal Service for the purpose of conducting criminal and civil investigations before presentment of a case to

*/ An enforcement matter not addressed by S. 1407 is the authority of Postal agents to carry firearms and make warrantless arrests for the commission of Federal felony offenses. These matters are covered, however, by S. 1630, the pending version of the comprehensive revision of the Federal Criminal Code.

the grand jury or the filing of a civil complaint. The inspection demand authority contained in S. 1407 is analogous to the pretrial investigative demand authority available to the Department of Justice for conducting antitrust investigations. See 15 U.S.C. §1311 et seq.

The Justice Department's investigative demand authorization is subject to a number of statutory safeguards and standards, including specific provisions that prohibit demands for records that would be exempt from disclosure or otherwise privileged if subpoenaed by a grand jury or sought for discovery under the Federal Rules of Civil Procedure. Although S. 1407 directs the Postal Service to promulgate regulations governing inspection demands and prohibits demands that are "unreasonable," it is not clear whether these provisions are intended to assure the adoption of standards such as those described above that govern investigative demands issued by the Justice Department. We recommend the Committee address the standards that are intended to apply to inspection demands issued under S. 1407.

Cease and Desist Orders

Section 3 of S. 1407 would provide the Service with authority to issue cease and desist orders for certain illegal uses of the mail. This would supplement the Service's authority under existing law to issue so-called stop mail orders. See 39 U.S.C. §3005.

Section 4 of the bill, quoted in part below, explains what will constitute a violation of a cease and desist order issued under section 3:

"The resumption through the use of any instrumentality of interstate commerce of any activity with respect to which a cease and desist order has been issued * * * shall * * * be considered to be a failure to comply with such order."
(Emphasis added.)

As presently drafted, section 4 seems to cover fraudulent activities not involving the mails that could not have been the subject of a cease and desist order under section 3. For example, a cease and desist order could properly issue for a fraudulent mailing, but the Service would not be similarly empowered to order the cessation of fraudulent

activity not involving the mails. Nevertheless, section 4 may be read to provide that once the Service orders the cessation of a particular fraudulent or other illegal use of the mails (e.g., engaging in conducting a lottery, fraudulent solicitations), a resumption of the activity by telephone, television, or other form of interstate communication not involving the mails would be deemed a violation of the original cease and desist order. The Postal Service could file a civil action and seek the imposition of civil fines if this were to occur.

If section 4 is not intended to operate in this manner, we recommend the bill be clarified. However, if our interpretation of section 4 is consistent with the intent of the provision, we recommend the Committee consider whether existing Postal Service resources are adequate to assume a monitoring and enforcement role for fraudulent and related activities that do not involve the use of the mails. In addition, we recommend that provision be made for the Postal Service to coordinate the exercise of this expanded authority with agencies such as the Justice Department, the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Communications Commission. These agencies have jurisdiction over the instrumentalities of commerce not involving the mails that might be used in connection with the violation of a Postal Service cease and desist order.

We hope this expression of views will be of assistance to the Committee in its deliberations on S. 1407.

Sincerely yours,

Charles A. Bowles
Comptroller General
of the United States



BOARD OF GOVERNORS
Washington, DC 20260-1000

July 14, 1982

Honorable William D. Ford
Chairman, Committee on Post Office
and Civil Service
House of Representatives
Washington, D.C. 20515

Honorable Mickey Leland
Chairman, Subcommittee on Postal
Personnel and Modernization
Committee on Post Office and
Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairmen:

This letter responds to your request of May 14 seeking the views of the Governors on S. 1407, which has passed the Senate and is now pending before your Committee. This bill would amend the provisions of Title 39 relating to postal inspectors and their authority to investigate allegations of mail fraud.

Hearings on this legislation have focused on a serious problem: unsuspecting consumers, especially the elderly, are often the innocent victims of fraudulent schemes that rely on the mails. The United States Postal Service has the responsibility, in conjunction with the Department of Justice, for identifying and stopping these illegal practices. The provisions of S. 1407 would significantly strengthen the Postal Services' ability to carry out its responsibility. Any legislation that strengthens the authority of postal inspectors, however, must be accompanied by adequate safeguards to assure that the rights and privacy interests of legitimate users of the mails are protected.

S. 1407 would correct serious deficiencies in the ability of the Postal Service to protect consumers against fraudulent activities that involve the mails. Under this legislation, the Postal Service must issue regulations governing the exercise of these enhanced investigative powers. If S. 1407 is enacted, the Board of Governors of the Postal Service will review the proposed regulations with care to ensure that the new enforcement powers are carried out in a manner that protects the rights and privacy of all users of the mails.

In its review of this legislation, I believe that the Congress should make certain that adequate safeguards are provided in view of the special status of the Postal Service. With that in mind, legislation along the lines proposed in S. 1407 should help protect the elderly from fraudulent mail schemes. Our senior citizens need protection and I can assure you that the Governors of the Postal Service will be particularly attentive to the needs of the elderly in reviewing regulations governing the exercise of any enhanced investigative powers that the Congress vests in the Postal Service.

We appreciate the opportunity to comment on this legislation.

Sincerely,

Robert L. Hardesty
Robert L. Hardesty
Chairman

Interstate Commerce Commission
Washington, D.C. 20423
July 8, 1982

OFFICE OF LEGISLATIVE COUNSEL

Honorable William D. Ford
Chairman
Committee on Post Office and Civil Service
U. S. House of Representatives
Washington, D. C. 20515

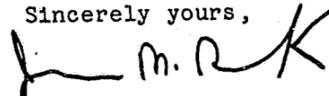
Dear Mr. Chairman:

Thank you for your letter requesting the Commission's comments on H.R. 3973 and S. 1407, bills which would amend title 39, United States Code, to strengthen the Postal Service's ability to protect consumers against fraud and misrepresentation perpetrated through the mails. Since this legislation does not appear to have a significant effect on the activities of the Interstate Commerce Commission, Chairman Taylor has asked me to respond to your letter on his behalf.

The only language in S. 1407 which seems to impact on the Commission's jurisdiction is a provision of section 4, dealing with civil penalties. This provision would establish that the use of any instrumentality of interstate commerce to resume an activity after a cease and desist order has been issued under 39 U.S.C. 3005 shall be considered a failure to comply with such order, and therefore subject to the civil penalties prescribed in the bill. Thus, if a cease and desist order had been issued against a person under investigation for a fraudulent mail order scheme and that person continued to conduct his business by utilizing means other than the mails for transporting his goods, he would be liable for civil penalties for violating the order. Although this provision could apply to persons utilizing ICC-regulated carriers, the Commission would not object to the imposition of civil penalties in such cases. This authority should make it easier for the Postal Service to stop incidences of this type of consumer fraud.

I hope that this information is helpful to you as you consider this important legislation. If the Commission can be of any further assistance in this matter, please do not hesitate to contact us.

Sincerely yours,


Janice M. Rosenak
Legislative Counsel

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
MAY 20 1982

IN REPLY REFER TO:

MAY 21 1982

Honorable William D. Ford
Chairman, House Committee on Post
Office and Civil Service
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of May 11, 1982, concerning H.R. 3973 and S. 1407, legislation strengthening the investigatory and enforcement powers of the United States Postal Service. The following comments are those only of the Commission's Office of General Counsel and not of the Chairman or the other members of the Commission.

My staff has reviewed the provisions of H.R. 3973 and S. 1407 and we have no specific comments to make on the legislation which basically concerns the enforcement process and procedures of another Federal agency.

I would, however, call to your attention the fact that in September 1981, the Commission submitted to the Congress an extensive legislative package of proposed amendments to the Communications Act of 1934. Among the numerous amendments, we have proposed the deletion of 47 U.S.C. §312(a)(6) which allows the Commission to revoke any station license or construction permit for violation of 18 U.S.C. §§1304 and 1343, the broadcast lottery and wire fraud statutes, as well as of 18 U.S.C. §1404, the anti-broadcast obscenity law. In February, Representative Broyhill introduced this proposal as part of H.R. 5585, the Broadcast Regulation Reform Act 1982.

We have recommended the elimination of this revocation authority for offenses related to wire fraud, broadcast of lotteries and obscenity because the proposed elimination will remove direct Commission involvement in and review of the content of broadcast programming where, in our judgment, such Federal government involvement no longer appears warranted. We believe, moreover, that criminal prosecution by the Department of Justice

and United States Attorneys provides a more effective remedy. Of course, after a criminal conviction of a licensee, the Commission could still determine what impact the relevant conduct should have on the licensee's qualifications.

Thank you for the opportunity to comment on H.R. 3973 and S. 1407.

Sincerely yours,

Stephen A. Sharp
Stephen A. Sharp
General Counsel



U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 18 1982

Honorable William D. Ford
Chairman
Committee on Post Office
and Civil Service
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your letter of May 11, 1982, requesting the views of the Department of Justice with respect to S. 1407, a House version of which will be the subject of Subcommittee hearings commencing May 20, 1982. This legislation would strengthen Postal Inspection Service investigatory and enforcement powers.

In view of your desire to hold hearings next week, and because the Department's position was set forth in a November 30, 1981, letter to the Senate Governmental Affairs Committee, I am taking the liberty of enclosing a copy of the Department's report on S. 1407. As you will note, the Department supports enactment of S. 1407 provided two modifications are made in the bill. It is my hope that the enclosed letter is responsive to the Committee's request and that the information set out therein will be of value in connection with your consideration of this issue.

Please let me know if we can be of further assistance to you during the course of your review of this important legislation.

Sincerely,

Robert A. McConnell
Robert A. McConnell
Assistant Attorney General

Enclosure

cc: Honorable Mickey Leland
Chairman
Subcommittee on Postal Personnel
and Modernization



United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

NOV 30 1981

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on S. 1407, a bill "To amend title 39, United States Code, by strengthening the investigatory and enforcement powers of the Postal Service by authorizing inspection authority and by providing for civil penalties for violations of orders under section 3005 of such title (pertaining to schemes for obtaining money by false representations or lotteries), and for other purposes."

S. 1407 is intended to give the Postal Service certain additional powers to help deter mail fraud schemes. As such, the Department of Justice generally supports this consumer protection bill. We do, however, have several suggested changes which we will make reference to later in our report.

S. 1407 proposes a new Section 413 of title 39, United States Code which would authorize the Postal Service, upon written request, to inspect books and records relating to matters under investigation pursuant to 39 U.S.C. §404(7), which authorizes investigation of "postal offenses and civil matters relating to the Postal Service."

S. 1407 also proposes new subsections (d)(1) and (d)(2) to 39 U.S.C. §3005. The proposed 39 U.S.C. §3005(d)(1) would authorize the Postal Service to purchase any article or services offered by a promoter for sale by mail. The unreasonable failure by any person to comply with such a purchase demand would constitute probable cause to believe that such person is engaging in prohibited mail fraud activities described in §3005(a)(1) and therefore would be grounds pursuant to 39 U.S.C. §3007, for a district court to enter a temporary restraining order and preliminary injunction directing detention of a defendant's incoming mail. Similarly the proposed 39 U.S.C. §3005(d)(2) provides that the unreasonable

failure of any person to comply with a written Postal Service demand, under the proposed §413, to inspect records, would also constitute probable cause to believe that such person is engaging in prohibited mail fraud activities and therefore would be grounds for entry of a temporary restraining order or preliminary injunction pursuant to 39 U.S.C. §3007.

S. 1407 further proposes a new Section 3012 of title 39 United States Code which could establish a civil penalty for any person who evades or attempts to evade the effect of a mail stop order issued pursuant to 39 U.S.C. §3005(b). The civil penalty could not exceed \$10,000. In determining the civil penalty the Postal Service would be required to take into account certain factors such as the extent and gravity of the violations in a particular case. Administrative due process procedures would be provided. Any person assessed a civil penalty would be allowed to appeal the decision to a Court of Appeals of the United States. An action for collection of any civil penalty could be brought in any appropriate District Court of the United States.

This bill will give the Postal Service some of the additional power it needs to curb mail schemes by unscrupulous promoters. At present, while the Postal Service can order a mail stop for such a scheme, the promoter is free to change his name and obtain a new post office box to continue the same scheme. The Postal Service can only commence another hearing process pursuant to 39 U.S.C. §3005(a) which is a slow process and which, even if successful, can be defeated once again by the promoter changing his name and obtaining a new post office box. Moreover, experienced promoters of such schemes often fail to deliver the product or service for a certain period following its advertisement in the mails knowing that the Postal Service polices such advertisements by making attempts to covertly purchase such product or service. The failure to deliver such product or service effectively curtails the Postal Service's ability to test such product or service and to obtain, where warranted, a temporary restraining order from a district court pursuant to 39 U.S.C. §3007(a) until after most of the victims have placed their orders, and the mail has been received by the promoter.

While we generally support S. 1407, we believe it can be improved by the following changes.

With respect to the proposed 39 U.S.C. §3005, subsections (d)(1) and (d)(2), we note that those subsections establish certain potentially problematic presumptions concerning what constitutes probable cause for purposes of obtaining an injunction in district court pursuant to 39 U.S.C. §3007. The latter section presently provides that a district court shall enter a temporary restraining order and preliminary injunction directing detention of a defendant's incoming mail upon application by the Postal Service and upon a showing of probable cause to believe that 39

U.S.C. §3005 (pertaining to schemes for obtaining money by false representation or lotteries) is being violated. As discussed above, proposed subsection (d)(1) establishes, for purposes of §3007, a presumption of probable cause of a violation of §3005(a) where a person has unreasonably failed to comply with a Postal Service purchase demand; proposed subsection (d)(2) establishes, for purposes of §3007, a presumption of probable cause of a violation of §3005(a) where a person has unreasonably failed to comply with a Postal Service document demand. With respect to both these subsections, however, it appears advisable that the statute itself or Postal Service implementing regulations further define what is meant by an "unreasonable failure" to provide a requested article and an "unreasonable refusal" to comply with a document demand. Otherwise the presumptions of probable cause established in the proposed §3005(d)(1) and (d)(2) may well be subject to challenge under the Due Process Clause.

With respect to proposed 39 U.S.C. §3012, we suggest that a sentence be added to subsection (b)(2) to the effect that "The Postal Service shall have the power to compromise, mitigate, or remit any penalties before final payment of such penalty is made." This provision is consistent with other civil penalty provisions. It should be noted, however, that once the penalty is paid into the U.S. Treasury, the Postal Service is powerless to refund any such penalty from the Treasury.

In conclusion, the Department of Justice recommends enactment of this legislation amended as suggested above.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General

○

END